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THE

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VOLUME CXXXVII

COMMON PLEAS
XV

CONTAINING

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COMMON BENCH REPORTS. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, in Hilary, Easter, and Trinity Terms and Vacations, 1849. By JAMES MANNING, Serjeant at Law; T. C. GRANGER, of the Inner Temple, Esq., Barrister at Law; and JOHN SCOTT, of the Inner Temple, Esq., Barrister at Law. Vol. VII. London, 1850.

[1] Cases Argued and Determined in the Court of Common Pleas, in Hilary Term, in the Twelfth Year of the Reign of Victoria.

The judges who usually sat in banco in this term, were—Wilde, C. J., Maule, J., Cresswell, J., V. Williams, J.

Ex parte Elizabeth Taylor. Jan. 11, 1849.

The court will not grant a rule to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 W. 4, c. 74, s. 91, upon a mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead. The affidavit must shew some reasonable ground for presuming the statement to be true.

Byles, Serjt., moved for a rule, under the 3 & 4 W. 4, c. 74, s. 91, to enable Mrs. Elizabeth Taylor to convey her interest in certain property, to which she claimed to be separately entitled under the will of one Andrew Witham, deceased, without the concurrence of her husband.

[2] The affidavit upon which the motion was founded, stated that the deponent (Mrs. Taylor) was married to one Archibald Taylor, on the 9th of July, 1843; that Taylor, who was a seaman, in March, 1845, left England for Honduras, on board a ship called the "Demerara Packet;" that since he left England, she had only twice heard from him,—the last time being within twelve months after his departure; that the deponent had been informed that her said husband died in the early part of 1847, of the yellow fever, whilst employed on board a boat in Notta Bay, in the island of Jamaica, and that his body was thrown overboard, but that the deponent was unable to prove his death; that she had never heard, or had any tidings of or from her said late husband, since the time when she so heard of his death as aforesaid; that she was unable positively to state whether he was still alive or not; but that, if he was still living, she did not know, nor had she any means of ascertaining, where he was then residing. [Wilde, C. J. The deponent does not state from whom she received the information about her husband's death in Notta Bay, or that she believes it to be true: nor does it appear that any inquiry has been made of the owners of the ship in which he sailed.] To bring the case within the clause in question, it is not necessary to shew the husband dead. It is enough if it appear that his residence is not known. [Wilde, C. J. The same may be said in the case of every man who goes to sea.

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Maule, J. The affidavit does not shew when the information of the husband's death was received by the deponent: it may have been only yesterday.]

Wilde, C. J. The affidavit is much too loose to warrant the court in granting a rule. You may renew your application upon better materials,—shewing when, and from whom, the information of the husband's [3] death was received; and the deponent must allege her belief of its truth. The fact may be ascertained with reasonable certainty, by addressing an inquiry to the owners of the ship.

Byles, on a subsequent day, renewed his motion, upon a further affidavit of Mrs. Taylor, stating, that one Harrison, a seaman, who left England on board the "Demerara Packet" with her husband, called upon her in the month of April, 1847, and informed her that he had just returned from Notta Bay, and that her husband had died there of the yellow fever about a month before he (Harrison) left that place, and that his body was thrown overboard; that Harrison on that occasion gave the deponent certain articles which had belonged to Taylor at the time of his death; that, when her husband left England, she received from him what is called a "half-pay ticket;" that she accordingly obtained from the owner of the ship the half of her husband's pay for the second month after his departure; but that, when she applied for the third month's half-pay, she was informed that Taylor had deserted. There was also an affidavit shewing inquiries made of the owner of the "Demerara Packet," the answers to which tended to confirm the probability of Taylor's death.

Per curiam. Enough has now been done to justify the court in granting a rule.

Fiat.

[4] Leader and Cock *v.* Purday. Jan. 11, 1849.

[S. C. 6 D. & L. 408; 18 L. J. C. P. 97; 12 Jur. 1091.]

One who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as proprietor of the copyright in the whole composition.—In an action by A., for the infringement of copyright in a musical composition, consisting of an "air," which was old and not the subject of copyright, of "words," which were written by B., and of an "accompaniment," which was composed by C. at the request and for the benefit of B.:—Held, that it was not competent to the defendant,—under a notice of objections stating merely that A. was not the owner of the copyright, and that there was no subsisting copyright in the work,—to object at the trial that there had been no assignment by C., even though the point arose upon the evidence produced on the part of the plaintiff.—A., the author of a musical composition, in October, 1844, agreed in writing, not under seal, with B., for the sale of the copyright therein to him, undertaking to execute, when called upon, a proper assignment to B., his executors, &c., or as he or they should direct:—Held, that this did not operate as an assignment to B., so as to render inoperative a subsequent regular assignment by A. to B. and C.

This was an action upon the case for an infringement of the plaintiffs' copyright in a musical composition.

The declaration stated that there was a subsisting copyright in a certain book, to wit, a musical composition, called "Pestal," and that the plaintiffs were proprietors of such copyright, and had printed and published for sale, and had sold, divers copies, &c.; that the defendant, after the passing of a certain act passed in a session of parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled "An act to amend the law of copyright," knowingly, and without the consent of the plaintiffs, so being the proprietors of such copyright of and in such book, first had and obtained in writing, in a certain part of the British dominions, to wit, Great Britain, printed and caused to be printed and published for sale divers copies of the said book, in which there was such subsisting copyright, and of which the plaintiffs were such proprietors as [5] aforesaid, contrary to the form of the statute in such case made and provided, &c.

The defendant pleaded,—first, not guilty,—secondly, that there was not any subsisting copyright in the said book, or any part thereof,—thirdly, that the plaintiffs were not the proprietors of the alleged copyright.

The defendant had given the following notice, under the 5 & 6 Vict. c. 45, s. 16 (*a*), of the objections on which he intended to rely:—"First, that the plaintiffs were not the first publishers of the work in question: secondly, that they were not the owners of the copyright: thirdly, that there was no subsisting copyright in the musical publication: fourthly, that the air was not composed by [6] Pestal, but was published by the plaintiffs fraudulently in his name, in order to deceive the public."

The cause was tried before Cresswell, J, at the first sitting in London, in Michaelmas term, 1847.

It was conceded that the air of Pestal was old, and not the subject of copyright, having already been published as well in England as abroad. It was proved, that, some time prior to the year 1844, a gentleman named Bellamy wrote certain words adapted to the air, and got a friend of his (Mr. C. E. Horne) to compose an "accompaniment;" that, on the 24th of October, 1844, Bellamy entered into an agreement, in writing with Leader, whereby,—reciting a sale of the copyright in the production to Leader,—he undertook to execute a proper assignment of his aforesaid copyright and interest therein to Leader, his executors, &c., or as he or they should direct; that, in pursuance of this agreement, Bellamy afterwards, on the 11th of May, 1847, executed a regular assignment by deed, of the copyright to the plaintiffs; and that the plaintiffs, in May, 1845, published the air, with the words and accompaniment, and a short statement on the title-page, ascribing the composition of the air to one Colonel Pestal, an officer in the Russian army, while under sentence of death for a political offence, and shortly before his execution.

The defendant also published the air with words and an accompaniment, and with a title-page closely resembling that of the plaintiffs' publication, and containing the same statement as to the authorship of the original air.

The alleged piracy was in the "accompaniment" only. Two musical professors of eminence, Dr. Calcott and Mr. Masters, who were called on the part of the plaintiffs, thought the accompaniment published by the defendant was an infringement of that of the plaintiffs, assigning as one of their reasons for coming to that conclusion, that they found the same musical errors in [7] both: they both, however, admitted that the laws of harmony would require the composers of both to use pretty much the same notes.

For the defendant, the master of the military band at Woolwich was called, who stated that the air of Pestal had been played by the band there for many years, and that, in his judgment, the two accompaniments were totally different. The defendant also called one Grantham, who composed the accompaniment for him, and who swore that he had never seen or heard the plaintiffs' accompaniment. The person who

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(*a*) Which enacts, "that, after the passing of this act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and, if the nature of his defence be, that the plaintiff was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein: and, at such trial or hearing, no other objection shall be allowed to be made on behalf of such defendant, than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice."

composed the defendant's words likewise deposed that he had never seen the plaintiffs' words at the time he wrote for the defendant.

The defendant then called one Glover, who said that, in the year 1842, he had given a copy of the original air to one Jefferies; and Jefferies was called to prove that he had written a third set of words. This evidence was objected to, on the part of the plaintiffs, on the ground that the name of Jefferies was not disclosed in the defendant's notice of objections; and the learned judge rejected it.

On the part of the defendant, it was objected, that the plaintiff's claim should have been limited to copyright in the accompaniment; and that, inasmuch as it appeared that there were two publications of Pestal, one of which could not be the subject of copyright, the plaintiffs should have new-assigned: and, further, that there was no proof of any assignment of the accompaniment by Horne, who composed it, to the plaintiffs; and that, Bellamy having already parted with his interest in the copyright to Leader, by the agreement on the 24th of October, 1844, there was no interest remaining in him upon which the assignment to the plaintiffs, of the 11th of May, 1847, could operate.

The learned judge left it to the jury to say whether **[8]** they thought the resemblance between the two accompaniments was designed, or was merely accidental, and such as would necessarily arise from an observance of the laws of harmony.

The jury were of opinion that the similarity of the defendant's accompaniment to that first published by the plaintiffs, was not accidental, but designed; and they accordingly returned a verdict for the plaintiffs, with nominal damages.

Byles, Serjt., in Michaelmas term, 1847, pursuant to leave reserved to him at the trial, moved for a rule to shew cause why a nonsuit should not be entered, or a verdict for the defendant; or why there should not be a new trial on the ground of the improper exclusion of evidence, and that the verdict was not warranted by the evidence. This declaration is framed upon the 5 & 6 Vict. c. 45, the 2nd section of which, amongst other things, enacts that the word "book" shall be construed to mean and include a "sheet of music." The publication in question consisted of a title-page, an air,—which was admitted to be publici juris,—words, as to which no question arose, and an accompaniment. The plaintiffs, therefore, claimed too much, when they claimed copyright "in a certain book, to wit, a musical composition called Pestal:" and, inasmuch as it appeared that there was a production bearing that name, which could not be the subject of copyright, the plaintiffs should have new-assigned. [Maule, J. There was no justification.] There was a traverse of the substance of copyright in Pestal. [Maule, J. Can there be a new-assignment after a negative plea?] Suppose the defendant had pleaded to this effect, that Pestal is a musical composition in which there is no subsisting copyright, and this he is ready to verify. [Maule, J. The defendant affirms nothing. Coltman, J., **[9]** referred to *Barnes* v. *Hunt* (11 East, 451).] *Barnes* v. *Hunt* is no longer law; it is now clearly settled, that, upon a plea of leave and licence, in trespass, the plaintiff must new-assign. [V. Williams, J. The whole doctrine of new-assignment rests upon that case.] Suppose the defendant in this case had pleaded leave and licence,—would not the plea have been sustained by proof of leave and licence to publish Pestal in its original shape? This is a clear misdescription. Then, the plaintiffs proved that their accompaniment was composed by Mr. Horne: but they shewed no assignment of the copyright from Horne. [Wilde, C. J. Horne was employed to compose it for Bellamy.] That does not make the product of the composer's brain the property of the employer (*b*). The plaintiffs put in an agreement by Bellamy to assign to Leader, dated the 24th of October, 1844: they then put in a deed of the 11th of May, 1847, purporting that Bellamy assigned the same copyright to Leader and Cocks. If the agreement of the 24th of October, 1844, operated as a legal and valid assignment from Bellamy to Leader, Bellamy would have nothing that he could convey to Leader and Cocks by the deed of the 11th of May, 1847 (*c*); and, if so, there is a clear

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(*b*) But see *Wyatt* v. *Barnard*, 3 Ves. & B. 77. As to the employment by patentees, of others, to give practical effect to their inventions, vide *Allen* v. *Rawson*, ante, vol. i. p. 551. And see *Bloxam* v. *Elsee*, 1 C. & P. 567, and *Minter* v. *Wells*, 1 Webster's Patent Cases, 132.

(*c*) See *Power* v. *Walker*, 3 M. & S. 7, 4 Campb. 8; *De Pinna* v. *Polhill*, 8 C. & P. 78.

ground of nonsuit. The evidence of Jefferies was improperly rejected. [Wilde, C. J. Was it material evidence in the cause? Maule, J. The words had already been given up.]

A rule nisi having been granted,

Talfourd, Serjt., and Petersdorff, now shewed cause. **[10]** One main object of the recent statute, was, to prevent questions of this sort from being raised by a mere wrong-doer. When Mr. Bellamy first conceived the notion of adapting the air of "Pestal" to words of his own composing, and of adding an accompaniment, he acquired to himself that which unquestionably might be the subject of copyright, and susceptible of assignment under the 13th section of the 5 & 6 Vict. c. 45 (*a*). The first question is, whether the plaintiffs succeeded in shewing that this was such a publication as came within the description in the declaration. The objection was, that the whole publication was not the property either of Bellamy or of the plaintiffs. That, the plaintiffs never pretended. All they say is, that Bellamy had a clear and undoubted right to the words and the accompaniment, which he conveyed to them. Pestal had never been published as a song. Bellamy was the author of the words, and the accompaniment was composed, at his suggestion, and for his benefit, by his friend Horne. Both, therefore, became his property. To justify a claim of copyright, it is not necessary that there should be entire originality in every part of the work: if it were **[11]** so, there could be no copyright in Pope's Iliad, Dryden's Virgil, Williams's Saunders, Hargrave and Butler's Co. Litt., and many other works similarly circumstanced. In declaring for an infringement of a patent right, where the claim is of a combination only, the declaration never need specify the particular parts of the machine or manufacture of which the plaintiff alleges himself to be the inventor: the plaintiff may claim generally. Besides, under the notice of objections here delivered, it was not open to the defendant to set up the authorship of Horne. In *Boosey* v. *Davidson* (4 D. & L. 147), it was expressly held, that the defendant is bound, in his notice of objections, to state the name of the party whom he alleges to be the proprietor or first publisher, the title of the work, the place where, and the time when the first publication took place. The agreement between Bellamy and Leader, of the 24th of October, 1844, was a mere executory agreement: it did not purport to be, nor did it operate as, an assignment of the copyright. The title of the plaintiffs arises wholly under the deed of the 11th of May, 1847. Copyright cannot be assigned by parol: the recent statute, as well as the 8 Ann. c. 19, evidently contemplate that the assignment must be by deed. [Coltman, J. Would copyright pass, even by deed, independently of the statute?] It is submitted that it would.

Couch, in support of the rule. The only portions of the publication in question that were new, were, the words and the accompaniment. Assuming Bellamy's title to have been well conveyed to the plaintiffs, that did not justify them in claiming in their declaration the entire work; they should have limited their claim to the words and the accompaniment. The instance put on the other side, of Hargrave & Butler's Coke upon **[12]** Littleton, is hardly analogous: in declaring for the piracy of a note of Mr. Hargrave's, the plaintiff certainly would not describe himself as the proprietor of the copyright of Coke upon Littleton,—which is what the plaintiffs have in effect done here. The other instance of Williams's Saunders is equally inapplicable.

(*a*) Which enacts, "that, after the passing of this act, it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company, of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this act annexed, upon payment of the sum of 5s. to the officer of the said company; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest, therein, by making entry in the said book of registry, of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment, so entered, shall be effectual in law, to all intents and purposes, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed."

[V. Williams, J. The text there was a translation from the old French (*a*).] The provision in s. 18 of the 5 & 6 Vict. c. 45 (*b*), as to encyclopædias and serial **[13]** works, shews, that, in this case, there should have been an assignment from Horne, to make the title perfect. [Maule, J. The 18th section contemplates the case of a publisher employing an author to write an article for an encyclopædia or other serial or periodical work, for a consideration, and not a case like this, where the suggested task is done through friendship only. This was never intended to form a portion of a work.] There was nothing to prevent Horne from giving the accompaniment to any one else, or from publishing it himself. But it is said that the defendant was not at liberty to urge this objection, because his notice of objections did not give the name of Horne as the author or proprietor. The objection, however, arises, not by way of defence, but upon the plaintiffs' own case. It is a matter that is exclusively within their knowledge: whereas, the object of the 13th section of the statute was, to give the plaintiff information only of that of which he was ignorant. [Maule, J. It does not appear that the plaintiffs knew any more about Horne than the defendant did.] The plaintiffs were more likely to be informed as to the title of the party from whom they took the assignment, than the defendant was. Besides, their own title-page stated that the music was "arranged by C. E. Horne." [Maule, J. The plaintiffs did not provide themselves with evidence of Horne's title, because the defendant's notice of objections gave them no intimation that Horne's title would come in question. If the plaintiffs had incurred the expense of proving Horne's title, the defendant would, upon the taxation of costs, have **[14]** objected before the master, and with reason, that the expense of that proof ought not, under the circumstances, to be allowed.] The statute never could have intended that the want of a formal notice should prevent the defendant from availing himself of matters appearing upon the plaintiff's case. Then, as to the assignment,—Bellamy having already, by the agreement of the 24th of October, 1844, divested himself of all his interest in the copyright to Leader, there was nothing upon which the assignment of the 11th of

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(*a*) See *Wyatt* v. *Barnard*, 3 Ves. & B. 77.

(*b*) Which enacts, "that, when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, or carry on, or be the proprietor of, any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed, or shall employ, any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor,—the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same right as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only, that, in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that, during the term of twenty-eight years, the said proprietor, projector, publisher, or conductor, shall not publish any such essay, article, or portion separately or singly, without the consent, previously obtained, of the author thereof, or his assigns: Provided also that nothing herein contained shall alter or affect the right of any person who shall have been, or who shall be, so employed as aforesaid, to publish any such his composition in a separate form, who, by any contract, express or implied, may have reserved, or may hereafter reserve, to himself such right; but every author reserving, retaining, or having, such right shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor, as aforesaid."

May, 1847, could operate. [Coltman, J. Has it not been held that an assignment of copyright must be by deed?] It must, it seems, be in writing—*Power* v. *Walker* (3 M. & S. 7, 4 Campb. 8); but, though an intimation of opinion to that effect was thrown out by Tindal, C. J., in *De Pinna* v. *Polhill* (8 C. & P. 78), it has never been distinctly decided that the assignment must be by deed. [Maule, J. Bellamy does not profess to assign the copyright by the agreement of the 24th of October, 1844.] It has repeatedly been held, that an agreement operates as a present demise, even where every line of the document points evidently to the execution of a more perfect and formal contract.

COLTMAN, J. It appears to me that there is no ground for granting a new trial in this case. The first question is, whether the plaintiffs were entitled to claim copyright in the whole "book,"—a musical composition consisting of an "air," in which no person claimed copyright, certain words and prefatory matter, of which one Bellamy (under whom the plaintiffs claimed) was the author, and an "accompaniment," which Bellamy procured a friend to compose for him. It is said, that, as the "air" was not the plaintiffs' property, the declaration improperly claimed the whole combination. It appears to me, however, that no difficulty of that **[15]** sort arises here. This is very like the common case of improvements in a machine, where the patent is taken out for an improved machine (*a*).

It was further objected, that the plaintiffs should have shewn an assignment of the "accompaniment," by Horne to Bellamy. But I think it was not competent to the defendant, under the notice of objections which he gave, to raise that point. The words of the 16th section are express, that the defendant shall not at the trial be allowed to give evidence that the plaintiff was not the author or proprietor of the copyright, unless his notice shall specify the name of the person whom he alleges to be so.

As to the only remaining question, it seems to me that it was quite competent to the parties to enter into an executory contract for a future formal assignment of the copyright; and that these parties had clearly and unequivocally entered into such a contract.

I therefore think the rule must be discharged.

MAULE, J. I am of the same opinion upon all the points.

CRESSWELL, J., expressed no opinion.

V. WILLIAMS, J. I also am of opinion that this rule ought to be discharged. As to the first point, that the invasion is of the "accompaniment" only, that resolves itself into a question of pleading. If the subject-matter of the copyright is properly described in the declaration, the plaintiffs clearly have a right of action in respect of its infringement: and it seems to me that it is properly described.

Rule discharged.

[16] GELL v. BURGESS. Jan. 13, 1849.

A declaration in debt contained three counts,—the first on a bill of exchange, the second, for money lent, and the third, upon an account stated; concluding, to the plaintiff's damage of 10l., &c.—The defendant pleaded,—first, as to 10s., parcel of the moneys in the first and last counts (averring identity), payment and acceptance in satisfaction before action brought;—secondly, as to the residue of the first and last counts, payment and acceptance, after action brought, of 50l., in satisfaction and discharge "of the causes of action in the introductory part of the plea mentioned;"—thirdly, to the second count, never indebted:—Held, that the second plea sufficiently answered the damages for the detention of the moneys mentioned in the first and third counts.

This was an action of debt. The first count of the declaration charged the defendant as the acceptor of a bill of exchange drawn by the plaintiff, payable to his own order; the second was for money lent; and the third, for money due upon an account stated,—concluding, "to the plaintiff's damage of 10l., and therefore he brings his suit, &c."

(*a*) But, in that case, the specification distinguishes between that which is old and that which is new.

The defendant,—who was under terms to plead issuably,—pleaded, first, "as to the sum of 10s., parcel of the moneys in the said first count of the declaration mentioned, and also the sum of 10s., parcel of the moneys in the last count of the declaration mentioned, that the said account in the said last count mentioned, so far as the same relates to the said sum of 10s., parcel, &c. in the said last count mentioned, was had and stated of and concerning the said sum of 10s., parcel, &c. in the said first count mentioned, and not otherwise; and that the said sum of 10s., parcel, &c. in the said first count mentioned, is one and the same, and not other than, or different from, the sum of 10s., parcel, &c., in the said last count mentioned: And the defendant further says, that, after the accruing of the causes of action in the declaration mentioned, so far as the same relate to the said sums of money in the introductory part of this plea mentioned, and before the commencement of this suit, to wit, on, &c., he the **[17]** defendant paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, 10s., in full satisfaction and discharge of the said sums of money in the introductory part of this plea mentioned;" verification.

Secondly, "for a further plea in this behalf, as to the residue of the said first and last counts, actio inde ulterius non, because he, the defendant, after the commencement of this suit, to wit, on, &c., paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, 50l., in full satisfaction and discharge of the causes of action in the introductory part of this plea mentioned; and this he the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action thereof against him" (*a*).

Thirdly,—to the second count,—nunquam indebitatus.

The plaintiff signed judgment for damages on the first and last counts,—contending that the second plea professed to answer the debt only, and not the damages.

Maule, J., having made an order for setting aside this judgment for irregularity,

A. W. Hoggins moved to set aside the order. The second plea is pleaded only "as to the residue of the said first and last counts:" it professes, therefore, to answer only the debt in each of those counts, and not the damages for its detention; which, according to *Lowe* v. *Steele* (15 M. & W. 380), it ought to have done. *Henry* v. *Earl* (8 M. & W. 228, 9 Dowl. P. C. 725) is also an authority to shew that a plea of payment, in debt, pleaded to the "causes of action in the declara-**[18]**-tion mentioned," is not an answer to the damages; and that the plaintiff may sign judgment for any damages which are not answered by the plea. In *Triston* v. *Barrington*, (16 M. & W. 61), the plea was a plea of payment of a sum of money in satisfaction of all the causes of action in the declaration mentioned,—and it was held to be an answer as well to the damages as to the debt. [V. Williams, J. Is there no plea covering the whole declaration?] No. The damages are not covered by any plea: *Lumley* v. *Musgrave* (4 N. C. 9, 5 Scott, 230). [Wilde, C. J. Is not the damage at the end to be read in each count? Suppose there had been only one count? Maule, J. The count, properly speaking, is the whole declaration, from beginning to end, whether there be but one count, or several counts, popularly so called.] Where the plea acknowledges the cause of action, it should answer the damages as well as the debt: it may be otherwise where the cause of action is denied. [Wilde, C. J. I think it is quite clear that the plaintiff had no right to take upon himself to sign judgment.] In *Wheeler* v. *Senior* (9 Dowl. P. C. 270, 7 M. & W. 562), a count in assumpsit stated that the plaintiff made his bill of exchange, which the defendant accepted, and that, before the bill became due, the plaintiff had parted with the possession thereof; and thereupon, in consideration that the plaintiff would again procure possession of the bill, and prevent the same from being presented for payment, the defendant promised that he would remit the plaintiff the amount (728l. 6s.) on a certain day: the count then averred performance by the plaintiff, and a breach by the defendant. The latter pleaded, as to 609l. 10s., parcel of the said sum of money, that the defendant paid to the plaintiff 700l., in satisfaction of the sum of 609l. 10s., parcel of certain moneys specified in a bill of exchange dated, &c., which **[19]** was the same identical bill as that declared on. A replication, denying that the bill mentioned in the plea was the same identical bill, and concluding with a verification, was held bad on special demurrer. But the court also intimated an opinion

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(*a*) Vide 2 Lutw. 1177, 1 Com. Rep. 318; 4 East, 502; R. T. 1 Vict. reg. 1; *Thompson* v. *Jackson*, 1 M. & G. 242, 1 Scott, N. R. 157.

that the plea was bad, for not alleging the money to have been paid in satisfaction of damages. [Cresswell, J. Does the detention of the debt form part of any count?] Yes. [Cresswell, J. Then the plea does answer the detention of the debt. The plaintiff accepted the money in satisfaction of the detention.] *Corbett* v. *Swinburne* (8 Ad. & E. 673), which shews that costs are included in the damages, serves to fortify this view. It would be a discontinuance to reply to this plea, if it does not answer the damages.

Wilde, C. J. It seems to me that this judgment was irregularly signed. The damages at the end of the declaration, must be supposed to attach to some complaint in some part of the declaration; otherwise there would be nothing to which it would be referable. The commencement of the declaration states that the plaintiff complains of the defendant,—who has been summoned to answer the plaintiff in an action of debt,—and that he demands of the defendant a certain sum, which the defendant owes to and unjustly detains from him. The count then proceeds to set forth the grounds of complaint, and concludes,—"which said several moneys were to be respectively paid by the defendant to the plaintiff on request; whereby, and by reason of the non-payment of the said several moneys respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant; yet the defendant hath not paid the said sum above demanded, or any part thereof; **[20]** to the plaintiff's damage of 10l., and thereupon he brings suit, &c." To what are you to refer that damage? Why, clearly, to the matters of complaint previously set forth. Suppose you were to sever the damages, and to apply them to each of the several causes of complaint,—the plaintiff would recover the several portions in reference to the matters charged in each count. The effect would be, to read into each count so much of the damages as are applicable to it. I therefore think this plea, which professes to answer the residue of the first and last counts, in truth answers all that substantially forms part of each of those counts, including the damages. The whole of the declaration should be read together. For these reasons, I think the judgment was improperly signed, and consequently that the order setting it aside was rightly made.

Maule, J. Formerly, a count meant a declaration. Now, it means something that, standing alone, is a declaration. I think the "count," properly speaking, includes the whole cause of action, as well at the end as at the beginning of the declaration. The cases relied on are cases where the language of the plea excluded damages,—being pleaded to part of the money mentioned in a particular count. So, here, this plea would be bad, if considered as pleaded to a part of the cause of action in a single count.

The rest of the court concurring,
Rule refused.

[21] Smyth and Two Others *v.* Anderson. Jan. 18, 1849.

[S. C. 18 L. J. C. P. 109; 13 Jur. 211. Applied, *MacClure* v. *Schemeil*, 1871, 20 W. R. 169. Discussed, *Armstrong* v. *Stokes*, 1872, L. R. 7 Q. B. 607. Referred to, *Hutton* v. *Bulloch*, 1873-74, L. R. 8 Q. B. 334; L. R. 9 Q. B. 572. Considered, *Irvine* v. *Watts*, 1880, 5 Q. B. D. 420.

The right of the seller of goods to resort to an undisclosed foreign principal, is barred by any circumstance which shews that the enforcement of that right would operate injustice.—A., as agent of B., a merchant residing abroad, bought goods of C. At the time of the purchase, A. did not inform C. who was his principal; but the invoices described the goods as "bought on account of B., per A." C. afterwards drew upon A. for the amount, at four and six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, and of the acceptance of the bills by A., made large remittances to A. on account of these and other goods; and A., at the time of his stoppage, was considerably indebted to B.:—Held, that, under these circumstances, it was not competent to C. to sue B. for the price of the goods.—Held also, that the above defence was admissible under non assumpsit.—Held also, that the books of C. were not admissible for the purpose of shewing that B. had been throughout debited by him as principal.

This was an action of assumpsit for goods sold and delivered, for money paid by the plaintiffs to the defendant's use, for work and labour and commission, and for money found due upon an account stated.

The defendant pleaded non assumpsit.

The cause was tried before Wilde, C. J., at the sittings in London, after Michaelmas term last. The facts that appeared in evidence were as follows:—

The plaintiffs, Smyth, Cowan, and Pender, carried on business as commission-agents at Manchester, under the firm of John Pender & Co. Smyth and Cowan also carried on business as merchants at Glasgow, under the firm of Alexander Smyth & Co.

The action was brought to recover a sum of 1960l. 17s. 5d., being the amount of goods alleged to have been sold by the plaintiffs to the defendant, who was a member of a mercantile firm at Bombay, trading under the name of Anderson & Co.

It appeared, that, in July, 1847, Pender, one of the plaintiffs, called for orders upon a house of great credit in London, carrying on the business of merchants and **[22]** agents, under the firm of Melville & Co., and who had, for a long time, corresponded with Anderson & Co., of Bombay. Young, a clerk in the employ of Melville & Co., on that occasion gave Pender an order for the goods in question, telling him that they were for shipment to Bombay, pursuant to orders which the firm had received. Young, who was called as a witness, could not undertake to say that the names of Anderson & Co. were mentioned at the time. But it was conceded that the goods were, in fact, ordered for Anderson & Co., and that they were shipped to and received by them.

A few weeks after the order was so given, invoices were sent in duplicate from the Manchester house of John Pender & Co., to Melville & Co., in London, who, retaining one copy, forwarded the other to Anderson & Co.

The first two invoices, which were dated the 20th of August, 1847, were headed as follows:—"Invoice of [40] cases goods bought and laying here to order, on account of Messrs. A. Anderson & Co., Bombay, per Messrs. Melville & Co., London, by John Pender & Co., agents." The third and fourth were respectively dated the 18th of September, 1847, and were headed as follows:—"Invoice of [6] cases goods bought and forwarded to Messrs. Leach, Harrison & Co., Liverpool, to be shipped per ———, on account and risk of Messrs. A. Anderson & Co., Bombay, per Melville & Co., London, by John Pender & Co., agents."

In payment for these goods, Smyth & Co. drew two bills upon Melville & Co., one for 1286l. 19s., dated the 25th of August, 1847, payable at six months; the other, for 646l. 16s. 6d., dated the 21st of September, payable at four months,—the former being drawn for the price of the goods in the first two invoices, the latter for that of the goods in the third and fourth invoices.

[23] The goods mentioned in the third invoice, were supplied by the Glasgow house: all the rest were furnished by the Manchester house. But the bills were drawn as above, for the convenience, and at the request, of Pender & Co.

In September, 1847, shortly after the goods had been shipped for Bombay, the defendant arrived in England. Some doubt arising as to whether a portion of the goods were in conformity with the order given to Pender, the matter was referred to the defendant, who had personal communications on the subject with the plaintiffs, both at Manchester and at Glasgow; and a memorandum in his handwriting was put in, which was the subject of discussions between the defendant and Smyth & Co. in the month of October, 1847, and which was relied upon by the plaintiffs as amounting to an admission that he was a party interested in the transaction, and as shewing that Anderson was, at that time, known to the plaintiffs to be, and then acted as, the principal.

It appeared that Pender & Co. had on other occasions had dealings with Melville & Co.

Melville & Co. stopped payment on the 8th of November, 1847; and the two bills were subsequently dishonoured.

Upon the bill for 646l. 16s. 6d. becoming due, and being returned, letters were addressed to the defendant both by the Manchester house and the Glasgow house.

To the demand of the latter, the defendant returned a peremptory denial of his liability: to the letter of the former, he replied, in substance, that, not knowing the state of the account between his firm and Melville & Co., he was not then prepared to take upon himself any of the liabilities of that house.

In order to shew that the plaintiffs had intended from the beginning to debit Anderson & Co. with the goods, [24] as the known principal, and not Melville & Co., the plaintiffs' books, in which Anderson & Co. were so charged, were offered in evidence. His lordship, however, declined to receive them.

It appeared upon the defendant's case, that Melville & Co. had a general account with Anderson & Co., and also what they called a shipping account; that, upon the latter account, Anderson & Co. stood indebted to Melville & Co. in about 1800l.; but that, on the general account (which included the balance on the shipping account), Melville & Co. were, at the time of their stoppage, debtors to Anderson & Co. to the extent of 2400l.

There was no evidence of any payment by Anderson & Co. to Melville & Co., precisely applicable to these particular goods: but it appeared that, shortly after the shipment of the goods, Melville & Co. had sent to Anderson & Co. an account in which they debited them with the amount of the two bills, of which Anderson had notice; and that Anderson & Co. had since made remittances to Melville & Co. to an amount more than sufficient to cover these bills.

The date of credit upon the transaction in question, as "equated" between Melville & Co. and Anderson & Co. was the 11th of January, 1848.

In the course of his summing up, the lord chief justice addressed these remarks to the jury:—"You have been correctly told, that, if a merchant sells goods to another, in ignorance that he buys as an agent, or, knowing that he is an agent, being uninformed as to the name of his principal, although the seller may, in the first instance, have adopted the actual buyer, yet, when he discovers for whom the goods were bought, he is at liberty to adopt the principal as his debtor, and charge him,—that is, provided the principal has not in the interim paid his agent. The seller cannot, upon dis-[25]-covering the true character of the transaction, charge the principal, to whom he did not give credit in the first instance, to the prejudice of the principal with reference to the state of accounts between him and his agent. That may in this case relieve us from one view of the matter; because it seems now to be conceded, that, according to the state of the accounts between Melville & Co. and Anderson & Co., if the former are the creditors of the latter for these goods, they are overpaid,—having in their hands a balance due to Anderson & Co. of 2400l. This, therefore, is the case of a claim made upon the principal after he has paid his agent; which brings it back to the question—on whose credit the goods were originally sold." And he ultimately told them, that, if they were of opinion that the sale was originally made upon the credit of Melville & Co., and not on that of Anderson & Co., they ought to find for the defendant.

The jury returned a verdict for the defendant.

Jan. 15.—Shee, Serjt. (with whom was Greenwood), on a former day in this term, moved for a new trial, on the grounds of misdirection, that evidence had been improperly rejected, and that the verdict was against evidence.

The lord chief justice,—assuming it to be quite clear, that, at the time the contract for the sale of the goods was entered into, Anderson & Co. were not known to the sellers as the principals,—left it to the jury to say whether credit had been originally given to Melville & Co. or to Anderson & Co. [Wilde, C. J. I had in my mind the cases of *Paterson* v. *Gandasequi* (15 East, 62), *Addison* v. *Gandassequi* (4 Taunt. 574), and *Thomson* v. *Davenport* (9 B. & C. 78, 4 M. & R. 110), and endeavoured to steer by them.] The substance of the [26] ruling of the learned judge was this—Anderson & Co. were unknown principals, at the time of the contract: becoming known afterwards, they would be liable for the price to the sellers, unless they had paid Melville & Co.: but, having paid Melville & Co., they were discharged.

It is undoubtedly true, that an undisclosed principal who has paid the agent, to whom the credit was originally given, may, under some circumstances, be protected. But the rule is subject to a large exception, which it was most important to advert to in this case, but which seems to have altogether escaped the attention of the lord chief justice. The principal may be charged, unless the state of accounts between him and the agent be such as to make it manifestly unfair and unjust that he should be charged.

[Maule, J. If the principal has not paid, or the state of accounts between him and his agent is such that no prejudice could accrue to him by being called upon to pay again, he is liable.] If Anderson & Co. had paid for the goods in the ordinary course, and not prematurely, the general rule stated by the lord chief justice, would have been applicable. But a principal cannot relieve himself from liability to the seller, by a payment made by anticipation to his agent. [Maule, J. The principal is supposed not to know with whom his agent contracts.] But he knows the terms on which he contracts, and, among them, the time of payment. [Wilde, C. J. Suppose the agent says he will not buy on his own responsibility, unless the money is first placed in his hands? There is nothing to prevent parties from so dealing (*a*).] If the seller, knowing the principal at the time, elects to charge the agent, he cannot afterwards have recourse to the principal: *Paterson* v. *Gandasequi*. Lord Ellenborough, in that case, says: "The **[27]** law has been settled in a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him: but that must be taken with some qualification; and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor." And Bayley, J., said: "I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree, that, where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal." In *Thomson* v. *Davenport*, at the time of making the contract, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who selected the goods: it was held that the seller might nevertheless resort to the principals. Lord Tenterden there says: "I take it to be a general rule, that, if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered, to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, **[28]** dealing with him, and him alone, then, according to the cases of *Addison* v. *Gandassequi* and *Paterson* v. *Gandasequi*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed who the principal was. They had not, therefore, at that time, the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned,—the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is there considered to be given to the British buyer, and not to the foreigner." The distinction here relied on is laid down by Lord Ellenborough, in express terms, in *Kymer* v. *Suwercropp* (1 Campb. 109), where it was held, that, if goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he has previously paid the price of the goods to the broker: Secus, if the day of payment is allowed to pass by **[29]** without any demand being made upon the principal. In Smith on Contracts (page 181, 182), speaking of the situation of

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(*a*) See *Edwards* v. *Smith*, 12 J. B. Moore, 59.

an agent who contracts without naming his principal, the result of the three cases of *Paterson* v. *Gandasequi*, *Thomson* v. *Davenport*, and *Kymer* v. *Suwercropp*, is thus given:—"It is settled, that, in such a case, the other contracting party may, when he discovers the true state of the facts, elect to charge either him or his principal, whichever he may think most for his advantage; and that he may do the same where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is. But there is this qualification to the right of election, viz. that, if the state of accounts between the agent and principal have been altered, so that the principal would be subjected to a loss by the contracting parties' election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name. Now, B., when he discovers me to be the real principal, may elect whether he will treat me or my agent A. as his debtor. But if, in the mean time, I have paid A., he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, viz. that the principal cannot, by prematurely settling with his agent, deprive the contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, but not for ready money, but at three months' credit. A. purchaser in his own name from B. B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, 'You are too late; I have settled with A., my agent.' The **[30]** answer would be—'You had no occasion (*a*) to do so pending the time of credit; and you cannot, by doing so, deprive B. of his right to elect you as his debtor.'" The fair result of all the authorities is, that the principal (unknown at the time of the contract, but discovered afterwards,) is discharged by payment to the agent, only where such payment is made at the usual or stipulated time; and that he cannot relieve himself from responsibility by a premature or anticipated payment. [Wilde, C. J. That rule, at all events, cannot apply to foreigners, who must, as a matter of necessity, remit to their correspondents here before the maturity of the bills accepted on their account.] In *Paterson* v. *Gandasequi*, Lord Ellenborough refers to a MS. case of *Powel* v. *Nelson* (cited, 15 East, 65), as one in which the liability of a principal was carried the furthest that he could remember. There, a factor made purchases for his principal, who made payments to him on account. Afterwards, the factor was pressed for payment, by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue. It was held by Lord Mansfield, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice.

Then, was this defence open to the defendant under non assumpsit? [Maule, J. It would be competent to the defendant, under non assumpsit, to shew that the action is brought before the expiration of the stipulated credit (*c*). The defence here is, that, before the credit expired, a state of things existed as between Anderson & Co. and Melville & Co., their agents, which took away the plaintiffs' right to charge Anderson & Co. as the buyers of the goods.] Under non assumpsit, the only **[31]** question was, whether or not the defendant contracted. It is clear upon the facts that he did: for, the moment the name of an undisclosed principal becomes known, the contract of the agent is the contract of the principal. [Cresswell, J. That may or may not be. Maule, J. Nobody contracted on the terms of present payment. If, then, any circumstances prevented a liability from attaching upon the defendant before the expiration of the credit, they would be admissible under non assumpsit. A special plea setting out all the facts would clearly be demurrable.]

As to the rejection of evidence,—It had been insisted from the beginning, on behalf of the plaintiffs, that they had all along intended to look to Anderson & Co., knowing them to be the principals: and the plaintiffs' books were offered in evidence, for the purpose of shewing that Anderson & Co. were originally debited by them. For that purpose, it is submitted, that the books ought to have been received. In *Addison* v. *Gandassequi*, the seller's books were given in evidence. [Maule, J. By whom?] That does not appear from the report. The books here were offered, not for the purpose of proving a fact against a person not informed of the entry, but

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(*a*) I.e. "You had no right, as against B."

(*c*) See *Hayselden* v. *Staff*, 5 Ad. & E. 153, 6 N. & M. 659.

simply to shew that the plaintiffs did not at the time elect to abandon their remedy against the principals. [Wilde, C. J. Suppose the plaintiffs had told somebody so, or had written a letter to that effect to a third party,—would that have been evidence?] Perhaps not.

The verdict was not justified by the evidence. Assuming that the names of Anderson & Co. were not mentioned at the time the order was given by Young to Pender, it is clear that they were known to the plaintiffs before the goods were delivered, for, their names are mentioned in the invoices. [Wilde, C. J. The names of the consignees were necessarily communicated to the **[32]** plaintiffs. Maule, J. Melville & Co. of course informed the plaintiffs on whose account and risk the goods were to be shipped.] In *Thomson* v. *Davenport*, Littledale, J., puts this case (9 B. & C. 90): "The seller may, in his invoice and bill of parcels, mention both principal and agent; he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent." And he adds: "The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal." [Wilde, C. J. The invoice here is just as good to charge Melville & Co., as to charge Anderson.] "Per" means "by" or "through," and shews that Melville & Co. were known throughout to have been acting as agents for Anderson and Co. [Maule, J. The form of the invoices seems to shew that the plaintiffs knew Anderson & Co. to be the principals at the time of the contract.] That was the plaintiffs' contention at the trial; but the jury were told that there was no evidence of the fact. [Cresswell, J. The drawing of the bills upon Melville & Co., was a strong circumstance against the plaintiffs' right afterwards to resort to Anderson & Co.]

That which occurred between the defendant and Smyth & Co. at Glasgow, amounted to evidence of an account stated: *Chisman* v. *Count* (2 M. & G. 307, 2 Scott, N. R. 569). [Maule, J. It was left to the jury to say whether or not Anderson was originally liable. If that question was properly found for the defendant, that which took place at Glasgow was clearly no evidence of an account stated.]

Cur. adv. vult.

[33] Maule, J. A motion having been made in this case for a new trial on the ground of misdirection, and that the verdict was against the evidence, the court took time to consider whether a rule should be granted or not. It was an action brought by certain persons trading under the firm of John Pender & Co., at Manchester, against the defendant, a partner in the house of Anderson & Co., merchants at Bombay, for the price of certain goods which had been bought by persons carrying on the business of commission-agents in London, under the firm of Melville & Co. A question arose at the trial, as to whether or not the names of Anderson & Co. had been mentioned at the time of the purchase of the goods; but it appeared that bills were drawn upon Melville & Co., by Smyth & Co., of Glasgow, at the request and for the use of Pender & Co., for the price of the goods. There is no doubt, upon the evidence, that, at the time the bills were drawn, Pender & Co. were aware that the goods had been bought for Anderson & Co.; and the probability is that they knew, at the time the order was given, that the goods were going to Bombay. It certainly appears to me, that, considering that these goods were bought by Melville & Co. for persons residing at Bombay, and that the plaintiffs took for the amount bills accepted by Melville & Co., there can be no reasonable doubt that the sale was a sale to Melville & Co., and not to Anderson & Co. It is well known, in ordinary cases where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been.

It further appeared, that Melville & Co., who had had large dealings with Anderson & Co., had sent them an account current, in which they debited them with **[34]** these bills, as accepted on account of these particular goods; and that remittances had been made by Anderson & Co. to Melville & Co., to a larger amount than the price of these goods, after Anderson & Co. were aware of the bills having been so drawn and accepted on account of them.

In the course of the summing up, the lord chief justice is represented to have laid down this proposition of law,—putting it as a possible case (though I say the evidence clearly negatived it), that Anderson & Co. were the real buyers of the goods, so that primâ facie the sellers would have a right to resort to Anderson & Co. as soon as they discovered that fact,—that the transaction which took place been Anderson & Co. and Melville & Co. with relation to these bills, took away the right of Pender & Co. to sue Anderson & Co. for the price of these goods. The correctness of that proposition of law is impugned by this motion.

Several cases have been cited, three of which, viz. *Paterson* v. *Gandasequi*, *Addison* v. *Gandassequi* and *Thomson* v. *Davenport*, form the foundation of all the law upon this subject. In these cases, the rights of a principal, where the purchase is made by an agent, and the rights of the seller, where the purchase has been made by an agent for a principal disclosed or undisclosed, and whether residing in this country or abroad, have been very fully discussed. There can be no doubt, that, where goods are bought on account of a principal unknown at the time, but who resides in this country, and nothing has been done to shew an election on the part of the seller to take the agent as the actual buyer, the seller, on discovering the principal, may sue him for the price. In *Paterson* v. *Gandasequi*, and *Addison* v. *Gandassequi*, that was ruled or assumed, the seller not knowing that the buyer was dealing for an undisclosed principal. *Thomson* v. *Davenport* carried the rule a **[35]** little further, and decided, that, where the broker states that he has a principal, but does not disclose who he is, the seller, on discovering such undisclosed principal, may have recourse to him. Assuming him to be a principal, he is the real buyer, and ought to pay, unless there be something in the transaction which makes it inequitable or unjust that he should pay. The court there intimated, that there was a question which might have been raised, viz. whether, since Thomson, the party for whom the goods were bought, resided in Dumfries, and the sellers in Liverpool, the credit might not have been given exclusively to the agent. But it was assumed that Thomson was the buyer of the goods; and the argument was, that, inasmuch as the seller knew that the goods were bought for an undisclosed principal, whose name he did not choose to ask, he must be taken to have contracted with the broker only. That was the only question raised. Had it been insisted there, that there was no principal at all other than the actual buyers the decision might have been in favour of the defendant. That case, in effect, decides, that, if the principal is not named, it is the same as if none exists. There are, however, dicta there which seem to sustain the ruling upon the present occasion. Bayley, J., observes: "It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment." In the opinion, therefore, of that learned judge, the right of the seller to sue the principal, is limited, not by payment only, but by the state of the accounts between the agent and the principal, making it unjust that recourse should be had **[36]** against the latter. Something to the same effect is said by Sir James Mansfield, C. J., in *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, which are cited in a note in 2 Smith's Leading Cases, 207. Sir James Mansfield there said: "If Hodgson (the assumed buyer, who was really the principal, though he pretended to be an agent,) had really paid Smith, Lindsey, & Co. (upon whom he had directed the sellers to draw bills for the goods), it would have depended upon the circumstances, whether he would be liable to pay for the goods over again: if it would have been unfair to have made him liable, he would not have been so." These two dicta,—and I find nothing in any other case to detract from their authority,—seem to me to afford a sensible rule on the subject.

But here it is said, that, as the remittance made by Anderson & Co. to Melville & Co., to put them in cash, amongst other purposes, to meet these bills upon which they had so incurred a liability, was made before the expiration of the credit for the goods, the payment could not, according to the decision in *Kymer* v. *Suwercropp*, have the effect contended for. Payment, however, is only put, in the dicta to which I have adverted, as one instance of its being unjust or unfair that the seller should enforce the contract against the principal.

Kymer v. *Suwercropp* was a case in which four specific quantities of coffee were sold upon certain terms which are mentioned in the report in Campbell, but which are not alluded to in some of the books in which that case is cited. The coffees were sold on the 10th, 17th, and 24th of June, and 1st of July,—not upon a month's credit,—

but they were sold by public auction, to be weighed and taken away within a month from the day of sale, and to be paid for on delivery. The purchaser, therefore, was bound to pay for them within a month: but he was at liberty, at any time within the month, to take them away and pay for them. What **[37]** was done was this:—The coffees were bought by Kenyon & Co., as brokers for the defendant; which was not known to the plaintiffs until the 8th of July, on which day Kenyon & Co. became insolvent. A great part of the coffee had previously come to the defendant's hands, the warrants for the delivery of it from the West India Docks having been given him by Kenyon & Co., who had received them from the plaintiffs. For so much he paid Kenyon & Co., by accepting a bill, dated the 15th of June, drawn by them upon him, for 751l., at one month after date, which was satisfied when it became due. The residue of the coffee was stopped by the plaintiffs in transitu. However, at the expiration of one month from the respective sales, the plaintiffs sent a clerk to demand payment of the defendant. The clerk, on one of these occasions, offered, on being paid, to give the defendant the remaining warrants (although he had them not at that time about him); but the defendant refused to pay. Here, then, is a purchaser who had no right to receive the coffee without paying for it, which he was bound to do within a month. If he obtained it within the month without paying for it, he obtained it contrary to the contract. It is not at all probable that Kenyon & Co., who were upon the verge of bankruptcy, would be in advance by paying for the coffee when they were not bound to do so. It is much more probable that what was done was done by Kenyon & Co. and the defendant in fraud of the plaintiffs,—the defendant getting possession of the coffee without paying ready money for it, which he had no right to do, and Kenyon & Co. getting a bill, which in their then circumstances might be of service to them. In that state of things,—Kenyon & Co. having stopped payment, before the expiration of the month,—the sellers, on the day on which the month expired, tendered the warrants for the rest of the coffee to the defendant, and **[38]** demanded the money. With respect to this portion of the coffee, it was a clear case of goods bargained and sold. As to the other portion of the coffee, which had come to the defendant's hands, the defendant said—"I will not pay you (the sellers); I have already paid Kenyon & Co." To which the plaintiffs replied—"If you had paid Kenyon & Co. in cash, we might have been bound by that payment. But, as you have not done so, but have given a bill for the amount. You have not paid for the coffee according to your contract. You have, therefore, obtained it under circumstances which do not entitle you to set up that payment." That probably was the view which Lord Ellenborough took of the case; and it would clearly sustain the right of the plaintiffs to recover the price of the coffees, assuming the facts to be as I have stated them. I have already observed that that case has been treated as the case of a sale upon credit. It was not so in fact: the vendee at no time had a right to obtain possession of the goods without paying the price. Lord Ellenborough says: "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged. But, here, payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that his broker alone was trusted. He has received a great part of the coffee, and enjoyed the **[39]** benefit of it; the right of the vendors is entire, unless he has paid them, or some person authorised by them to receive payment; Kenyon & Co. had no such authority; therefore he is still liable. The rest of the coffee was stopped only to prevent its getting into the hands of the insolvent brokers; and, as payment was to precede the delivery, it was enough, if the plaintiffs, on being paid, were ready to have delivered it." That decision is clearly supported by the facts. In a subsequent page of the same volume of Campbell's reports (1 Campb. 180 (*c*)), the following note appears:—"In *Kymer* v. *Suwercropp*, a rule for a new trial was discharged,—on the ground that the defendant had not properly substantiated the fact that he had paid the broker for the coffee delivered to him; but the court did not give any decided opinion as to the effect of payment by the vendee to the broker before the day of prompt, when the warrants for the delivery of the goods have been parted with by the vendor, and passed to the vendee." The court, therefore, seems to have adverted to the case of a payment to the broker, according to the terms of the contract, though without giving any opinion as to the effect of such a payment. Lord Ellenborough must, however, be considered as having decided, and properly decided, that, under the circumstances of that case, the defendant had no right to set up a payment accepted by the brokers contrary to their duty, and not made by him in conformity with the obligation which the contract imposed upon him. That is all that the decision amounts to; and it seems to me to be quite consistent with the doctrine of Sir J. Mansfield, C. J., and of Bayley, J., in the cases I have before adverted to. *Kymer* v. *Suwercropp* is stated as if it established this,—that, in no case, shall a transaction between broker and principal have the **[40]** effect of barring the right of the seller to recover as against the principal, except payment according to the contract, that is to say, payment at or after the time limited by the contract. It in truth decides nothing of the kind: it decides that the vendee is not discharged, where there is no injustice done by holding him liable,—as, where he has not paid honestly in pursuance of the contract: but it by no means decides that there are no circumstances that can occur, except payment at or after the day stipulated for by the contract, that shall operate in discharge of the principal's liability to the seller. It leaves the general question wholly untouched. The difference between *Kymer* v. *Suwercropp* and the present case is very striking. The transaction there relied on to deprive the vendors of the right to resort to the principal was, a transaction which took place between the brokers and the vendee, without the knowledge of the vendors, and contrary to their interest, and in violation of the terms of the contract. If, in that case, the bill, instead of being given by Suwercropp to Kenyon & Co., had been given to Kymer & Co., the plaintiffs, or if the plaintiffs had known of it, or had desired Suwercropp to give the bill to Kenyon & Co., and had directed Kenyon & Co. to give up the warrants on receipt of the bill,—the plaintiffs would have been bound thereby, because parties to the transaction. That would have been much nearer to the transaction now in question.

In the present case, the whole is done for the benefit of the vendors. Pender & Co. were desirous of having negotiable instruments with the names of Melville & Co. upon them. The arrangement, therefore, is made, not behind the backs of the plaintiffs, but with their knowledge and concurrence; it is in truth their own act. They knew when they received the bills from Melville & Co., that Anderson & Co. were Melville & Co.'s prin-**[41]**-cipals. They knew also that Anderson & Co. lived in Bombay, to which place they themselves had directed the goods to be shipped, So that they took the bills with the knowledge that they were to be provided for by the house at Bombay. The natural and proper course, under such circumstances, was, that Anderson & Co. should remit funds to Melville & Co., to meet their acceptances, before they arrived at maturity. Melville & Co. becoming insolvent, Anderson & Co. are now sued for the price of the goods; and the question is whether it is fair and reasonable that they should be so charged. It is clear that Anderson & Co. have, in the necessary performance of their duty, and under an arrangement made by the plaintiffs themselves, paid the money to Melville & Co. The plaintiffs got what they at the time considered an advantage, viz. the security of Melville & Co.; and they must be taken to have requested that all might be done that was necessary and incident to the arrangement: and therefore the remittance that was made by Anderson & Co., to provide for the bills, was substantially made by them with the cognisance and at the request of the plaintiffs. Can they, then, be permitted to call upon the defendant,—who has done nothing whatever in contravention of the contract entered into by his firm, nothing in fraud of the plaintiffs, and nothing of which the plaintiffs were not fully cognisant and did not desire to be done, or know must necessarily be done,—to pay the price of the goods over again? It seems to me that the case falls within the rule laid down by Sir J. Mansfield and Bayley, J., by which a party is held to be discharged, where it would be evidently unfair and unjust to charge him. I think it a clear and satisfactory case of non-liability on the part of the defendant, who, in the course of a transaction to which the plaintiffs themselves were parties, has done that which substantially is a payment **[42]** in the ordinary course of business. The fact that the money was paid before the bills became due, does not, in my opinion, prevent the defendant from availing himself of this defence. Where all the parties are living in this country, and the agent has not accepted bills on account of the goods, so that the duty of putting him in funds by a previous remittance does not arise, if the principal pays the broker before the proper time has arrived, and without the privity of the seller, one can perceive the justice of not permitting the principal to set up such premature payment in answer to the seller's claim on him for the price.

It seems to me to be clear,—even upon the assumption that Anderson & Co. were concealed principals (upon which assumption alone the question could arise),—that the ruling of the lord chief justice was conformable to an established principle which it would be inconvenient to shake by the expression of a doubt about it.

It has been contended that this defence was not open to the defendant under non assumpsit. I have already expressed an opinion that the defence was admissible under that plea. A plea setting out all the facts out of which the defence arises, would only be a roundabout way of pleading non assumpsit. There is nothing from which an assumpsit could be implied; for, Anderson & Co. had paid the money before any liability could accrue. The defendant, therefore, never was indebted to the plaintiffs for goods sold and delivered.

For these reasons, I am of opinion that no rule should be granted in this case.

Wilde, C. J. Concurring, as I do entirely, with what has fallen from my brother Maule, I will only add a word or two respecting the case of *Kymer* v. *Suwercropp*, which has not been very well understood. The mar-**[43]**-ginal note states the point decided by Lord Ellenborough to be this,—"If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due, although he has previously paid the price of the goods to the broker: Secus, if the day of payment is allowed to pass by without any demand being made upon the principal." How is that borne out by the facts? By the terms of the contract, the time of payment was, the delivery of the goods, which was to be within one month from the respective days of sale. The warrants for part of the goods were delivered by the brokers of the sellers to the brokers of the buyer. When these were delivered, the money payable in respect of them became due; and, if the buyer had paid the money at that time, he would have paid it when it became due. The objection, however, was, not that the money was paid before it became due, but that it never was paid at all according to the contract. The case, therefore, does not involve the principle in support of which it has so frequently been cited.

Cresswell, J., and V. Williams, J., concurring,

Rule refused.

ClosSman *v.* White. Jan. 25, 1849.

The bailment in detinue is not traversable.

To a count in detinue on a bailment, in the usual form, the defendant, who was under terms to plead issuably, applied, by summons, to V. Williams, J., at chambers, for leave to plead the following pleas,—

[44] First, non detinet.

Secondly, a denial of the delivery of the goods to the defendant.

Thirdly, a denial of the terms upon which the goods were alleged to have been delivered.

Fourthly, that the goods were not the goods of the plaintiff at the time of delivery, but that the defendant had no notice thereof; that afterwards the true owner gave notice of his title, and forbade the defendant to deliver the goods to the plaintiff, and insisted on his retaining them, and threatened an action; and that the defendant bonâ fide withheld them in consequence.

Fifthly, that, after the goods had been delivered to the defendant, and whilst they were still in his possession, the plaintiff ceased to be owner of the goods, by transferring them to one P. Clossman, who gave notice to the defendant, and prohibited him from delivering to the plaintiff; wherefore, &c.

Sixthly, exoneration and discharge by mutual consent before the alleged detention.

Seventhly, leave and licence.

The learned judge having declined to allow the second and third pleas, on the ground that the bailment was not traversable.

Greenwood, on a former day, obtained a rule nisi to add the second plea. He submitted, that, where the bailment is the very ground of the action, the defendant is wholly undefended unless he is at liberty to traverse it; that it is only where the bailment is founded on property in the plaintiff, that it is not capable of being traversed, the bailment in that case being a pure fiction; and that the property, though put in issue by non detinet before the new rules of pleading, is not so now. He referred to Rastall's Entries, 212, *Mason* v. *Far*-**[45]**-*nell* (12 M. & W. 683), *Clements* v. *Fight* (16 M. & W. 49), and *Whitehead* v. *Harrison* (6 Q. B. 423).

Byles, Serjt., now shewed cause. The proposed plea is clearly a bad one. This matter underwent very full discussion in *Gledstane* v. *Hewit* (1 C. & J. 565), where, to a count in detinue, on the bailment of a promissory note, to be re-delivered on request, the defendant pleaded that the plaintiff had deposited the note with him to be kept as a pledge and security for the re-payment of a loan of 50l.; and the plaintiff replied a tender of the 50l.; and this was held to be no departure. On the part of the defendant, it was submitted that the replication was a departure; that it did not support the declaration, but contained matter which would defeat the right of action as stated in the declaration; that the contract stated in the plea, and admitted by the replication, was totally different from that stated in the declaration,—the one alleging a general bailment, the other a bailment for a special purpose, which might and ought to have been traversed in the replication: and *Kettle* v. *Bromsall* (Willes, 120), and *Mills* v. *Graham* (1 N. R. 140), were cited. But Bayley, B., said: "The nature of the action of detinue is, that the detainer is the gist of the action. The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it; and, if he can do that, he has done all that is necessary to maintain his action. He is not bound to shew the circumstances under which the article came into the defendant's hands. It may have come into the defendant's hands by bailment, by pledge, which is a species of bailment, by finding, or by other means. The action of detinue is an action of wrong (*h*), and it is only necessary **[46]** to prove so much as is material: and the question in this case is, whether the allegation that the note was to be re-delivered on request, is essential, to entitle the plaintiff to recover in this case. The defendant pleads what in substance amounts to this,—that the note was delivered on pledge, viz. that he was to hold it until the plaintiff paid him 50l., which is a different bailment from that stated in the declaration. If the declaration is to be considered as binding the plaintiff to a contract to re-deliver on request, the defendant's plea should have concluded with a traverse? it should have stated that the note was delivered by way of pledge, and have traversed that it was delivered, to be re-delivered on request. That would have been essential if the bailment in the declaration were material; but the authorities shew that such a traverse is not the common course of pleading; and the defendant must shew such a delivery as will give him a continuing right to withhold the article. If the plaintiff means to insist that the article was not delivered on the terms mentioned in the plea, he is at liberty, in his replication, so to do; but it is not for the defendant to tie him down to the bailment stated in the declaration, by a traverse. If the plaintiff does not mean to deny the terms which are stated in the plea, he may shew, that, even upon those terms, the defendant has no right to withhold. Therefore, to a plea of this description, the plaintiff has the option to deny the species of delivery on which the defendant insists, or to shew such circumstances as, admitting the delivery, establish that the defendant is guilty of a wrongful detention. As it seems to me, that is clearly to be deduced from the case of *Bateman* v. *Ellman* (Cro. Eliz. 866), and the other authorities on the same point. In Brooke's Abridgment (title Detinue de Biens, pl. 50), it is said: 'In detinue, it **[47]** is no plea that plaintiff did not bail as laid, for, the bailment is not traversable, and the defendant shall answer to the detinue' (*a*). So, Dyer (*b*), in detinue for forty quarters of wheat, the plaintiff declared

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(*h*) But detinue (at least, detinue on a bailment) may be joined with debt.

(*a*) For this position, Lord Brooke cites an original case,—not reported in the Year Books,—of 3 H. 4. And see the placitum in Brooke translated, 7 Vin. Abr. p. 33, pl. 8.

(*b*) *Anon.* fo. 29 b. But, although that case is intituled "Detinue," it is obvious that the action was not detinue,—i.e., an action brought to recover in specie the possession of certain specific goods,—but debt in the detinet, to enforce the delivery of a certain quantity. The plaintiff declared upon the non-delivery to him of 40 quarters of wheat, which he alleged he had contracted to buy of the defendant. No simply on a contract for wheat, &c.; the defendant pleaded, that the plaintiff bought of him eighty quarters, upon condition that, when plaintiff came for the wheat, he should pay immediately, or otherwise the whole to be void; and, further, that the plaintiff had received thirty quarters, and paid him for them, and, at another day, came and received ten quarters, and had not paid for them, so that the contract became void;—thus not traversing the contract as stated in the declaration, simpliciter, but going on to state circumstances which would justify him in withholding the corn. Then the question was raised, whether the defendant ought not **[48]** to have concluded his plea with a traverse; because, it was said, the plaintiff states an unconditional contract, which binds the defendant to deliver at all events, and the defendant says it is a conditional contract. No, said the court, that ought to come from the plaintiff. If the plaintiff means to insist that there was not such a contract as that stated in the plea, but such as his declaration implies, he should state it in his replication. Now, that case shews that the statement in the declaration is not a statement which binds the plaintiff, but that he is at liberty afterwards to answer the plea of the defendant. The defendant must shew that the bargain stated by him justifies him in that which is the gist of the action,—the detainer; and then the plaintiff is at liberty to deny the contract as the defendant states it, or to shew (that being the true contract) that there is a wrongful detention on the part of the defendant. *Bateman* v. *Ellman* is exactly analogous to that case which I have mentioned from Dyer. The plaintiff declared, simpliciter, on a bailment to the defendant of plate, to be re-delivered on the 17th of May: on a plea of non detinet,—which put the whole of the declaration in issue (as it seems to have been considered in *Mills* v. *Graham*),—the jury found specially, that the goods were bargained and sold to the defendant by indenture, on a condition, that, if the plaintiff paid such a sum upon the 17th May following, the bargain should be void: and they found that the money was paid on that day. No doubt that was a finding of a delivery on different terms from those stated in the declaration; but the court said it was well enough; for, the condition being performed by payment of the money, the plaintiff ought to have the goods again, and then the detention is a tort. That case, as it seems to me, shews that the plaintiff is not tied down to the terms of bailment stated it his declaration." And, after observing **[49]** upon the cases of *Kettle* v. *Bromsall* and *Mills* v. *Graham*, the learned baron concludes: "Thus, the authorities seem to shew, that, though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and, if he can make out that he was entitled to the possession and re-delivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover." That case was followed in *Walker* v. *Jones* (2 C. & M. 672). *Mason* v. *Farnell* (12 M. & W. 674) shews, that, since the new rules, the defendant cannot, under non detinet, or not possessed, set up a title inconsistent with the plaintiff's title. In *Whitehead* v. *Harrison* (6 Q. B. 423), a count in detinue stated that the plaintiff delivered an indenture of him the plaintiff to the defendant, to be re-delivered on request, and then averred a detainer after request. The plea traversed the bailment: and, upon demurrer thereto, Lord Denman, delivering the judgment of the court, said: "Doubtless, before the new rules, the common bailment was not traversable; as was decided by the court of Exchequer in the cases of *Gledstane* v. *Hewit* and *Walker* v. *Jones*. The only question is, whether the new rule

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possession was laid in the plaintiff; nor was there any allegation of transfer or change of the possession, by bailment, finding, or otherwise. The defendant might have satisfied the engagement stated in the declaration, by the delivery of any 40 quarters which came within the description of the wheat bargained for. If wheat had been delivered to the plaintiff, and afterwards bailed to the defendant, an action of detinue would have lain. This distinction is recognised in H. 6 E. 4, fo. 11, pl. 7.

The case in Dyer appears to go much beyond the point for which it is cited by Bayley, B., in the above judgment; and it seems not to be reconcilable with the authorities in which it has been decided, that, where the contract of sale is, in truth, conditional, and the plaintiff declares as upon an absolute contract, the defendant cannot plead the condition, but must simply deny the contract declared on. See *Hayselden* v. *Staff*, 5 Ad. & E. 153, 6 N. & M. 659, and the cases there cited.

which has confined the plea of non detinet to a simple denial of the detainer, makes any difference. That such is the effect of the new rule, see the rule itself (Hilary, 4 W. 4, Pleadings in particular Actions, III.), and *Jones* v. *Dowle* (9 M. & W. 19). It was argued for the defendant that he could not traverse the property of the plaintiff, because the words 'of the plaintiff' are immaterial, and are not to be found in the old entries in Rastall and other books; and that, **[50]** as the case of the plaintiff might really consist of some attempt to prove an actual contract of bailment, there is now no way to put him upon proof of his case, unless this traverse is allowed: then it seems most unjust to compel the defendant to plead specially, and take the onus of proof on himself, instead of being able, in this, as in all other cases, to put the plaintiff upon proof of his right. On the other hand, the plaintiff relies on the authorities, which shew that he is at liberty, notwithstanding the averment of bailment, to shew any other mode by which the goods came into the hands of the defendant and consequently, that the bailment is not traversable. The recent case, in the Exchequer, of *Mason* v. *Farnell*, favours this view of the case: and, however hard it may appear upon the defendant, we feel ourselves bound by the authorities to hold that the plea traversing the common bailment is bad. It should seem that some alteration is requisite in the declaration, and that the plaintiff should be bound to state truly how the goods came into the hands of the defendant; and then his statement would be traversable (*a*): but, until such alteration be made by the proper authority, we must abide by the decided cases." In *Clements* v. *Flight* (16 M. & W. 42), the declaration alleged that the plaintiff delivered certain paper-writings, purporting to be scrip-certificates, for shares, to the defendant, to be re-delivered on request, after payment to him of a certain sum, averring that that sum was paid to the defendant, and assigning for breach that the defendant had not delivered the paper-writings, though requested, but detained the same: the defendant pleaded that the paper-writings were deposited with him as a pledge and security for 210l. advanced by him to the plaintiff, and that, on payment of that sum, the defendant tendered and offered to deliver up and return them to the plaintiff, **[51]** who then refused to receive them: and the plea was held bad, on demurrer, for denying the detention argumentatively, and for amounting to non detinet. Pollock, C. B., in giving judgment, said: "In the course of the argument, it was suggested that the plea was bad, as containing an argumentative denial of the special bailment in the declaration. On reference to the late case of *Whitehead* v. *Harrison*, and the authorities there referred to, and particularly *Gledstane* v. *Hewit*, and Brooke's Abridgment, tit. Detinue de Biens, pl. 50, it seems, that, not only the common bailment, but any special bailment laid in a declaration of detinue is merely surplusage, and not traversable (supra, 47 (*a*)), the gist of the action being, the detainer of the plaintiff's goods, which the defendant must answer. The plea, therefore, was not open to this objection" (*b*). [V. Williams, J. The principle seems to be based on the doctrine that it is no departure to state in the replication a totally different case from that in the declaration. Maule, J. Suppose the goods were delivered to the defendant, to be re-delivered by him to the plaintiff on payment of 10l., how is the defendant to raise that, otherwise than by traversing the delivery modo et formâ? V. Williams, J. The new rules seem to assume that the declaration will in all cases state that the goods are the goods of the plaintiff.]

Greenwood, in support of the rule. The question is, whether the proposed plea is so clearly non-issuable that the defendant ought not to be allowed to put it upon the record. The action must be undefended, if the whole defence is, that the property is, and always has been, the defendant's. It is true that many of the old **[52]** precedents do not contain any allegation of property in the plaintiff. But there are instances of special traverse of the bailment in manner and form as alleged. One in Rastall (title Detinue de Chattels, fo. 212) is as follows: "H. B. summ̃ fuit ad respond. J. B. de placito qd. reddat ei catalla ad valenc̃ xx. l. que ei injuste detinet, &c. Et unde, &c., qd. ipse dic, &c., anno, &c., apud A., deliberasset cuidam J. A. catalla p^{9}d., videl't, unam crateram argenti, &c., ad valenc̃, &c., et unam aliam crateram, ad valenc̃, &c., salvo custodiend., et eidem J., cum inde requisit. fuisset, reliberand.; virtute cujus liberationis idem J. de crateris fuit possessionat. Idemq; J. A. sic inde possessionat' easdem

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(*a*) Vide tamen, Dyer, 29 b., supra, 47.

(*b*) If the bailment were directly traversable, a plea of lien would appear to be bad, as an argumentative traverse of the unconditional bailment alleged.

crateras, &c., apd. A. pred. die, &c., anñ, &c., casualiter amisit: et pred. crateř, &c. postea, scilicet, die, &c., añ, &c., ad manus et possessionem ipsius H. per inventionem inde apd. A. pred. devenissent: ꝑ qd. actio accrevit eidem J. ad exigend' et hēnd' de prefat' H. crateras, &c.: idem tamen H., licet sepius requisit', p⁹d' crateras, &c. eidem J. nondũ reddidit, sed ill' ei hucusꝗ reddere cõtradixit, et adhuc cõtradicit, ac illas ei adhuc injuste detinet. Unde dicit, &c." To which the defendant pleads—"Et pred' H., per C., attorñ suũ, veñ, &c., et dicit qd. pred' J. actioñ nõ, q̃a dicit qd. idem J. p⁹d' xx. die J., apud A. pred', mutuat' fuisset de pref. J. A. x. l. eid' J., cũ inde requisit' fuisset solvend': et ꝑ securitate solutionis earund' x. l., idem J. B. adtunc et ibidem deliberavit eidem J. A. p⁹d' crateras, &c., ad ea sibi custodiend' et retinẽd' quousꝗ idem J. B. solveret eid' J. A. pred' x. l. Virtute cujus liberationis idem J. A. de crateř, &c. fuit possessionat'; et sic inde possessionat' obiit intestat'; post cujus mortem, ꝓ eo qd. idẽ J. A. tẽpe mort' sue fuit possessionat' de diṽs bon' et cat. in diṽs dioces. infř reg. dñi Regis Angl', reverendissimus in xp̃o pater T., ep̃us Cantuarien. sequestravit oĩa bona et catalla que fuẽr pred. J. tempore mort' sue: et postea, **[53]** scilicet, sexto die N., anno, &c., idem ep̃us, per literas suas administrat', apud A. in coñ pred', cõmisit eidem H. administrationem bonorum et catallorum que fuẽr pred' J. A. tempore mortis sue. Virtute cujus idẽ H. pred' crateras, &c., ut bona et catalla que fuerũt pred' J. A. tempore mort' sue, apud A. pred' cepit, et inde fuit, et adhuc existit possessionat' qd. ꝗ p⁹d' J. B. p⁹d' x. l. prefat̃ J. A. in vita sua, nec eidem H. post mortem ejusdem J. A., nondum solvit; absque hoc quod pred' J. B. deliberavit crateras, &c., prefat' A., ad eas salvo custodiẽd' et eid' J. B., cum inde requisit' fuisset, reliberãd', in forma qua idem J. B., per narrationem suam pred' superi suppoñ: et hoc parat' est verificare, unde pet' judm si pred' J. A. actionem, &c." And the plaintiff replies—"Et pred' J. B. dicit qd. ipse deliberavit p⁹f. J. A. crateras, &c., ad eas salvo custodiẽd, et eid' J. B. cũ inde requisit' fuisset, reliberãd', in forma qua idem J. B. ꝑ narrationem suam pred' superi' suppoñ: et hoc pet' qd. inquiratur per patriam, &c." [Cresswell, J. Is not that rather in the nature of a contract for safe custody, which would bind the defendant to a greater degree of care than an ordinary bailee would be bound to take? Wilde, C. J. The defendant is not there traversing the bailment alleged, but setting up a different bailment. Cresswell, J. The defendant sets up a property in himself.] He traverses the bailment as alleged in the declaration. In Co. Litt. 283 a., it is said: "In detinue, the defendant pleadeth non detinet; he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but must plead it; but he may give in evidence a gift from the plaintiff, for, that proveth he retaineth not the plaintiff's goods." Lord Denman, in the course of the argument in *Whitehead* v. *Harrison*, says: "There are two forms of declaration in detinue; one, alleging a delivery by the plaintiff to the defendant; the other, a **[54]** finding by the defendant. In the first, no right of property in the plaintiff is set up; in the other, it is. The distinction does not seem to have been contemplated, in framing the new rules." [V. Williams, J. The averment in the declaration being altogether superfluous and immaterial, I cannot see why it should make any difference. Cresswell, J. Brooke's Abridgment, title Chartres de Terre, et detinue de eux, pl. 22 (citing M. 9 H. 5, fo. 14, pl. 22), is a strong authority to shew that the allegation of a bailment is immaterial:—"In detinue of charters, the plaintiff (Sir John Grey) counts that they were delivered to Sir H. N. (Sir Hugh Hales) to safely keep, and that, after his death, the same charters came to the hands of the defendant, and does not shew how, whether by bailment, trover, or as executor, or otherwise; and the opinion of the court was, that the count was good" (S. C. Fitz. Abr. tit. Detinue, pl. 33).

Wilde, C. J. It seems to me that this plea ought not to be allowed, and that the refusal to allow it in truth places the defendant in no difficulty whatever. The proposed plea is opposed to the current of authorities from a very early period. From Brooke's Abridgment, downwards, all the authorities have uniformly held that the bailment in detinue is not traversable: and I do not find anything in the new rules to call for any alteration in this respect. In detinue, the gist of the action is the detainer: the bailment is altogether immaterial,—in the sense of being traversable; it is like the allegation of the loss, in a count in trover. The plaintiff may allege any bailment he pleases. The defendant may plead anything which tends to shew his detention of the goods to be lawful. It may be that the plaintiff in his declaration sets up a true bailment; but he is not bound by it. The replication may set up the very bailment stated in the declaration, and so it **[55]** may become material. But, whether the matter appears in the declaration, or not, is quite immaterial. I find no limitation or restriction of that rule in any of the cases: and the reason is obvious; for, if the gist of the action is the detention, it follows that the defendant may shew the detention to be lawful. The argument has proceeded upon an assumption that the defendant was under some difficulty in that respect. But that is altogether a misapprehension. It is competent to the defendant to shew that the plaintiff was a stranger to the goods, or to set up any title inconsistent with the plaintiff's claim. This matter was very much gone into in *Gledstone* v. *Hewit*. The authority upon which that case was founded, goes to the whole root and substance of the present case. It may be that the goods were the plaintiff's, and yet the detention of them by the defendant may have been lawful. No ground has been, or could be, shewn to warrant this plea. The rule, therefore, will not be granted.

MAULE, J. I also think that the proposed plea is not sanctioned by any authority. The new rules certainly make the older authorities less clear and less applicable, but I do not think they make the difference that is suggested. The defendant, no doubt, ought to have some mode of setting up the defence he wishes to establish, viz. that the goods in question are not the plaintiff's goods; but this is not the proper way to do it. The bailment in detinue certainly was not traversable, before the new rules. If it was, it would have been traversed by non detinet. But the cases shew that it was not so. The only effect of the new rules is, to control and limit the effect of non detinet: and, if that plea did not, before the new rules, operate a traverse of the bailment,—which is quite clear,—the new rules have no operation at all upon the ques-**[56]**-tion. The defendant is put to avail himself of his defence in some other way. I do not think the matter quite so clear as it seems to the other members of the court to be; but, upon the whole, I concur with the lord chief justice in thinking that there is no ground for allowing this plea.

CRESSWELL, J. I am of opinion that the plea proposed to be added in this case ought not to be allowed. I am not aware that the new rules have ever been considered as operating to make good pleas that would have been bad before; though they make many pleas bad that would have been good before. In Bro. Abr. Detinue de Biens, pl. 50 (*a*)[1], it is laid down, upon the authority of a case in the Year Book, 3 H. 4 (*b*), that, "in detinue, it is no plea that ne baila pas; for the bailment is not traversable; for, he shall answer to the detinue." If we were to allow this plea, it would be in direct defiance of that authority: it would be traversing the bailment, and confessing the detinue. The authorities on the subject were reviewed with great care by Bayley, B., in *Gledstane* v. *Hewit*, who comes to this conclusion: "The authorities seem to shew, that, though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not, at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and, if he can make out that he is entitled to the possession and re-delivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover." The plaintiff may declare on a bailment, and **[57]** prove a finding (*a*)[2]. Having the high authority I have referred to, to start with, and seeing

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(*a*)[1] Supra, 47 (*a*). And see H. 14 H. 4, fo. 28 b. acc.

(*b*) There is no such case in the book of that year; nor—there being no reference to any folio or placitum—does Lord Coke profess to cite any Year Book. Supra, 48.

(*a*)[2] Bro. Abr. tit. Bailment, pl. 5 (translated in Viner's Abridgment, Detinue (D. 5), pl. 14), refers to P. 7 H. 6, fo. 22, pl. 3. There, in detinue for charters (bailed), the defendant said that he found them, and that others had brought the like action, absque hoc that the deeds were bailed to the defendant by the plaintiff, and he prayed that the parties might interplead. This plea was held by Martin, J., to be good; "for, unless he had traversed the bailment, the plea would not have served him; for, if you bailed the charters to him, he is chargeable as against you, and, as against him, the property is in you; and, although others have writs against him, he acknowledges the property to be in you, for, inasmuch as he accepted them for your delivery, he so understands it; wherefore he may say, as against the others, non detinet. But, if he were neither bound nor estopped as against any of you, by any bailment, and the goods come to him by chance (par fortune), and he claims nothing, he cannot plead in bar. But each of you who have an action pending, claim the deeds; wherefore, that the modern practice has uniformly gone in accordance with it, I think this plea ought not to be allowed.

V. WILLIAMS, J. I am of the same opinion. It was well established, before the new rules of pleading, that, in detinue, the defendant could not traverse the bailment: and there is nothing in the new rules to make the allegation of bailment a material and traversable allegation, or to require the plaintiff in such case to prove that which before he was not bound to prove. The cases of *Whitehead* v. *Harrison* and *Mason* v. *Farnell* shew that the new rules have not made any difference in this respect.

Rule discharged, with costs (*b*).

[58] JONES *v.* BOXER, Executrix, &c. Jan. 15, 1849.

The 10th section of the 2 W. 4, c. 39, does not apply to writs of distringas.—A writ of summons issued against the defendant on the 8th of August, 1848, and was returned and filed on the 8th of January, 1849,—which was a day too late. A distringas, however, had been obtained on the 1st of November, 1848, under which an appearance was entered for the defendant:—Held, that the declaration properly alleged the defendant to have been summoned "by virtue of a writ issued on the 8th of August, 1848,"—the distringas coming in the place of personal service of the summons.

This was an action of assumpsit by indorsee against indorser of a bill of exchange for 30l., bearing date the 14th of June, 1842, and payable at three months.

A writ of summons issued into Middlesex on the 8th of August, 1848, and was returned and filed on the 8th of January, 1849.

The writ of distringas, tested on the 1st of November, 1848, was served at the defendant's dwelling-house on the 18th; and an appearance was thereupon entered for the defendant.

The declaration stated the defendant to have been summoned to answer the plaintiff "by virtue of a writ issued on the 8th of August, 1848."

The defendant pleaded, amongst other things, that the supposed causes of action in the declaration mentioned did not, nor did any or either of them, accrue at any time within six years next before the commencement of the suit.

J. Brown moved for a rule calling upon the plaintiff to shew cause why the issue should not be set aside, on the ground that the defendant should have been alleged to have been summoned by virtue of a writ issued on the 1st of November, 1848, the writ of summons not having been returned and filed within the time required [59] by the 2 W. 4, c. 39, s. 10 (*a*). In *Pratt* v. *Hawkins* (15 M. & W. 399), which was

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it is reasonable that you should interplead, and that each of you should shew his right. And it was said in that case, that, if one finds my goods, I may elect to have a general writ, or a writ upon the matter."

(*b*) In debt, the defendant pleaded that she had deposited certain jewels, as a security, with the plaintiff, who had not returned them: the court refused to give judgment for the plaintiff; saying that they had no power to award restitution of the jewels: MS. Year-Book of Edw. 1. Lincoln's Inn Library. And see Yelv. 178, 9; 1 Scho. & Lefr. 177.

(*a*) Which enacts, "that no writ issued by authority of this act shall be in force for more than four calendar months from the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first an action on a bill of exchange dated in May, 1838, the original writ of summons into Middlesex was issued on the 15th of August, 1844; on the 14th of January, 1845, it was returned non est inventus, and filed and entered of record; on the same day, an alias writ of summons was issued in Middlesex; on the 10th of June, 1845, a pluries writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit. The alias writ of summons was not in fact returned or entered of record till the 4th of July, 1845. The nisi prius record was made up, stating only that the defendant was summoned to **[60]** answer the plaintiff by virtue of a writ issued on the 15th of August, 1844; and, on its production at the trial, the plaintiff obtained a verdict. The court held, that the provisions of the statute 2 W. 4, c. 39, s. 10, had not been complied with, and made absolute a rule to amend the nisi prius record, by stating the continuances according to the truth, at the costs of the plaintiff: and that, where a writ issued within six years after the cause of action accrued has not been duly continued, pursuant to the 2 W. 4, c. 39, s. 10, the defendant is not bound to plead such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit,—the last writ which is served, being, for this purpose, the commencement of this suit. That is an authority in point, except that the second writ there was a pluries, here a distringas. The record in this case should have stated that the defendant was summoned by virtue of a writ issued on the 1st of November, 1848. [Maule, J. You contend that the distringas is to be treated as if it had been an alias or a pluries summons?] Yes. [Maule, J. The distringas is, to compel appearance to a writ of summons. Where the plaintiff obtains a distringas, it is the same as personal service of the writ of summons.] That would be so, but for the 10th sect. of the uniformity of process act. [Cresswell, J. That section applies only to writs issued in continuation of former writs.] A distringas may issue in continuation of process to save the statute of limitations: *Ray* v. *Dow* (5 Dowl. P. C. 310). [Cresswell, J. That was with a view to outlawry.] The 10th section clearly applies to writs of distringas: the words are general.

[61] MAULE, J. The writ of summons in this case issued on the 8th of August, 1848, under the authority of the uniformity of process act, which, in s. 1, provides that all personal actions shall be commenced by writ of summons. The 10th section enacts "that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ." The question here is, whether, the action having been commenced by a writ truly stated in the issue, the issue is irregular for not stating the distringas. It is true that the action was commenced as is alleged, and that the defendant was summoned. The writ of summons is to be served within four calendar months. If the plaintiff is unable to serve it within that period, he may, upon satisfying the court, or (in vacation) a judge, that due attempts have been made to effect the service, obtain a distringas, and may after-**[62]**-wards, upon taking the proper steps, enter an appearance for the defendant as upon a personal service. The appearance, when entered, supposes the action to have

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writ; and return to be made in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

See *M'Kellar* v. *Reddie*, 5 Scott, N. R. 192.

been commenced by the writ of summons, which is the foundation of the distringas. It is perfectly competent to a defendant to appear to a writ which has not been personally served, but merely left at his dwelling-house. He may treat that as a served writ: or the plaintiff may, by adopting the course above adverted to, make a writ that has not been personally served equivalent to one which has. I therefore think this is a perfectly clear case. It would be a most strange and anomalous thing, if it were otherwise. The plaintiff having done all that is provided by the act as having the effect of service of the writ of summons, it would be singular if he were to be barred earlier than he would have been if the defendant had not kept out of the way. The 10th section is wholly inapplicable to a proceeding by distringas. If it were, then the distringas must issue within a month after the expiration of the former process; which would be quite a new practice. I think there is no ground for the motion.

The rest of the court concurring,

Rule refused.

[63] Higgs *v.* Scott. Jan. 16, 1849.

A., tenant to B., received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent then due. A., notwithstanding this notice, paid the rent to B. (under an indemnity which turned out to be unauthorised), and was afterwards compelled, by distress to pay the amount over again to C.:—Held, that the payment to B. was a voluntary payment, with full knowledge of the circumstances, and therefore not recoverable back in an action for money had and received.—At the trial, in support of a special count founded upon the indemnity, the plaintiff proved that one H. was B.'s general attorney; and he then proposed to prove that H., as such attorney, had given the indemnity:—Held, that this evidence was not admissible, in the absence of proof of H.'s authority to make such a contract for his client.

The plaintiff held premises as tenant from year to year to the defendant. After the commencement of the tenancy, the defendant mortgaged her term in the premises to a Mrs. Hardy. The interest being in arrear, the mortgagee, in the beginning of the year 1848, gave the plaintiff notice not to pay his rent to the defendant. Upon receipt of this notice, the plaintiff went with one Hawkins, who collected the defendant's rents, to one Hodgkinson, whom Hawkins represented to be the defendant's attorney, and gave him notice of Mrs. Hardy's claim. In consequence of what passed upon that occasion, the plaintiff, on the 18th of February, 1848, paid Hawkins the amount of two quarters' rent, less the property-tax. After this, a distress was put in upon the plaintiff's premises, under which the plaintiff was compelled to pay the two quarters' rent over again to Mrs. Hardy, the mortgagee. The present action was brought to recover back the money so paid—the first count being founded upon an indemnity given by Hodgkinson in the defendant's name, the second for money had and received.

In support of his case under the first count, the plaintiff called Hodgkinson; but the lord chief justice, before whom the cause was tried, said he would allow the plaintiff to prove notice given of Mrs. Hardy's claim to **[64]** Hodgkinson, but not that he had given the indemnity. The plaintiff then relied upon the facts above stated, as entitling him to recover back as money had and received, the two quarters' rent he had paid to the defendant after the date of the notice.

On the part of the defendant, it was objected,—first, that this was, in effect, an attempt to try a question of title in an action for money had and received;—secondly, that the payment having been voluntarily made, with full knowledge of the facts, the plaintiff could not recover it back.

A verdict having been found for the defendant, with leave to the plaintiff to move to enter a verdict for 19l. 2s. 6d., if the court should be of opinion that the evidence as to the indemnity was improperly rejected, or that the plaintiff was entitled to recover under the second count,

Byles, Serjt., now moved accordingly. The two leading cases that shew title not to be triable in an action for money had and received, are, *Lindon* v. *Hooper* (Cowp.

414), and *Cunningham* v. *Lawrents* (*b*). Both, however, were cases where the question of title arose between the litigant parties. The case which comes the nearest to the present is, *Newsome* v. *Graham* (10 B. & C. 234, 5 M. & R. 64), where, a tenant, having paid rent to A., was ejected at the suit of a third person, who afterwards recovered from him mesne profits for the period in respect of which he had paid rent to A.: and it was held that the tenant might recover back that rent from A., in an action for money had and received, he not having set up any title to the premises at the trial. Lord Tenterden, delivering the **[65]** opinion of the court, there says: "We are all clearly of opinion that the action for money had and received is maintainable. It appears that the plaintiff had, from time to time, paid rent to the defendants for certain premises which he held of them; that it afterwards turned out that the defendants had no title: the plaintiff was ejected, and compelled to pay the mesne profits for the time during which he had held of the defendants; and this action was brought to recover back the rent which he had paid to them. The objection was, that title to land could not be tried in an action for money had and received (*a*). That is true; but here, there was no trial of title. It had been previously ascertained that the defendants had no title whatever to this land, in respect of which the plaintiff had paid rent to them; and the defendants did not, at the trial of this cause, claim to have any title. From the short note of the nisi prius case of *Cunningham* v. *Lawrents*, in Bacon's Abridgment, it may be inferred that the defendant claimed title to the land at the very time when the action of assumpsit for the rents received was brought. In *Lindon* v. *Hooper*, the right of common was in dispute at the time when the action for money had and received was brought to recover back the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. In this case, it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land. That being so, we are of opinion that there should be no rule." Here, no title was set up by the defendant at the trial. [Wilde, C. J. The defendant was content to rely on the weakness of the plaintiff's **[66]** case.] The record in this case would not be evidence either for or against Mrs. Hardy on any future occasion. No case is to be found where the circumstance of a third person's title incidentally arising, has been held to oust a party from this form of action. [Maule, J. In *Knibbs* v. *Hall* (1 Esp. N. P. C. 84), it was held, that, where a party threatened with a distress for rent, pays money when he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand. The ground upon which the plaintiff was held entitled to maintain money had and received, in *Parker* v. *The Great Western Railway Company* (7 M. & G. 253, 7 Scott, N. R. 835), was, that, as the party could not do without his goods, the payment was made through necessity and the urgency of the case.] In *Brisbane* v. *Dacres* (5 Taunt. 143), the money was paid, with knowledge of the facts, but under a mistake as to the law, to one claiming it as a right; and it was held not to be recoverable back; but there, it is put upon the ground of there being nothing against conscience in the defendant's retaining it. Here, the retention of the money by this defendant, is clearly against conscience. In *Kelly* v. *Solari* (9 M. & W. 54), Parke, B., says: "I think, that, where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid, if it had been known to the payer that the fact was untrue, an action will lie to recover it back; and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position,—that a person so paying is precluded from recovering, by laches in not availing himself of the means of knowledge in his power,—seems, from the cases cited, to have **[67]** been founded on the dictum of Mr. Justice Bayley, in the case of *Milnes* v. *Duncan* (6 B. & C. 671, 9 D. & R. 731); and, with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to

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(*b*) Cor. Wilson, J., Worcester Spring Assizes, 1788, Bac. Abr. title Assumpsit (A.) 5th and 6th editions, vol. i. p. 260, 7th edit. p. 344.

(*a*) Vide *Young* v. *Grove*, ante, vol. iv. 668, 9.

waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it: but, if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case, the receiver was not entitled to it, nor intended to have it." That case is recognised, and the principle of it somewhat extended, by this court, in *Bell* v. *Gardiner* (4 M. & G. 11, 4 Scott, N. R. 621, 1 Dowl. N. S. 683). It was there held, that a negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge,—cannot be enforced against him, though he may have had the means of knowing those facts. [Maule, J. Where the party paying the money has been guilty of laches, he cannot recover it back: *Skyring* v. *Greenwood* (4 B. & C. 281, 6 D. & R. 401, 1 C. & P. 517). There, the paymaster of a military corps had given credit in account to an officer in that corps, from the 1st of January, 1817, to the 5th of November, 1820, for certain increased pay erroneously supposed to be granted by a general order of the 27th of August, 1806, to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In December, 1816, the paymasters were informed by the **[68]** board of ordnance that the increased pay granted by the order of 1806, would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer till 1821, and subsequently to that time they continued to receive his pay. It was held, in an action brought by his personal representative to recover such pay, that it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time. [Wilde, C. J. Several cases of that sort arose under Howard & Gibbs's bankruptcy.] It is clear, that, the plaintiff paid the money upon the faith of the defendant's representation that she was entitled to receive it. He did not intend that the defendant should have it whether she was entitled or not. It is true the plaintiff had the means of knowledge: but there were counter-representations. [Wilde, C. J. Of fact, or of law?] Of fact. [Cresswell, J. Is that so?] It is submitted that it is. The case of laches that has been suggested, does not apply. The plaintiff paid the money upon the representations of Hodgkinson, who represented himself as, and who was in fact, the attorney of the defendant. In that view, Hogdkinson's acts and representations were evidence against the defendant. [Wilde, C. J. The difficulty I feel is, whether the objection is not removed by Hodgkinson's affirmatively stating that he had no authority from the defendant to give the indemnity.] Suppose he had no instructions, still he was her attorney. [Maule, J. Primâ facie, the evidence was inadmissible; and no ground was laid for admitting it. Wilde, C. J. The payment was not made under any mistake either of fact or of law. The plaintiff paid the money after notice; and the facts turned out to be as **[69]** the notice stated.] The payment was induced by a misrepresentation. [Wilde, C. J. There was no evidence that the defendant made any representation at all. She demanded the rent as of right, knowing that the mortgagee had given the plaintiff notice of her claim.] The plaintiff never intended to make a gift of this money to the defendant. [Maule, J. He meant to pay it under an indemnity: he should have taken care to get one that he could enforce.]

Cresswell, J. I am of opinion that there is no ground for impeaching the decision of the lord chief justice as to the rejection of Hodgkinson's evidence. Seeing the purpose for which it was tendered, viz. to prove a contract, to make which there was no evidence of Hodgkinson's authority, it was properly rejected.

Then, as to the other point,—the plaintiff, when he paid the money, knew all the facts. He was informed of them; and there was nothing to shew he had not received correct information. When a party is told that certain deeds have been executed, he knows the fact, although he does not see the deeds. The whole case on the part of the plaintiff was, that he knew the fact of the mortgagee's claim; and therefore he asked for an indemnity, though he did not, unfortunately for him, get an effectual one. He paid the rent as a thing he was bound to pay, indicating no intention to reclaim it. There was no misrepresentation of the facts, no fraud on the part of the defendant in receiving the money, and consequently no ground upon which the plaintiff can be entitled to recover it back.

V. WILLIAMS, J. I am of the same opinion. I am not disposed to throw any doubt upon the case of *Kelly* v. *Solari*, confirmed, as it is, by *Bell* v. *Gardiner*. But I think the present case falls within the ordinary rule, [70] that money paid with full knowledge of all the circumstances, cannot be recovered back in an action for money had and received.

MAULE, J. I am of the same opinion. That the payment was made with full knowledge of all the facts on both sides was, I think, strongly evidenced by the receipt that was given.

WILDE, C. J. The general result of the evidence in this case is, that the defendant has received from the plaintiff a sum of money which she was not entitled to receive: and, in such a case, one would look very anxiously to see if the law would not warrant his recovering it back. But it is of infinitely more importance that general principles should be adhered to. I must confess I can see no foundation for the plaintiff's claim. The recovery back of money once parted with, is always attended with difficulty.

With respect to the evidence,—what passed with Hodgkinson, was admitted down to the point at which it tended to prove a contract. It was then objected that Hodgkinson had no authority from his client to enter into a contract of indemnity for her. Upon that the question for my decision was, whether or not there was evidence of any authority in him to contract for the defendant. I think there was not.

As to the other part of the case, it was an extremely simple one. The plaintiff is tenant to the defendant. A third person gives notice of a claim adverse to the defendant, stating the grounds of her claim minutely and correctly, viz. that the premises have been assigned to her by way of mortgage, and that the interest is in arrear. The landlady insists that she is entitled to the rent. Of what is the plaintiff ignorant? It does not [71] appear that any misrepresentation of fact was made by the defendant. The plaintiff yields to the defendant's claim of right, and pays her the money. It is, therefore, the simple case of a notice of adverse claims, to one of which the plaintiff elects to give the preference. The case, therefore, clearly falls within the general principle,—that money paid with full knowledge of all the facts, cannot be recovered back.

Rule refused.

DEARIE AND OTHERS, Assignees of J. Hughesdon and A. Mackay, Bankrupts, *v.* R. AND J. HENDERSON. Jan. 20, 1849.

The plaintiffs, as assignees of H. and M., delivered a declaration, the first two counts being in trover for a ship and cargo, alleged in the first count to have been in the possession of H., and, in the second, as having been in the possession of the assignees.—The third count stated that H., before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, empowering the defendants to sell the ship, and that H. and M. sent the deed-poll to the defendants for the purpose of securing them in respect of the acceptance by them of certain bills of exchange drawn upon them by H. and M.; that the defendants received the deed-poll with full notice and for the purpose aforesaid; but that they refused to accept or to pay the bills; and afterwards sold the ship, under colour of the deed-poll, before the bankruptcy of H. and M.—The fourth count stated that H., before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, of the like tenor and effect as the deed-poll mentioned in the last preceding count; that H. and M., before either of them became bankrupt, wrote a letter to the defendants, instructing them not to sell the ship; that the last-mentioned deed-poll and letter were delivered to the defendants, who held the deed-poll subject to the instructions contained in the letter; yet that the defendants, before the bankruptcy of H. and M., and contrary to the terms of the letter, sold the last-mentioned ship by a bill of sale executed by the vendors before, but completed by the purchasers after, the bankruptcy of H. and M.:—A judge at chambers having made an order "that the plaintiffs elect between the first and third, and the second and fourth counts, or be at liberty to amend the first and second counts, by confining the same to the cargo,"—on the ground that the counts were apparently founded upon the same principal subject-matter of complaint, within the rule of Hilary term, 4 W. 4, r. 5,—the court declined to rescind or vary his order.

The first count of the declaration in this case was in trover, for a ship and cargo in the possession of Joseph Hughesdon the younger, and alleged a conversion by the defendants before Hughesdon's bankruptcy.

[72] The second count was also in trover, for a ship and cargo in the possession of the plaintiffs as assignees of Joseph Hughesdon, and alleged a conversion by the defendants after the bankruptcy of Hughesdon.

The third count stated, that, before the said Joseph Hughesdon became bankrupt, to wit, on, &c., he, being then lawfully possessed, and sole registered owner, of a ship called the "Sir Robert Seppings," executed a deed-poll under seal [which was set out], impowering the defendants to sell the ship and convey her to the purchaser or purchasers, and that the said Joseph Hughesdon and A. Mackay sent and delivered the deed-poll to the defendants for the purpose of securing the defendants in respect of the acceptance by them of eighteen bills of exchange, for a large amount, to wit, 14,955l. 15s. 6d., drawn by the said J. Hughesdon and A. Mackay, upon the defendants, and payable to their order, and indorsed by the said J. Hughesdon and A. Mackay, and the defendants received the said deed-poll with full notice, and for the purpose aforesaid; that, although the said bills were all presented to the defendants, before any of them became due, by the respective indorsers and holders thereof, for acceptance by the defendants, the same were not, nor was either of them, at any time, accepted or paid by the defendants, but were respectively refused acceptance, and dishonoured by the defendants, and the said bills were then duly protested for non-acceptance, of which the respective **[73]** holders gave notice to the said J. Hughesdon and A. Mackay, and required them to pay the amounts of the said bills respectively; yet that the defendants, after such dishonour, and contrary to the purpose for which they held the said deed-poll, and before the bankruptcy of the said J. Hughesdon and A. Mackay respectively, sold the said ship, under colour of the said deed-poll, by a bill of sale executed in the name of the said J. Hughesdon, by R. Henderson (one of the defendants), before the bankruptcy, and completed by the purchasers after the bankruptcy, of the said J. Hughesdon and A. Mackay respectively, whereby the plaintiffs, as assignees of the said J. Hughesdon and A. Mackay respectively, had been deprived of the possession of the said ship, and had lost the freight of her cargo, to wit, 10,000l., which, but for such loss of possession, would have been payable to them as assignees of the said J. Hughesdon and A. Mackay.

The fourth count stated, that the said J. Hughesdon, before his bankruptcy, being the sole registered owner of a ship, executed a deed-poll under seal, of the like tenor and effect as the deed-poll mentioned in the last preceding count; and that the said J. Hughesdon and A. Mackay, before either of them became a bankrupt, wrote a letter to the defendants, instructing them that they did not wish the said last-mentioned ship to be sold: that the last-mentioned deed-poll and letter were delivered to the defendants, who held the said deed-poll subject to the instructions contained in the said letter; yet that the defendants, before the bankruptcy of either the said J. Hughesdon or A. Mackay, and contrary to the terms of the said letter, sold the last-mentioned ship, by a bill of sale, executed by the vendor before, but completed by the purchasers after, the bankruptcy of the said J. Hughesdon and A. Mackay,—averring damage as in the third count.

[74] On the 16th instant, Coltman, J., under the rule of Hilary term, 4 W. 4, r. 5, 6, made an order "that the plaintiffs elect between the first and third, and second and fourth counts of their declaration, or be at liberty to amend the first and second counts, by confining the same to the cargo, and that, in the meantime, all further proceedings be stayed."

Peacock now moved to set aside or to vary that order. The question is, whether the first and third, and second and fourth counts, respectively, are in "apparent violation" of the 5th rule of Hilary term, 4 W. 4, which provides that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each." The first count is, trover for a ship and cargo in the possession of the bankrupts, alleging a conversion before the bankruptcy; and the third is a special count in case against the defendants for improperly selling a ship under circumstances to which their authority to sell did not extend. The question is, whether, upon such a state of facts trover would be the proper remedy, or whether the plaintiffs would not be entitled to recover a greater amount under the special count, than under a count in trover. In *Williams* v. *Archer* (ante, vol. v. p. 318), it was held, that, in detinue for scrip certificates, which had been re-delivered after action brought, the jury might take as the measure of damages, the difference between the value of the scrip at the time of the demand and refusal, and the value at the time of the re-delivery. [Maule, J. To sustain the third count, the plaintiffs must shew a conversion.] It may be that the same evidence that will prove the third count, will also prove the first: but do they so clearly appear to be founded on the same subject-matter of complaint as to **[75]** fall within the rule? In *Gilbert* v. *Hales* (*a*), the declaration contained twenty-five counts: the first fifteen were on bills of exchange drawn at Paris: the next five, which related to the same bills, were special counts founded on the law of France: and the last five were on a special agreement to pay the bills, in consideration of the plaintiff procuring their discount. Application having been made to strike out the last set of counts,—it was held that they were not in apparent violation of the rule. And Alderson, B., said: "The question is, are the three sets of counts in apparent violation of the rule, as being substantially for the same cause of action. In this case, the first set of counts is founded on the law-merchant, the second on the law of France, and the third on a contract altogether independent of and collateral to the two former sets of counts. These counts do not, therefore, appear to be in violation of the rule, though the fact may be, and probably is, that there was but one contract." In the present case, it is impossible to say that the plaintiffs mean to rely on the same act of conversion in support of the first and the third counts. [Cresswell, J. The first and third counts here are evidently founded on the same subject-matter of complaint.] To constitute a violation of the rule, that similarity, or, rather, that identity, must be apparent on the face of the record. [Cresswell, J. That cannot be the true criterion. You cannot, in many cases, see from the record whether the two counts are the same or different: for instance, in the case of a contract alleged in one count with, and in another without, a condition.] One test is, the power of amendment under the 3 & 4 W. 4, c. 42, s. 23: would that apply here? The first and fourth counts **[76]** respectively allege the conversion and sale to have taken place before, the second and third counts after, the bankruptcy. Upon the fourth count, a question will arise as to what was the effect of the letter of instructions with reference to the deed-poll. The evidence that would be required to support that count, clearly would not sustain a count in trover.

Wilde, C. J. By the 5th rule of Hilary term, 4 W. 4, several counts are not to be allowed, "unless a distinct subject-matter of complaint is intended to be established in respect of each." Therefore, "counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed." The substantial complaint here is, that the defendants sold the ship in question, having an apparent, but not a real, authority so to do. What is that but a conversion? The subject-matter of complaint is clearly the same in all the counts, viz. a wrongful sale of the ship. The sale was complete before the bankruptcy: the execution by the vendees amounts to nothing. I think the order of my brother Coltman was quite right.

Maule, J. I also think the order in question was properly made. Looking at the declaration with the eye of a pleader, I have no hesitation in saying, that the first and third, and second and fourth counts, respectively, appear to be founded on one and the same principal matter of complaint; and that therefore the defendants are entitled to the undertaking provided for by the 6th rule, which declares, that, "where more than one count, plea, avowry, or cognisance shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, **[77]** avowries, or cognisances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bonâ fide intended to be established in

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(*a*) 2 D. & L. 227. And see *Fagan* v. *Harrison*, ante, vol. iv. p. 910.

respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances; in which case, he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied: and shall also specify the counts, pleas, avowries, or cognisances mentioned in such application, which shall be allowed."

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Rule refused.

SMALLCOMBE, THE YOUNGER, *v.* WILLIAMS. Jan. 25, 1849.

The venue having been changed, at the instance of the defendant, upon the common affidavit, from Gloucestershire to Bristol, and restored to Gloucestershire without an undertaking to give material evidence there,—the court refused to restore it to Bristol, upon an affidavit that the cause of action arose wholly in the latter place, that the witnesses the defendant would produce at the trial were very numerous, and all resident in Bristol, and that the plaintiff was a person in indigent circumstances and unable to pay costs if she failed to obtain a verdict.

Assumpsit for breach of promise of marriage. Plea, non assumpsit. The promise was alleged to have been made on the 1st of January, 1847; the declaration was delivered on the 5th of December, 1848; and the plea on the 16th.

The venue, which was originally laid in Gloucestershire, was changed by the defendant to Bristol, upon the usual affidavit, that the cause of action (if any) **[78]** arose in that city, and not elsewhere. On the 22nd of December, V. Williams, J.,—without any affidavit by the plaintiff to support the application, and without requiring her to enter into the ordinary undertaking to give material evidence there,—made an order restoring the venue to the county of Gloucester.

Cole,—upon affidavits stating, that the plaintiff's cause of action (if any) arose in the city and county of Bristol, and not in the county of Gloucester, or elsewhere out of the city and county of Bristol; that the defendant was married, aged fifty-eight years, and had six children; that the witnesses he would produce at the trial were very numerous, and all, except two, lived in the city and county of Bristol; that such two excepted persons did not live in or near the county of Gloucester; that the city of Gloucester is distant thirty-four miles and upwards from Bristol; that the plaintiff was a person in indigent circumstances, and wholly unable to pay the costs if the verdict went against her; that an action was brought in the Tolzey (vide 1 M. & G. 3) court of the city and county of Bristol, and tried in the month of July, 1847, the circumstances of which were closely connected with this cause (*b*); that the present plaintiff's attorney was the attorney of the plaintiff in such former action; that, at such trial, the present plaintiff and her brother were examined, and were the principal witnesses: that they both resided, and still continued to reside, in Bristol; that the plaintiff might have brought her action in the said Tolzey court, which is a court of record, in which trials are held four times a year, at the time of the quarter sessions, before the Recorder of Bristol, and in which **[79]** court damages to any amount might be recovered; and that, if this cause were tried at Gloucester, the expenses would greatly exceed the expenses of trying at Bristol,—now moved to set aside the order of V. Williams, J., and to restore the venue to Bristol.

WILDE, C. J. I do not think your affidavit sufficient. You are bound to shew some manifest inconvenience that would result from trying the cause at Gloucester. Your affidavits do not state the number of your witnesses; and, non assumpsit being the only plea, there cannot possibly be many necessary. Besides, Gloucester is now only about an hour or an hour and a half's journey from Bristol.

The rest of the court concurring,

Rule refused.

(*b*) An action against the defendant for the seduction of the now plaintiff.

Tolson *v.* The Bishop of Carlisle, M. B. Dykes, Widow, and J. B. Dykes, Clerk. Jan. 31, 1849.

In a local action, a suggestion to try the cause in an adjoining county cannot be granted before issue joined.

This was an action of quare impedit, wherein the plaintiff claimed the advowson and the immediate right of presentation to the vicarage of Bridekirke, in the county of Cumberland.

Manning, Serjt., moved to change the venue from the county of Cumberland to the county of Lancaster, on the ground of the existence in the former county, of undue influence and prejudice against the plaintiff's claim. The affidavits upon which the motion was founded, stated, amongst other things, that many per-**[80]**-sons of property and influence in the county (and amongst them the lord lieutenant) were in possession of burgages, tithes, and tenements, which the plaintiff claimed under the same title which was in issue in this cause; and that, upon a former occasion, the plaintiff had, under the advice of counsel, withdrawn the record in an action of ejectment brought for trial, upon the same title, at the assises at Carlisle, in consequence of the high sheriff having at a public dinner at the Bush inn, in that city, proposed the health of the defendant Dykes, and "success to his cause." [Cresswell, J. When did that occur?] In the year 1825. [Maule, J. Does it appear that any of the gentlemen who were present at that convivial meeting are now living?] It is enough for the present purpose that the spirit survives. The affidavits disclose the existence of a very general feeling amongst the freeholders of the county adverse to the plaintiff's claim, and shew strong grounds for the belief that a fair and impartial trial cannot be had in the county of Cumberland. [Wilde, C. J. Your affidavits do not state that issue is joined; your motion, therefore, is premature.] It is not absolutely necessary that issue should be joined. In *Dowler* v. *Collis* (4 M. & W. 531, S. C. (per nom. *Dowler* v. *Caller*), 7 Dowl. P. C. 55), it was held, that, although the general rule is, that a motion to change the venue on special grounds cannot be made until after issue joined, yet, if the pleadings and facts of the case are such that the court cannot fail to see what the issues joined must be, the application may be granted before issue joined. [Maule, J. This being a local action, a suggestion must be entered, to warrant a trial in another county; and that cannot be done until after issue joined (*b*).] **[81]** A rule may be granted quia timet,—to enter the suggestion when issue shall have been joined.

Wilde, C. J. That would be suggesting something contrary to the fact. We clearly cannot entertain the application at this stage of the cause.

The rest of the court concurring,

Rule refused.

Sanderson *v.* Dobson. 1849.

[S. C. in Chancery, 10 Beav. 478: in Exchequer, 1 Ex. 141. See *Fullerton* v. *Martin*, 1853, 1 Eq. R. 228; *O'Toole* v. *Browne*, 1854, 3 El. & Bl. 585; *Jegon* v. *Vivian*, 1865-68, L. R. 1 C. P. 24; L. R. 2 C. P. 422; L. R. 3 H. L. 285; *Dobson* v. *Bowness*, 1868, L. R. 5 Eq. 404.]

Testator, by his will,—reciting that he had contracted with A. for the sale of a freehold messuage at M., but that he had never executed any conveyance thereof to him,—devised the same to B. and C., their heirs and assigns, in trust, on receipt of the purchase-money, to enable them to convey to A. He then gave a leasehold estate to his two sisters, "their heirs, executors, administrators, and assigns, for and during the term of their natural lives, or the lives of the several persons for whose lives the same was held, and the life of the longest liver of them, without impeachment of waste." And, after the death of one of the sisters, he gave the whole of his said "leasehold estate" to the survivor, her heirs, &c., absolutely.—The will then proceeded as follows:—"I give unto my said sisters my silver-hafted knives

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(*b*) See Archbold's Practice, 7th edit., by Chitty, vol. i. p. 282, vol. ii. p. 1172.

and forks, and my silver table-spoons, equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said B. and C. their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts, &c.: I give and bequeath all my ready money, and the money arising by sale of my said premises at M., to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters," &c. And B. and C. were appointed executors:—Held, that the trustees, B. and C., took the reversion in fee in other lands of which the testator, at the time of making his will (made before 1838), was seised for life, with contingent remainders which failed, with the reversion in himself, in fee.

The following case was sent by the Master of the Rolls (Lord Langdale), for the opinion of this court:—

Thomas Stapylton, late of Leyburn, in the county of York, deceased, duly made, signed, and published his **[82]** last will and testament, in writing, bearing date the 4th of October, 1808, and which was attested as by law was required for passing real estate by devise, and, so far as the same is material to be here stated, was in the words following:—

"Whereas, I have lately contracted with Thomas Wray, of Aggelthorp, yeoman, for the sale to him of my freehold messuages, tenements, or dwelling-houses situate at Middleham, in the said North Riding, with the appurtenances thereunto belonging, at or for the price or sum of 240l., but have never made or executed any conveyance thereof to the said Thomas Wray: therefore, I give and devise all the said messuages, tenements, and dwelling-houses at Middleham aforesaid, unto and to the use of John Robson and Jonathan Sleigh, both of Leyburn aforesaid, gentlemen, their heirs and assigns,—in trust to enable them, on the receipt of the purchase-money, or so much thereof as I have not already received, to convey and assure the same to the said Thomas Wray, his heirs or assigns, or as he or they shall direct or appoint, and the receipt of them the said John Robson and Jonathan Sleigh shall be a sufficient discharge to the said Thomas Wray, his heirs and assigns: And I give and devise all my leasehold estate called Skelton Coat, with the rights and appurtenances thereunto belonging, situate, lying, and being near Bellerby, in the parish of Speninthorne, in the said North Riding, now in the tenure and occupation of Christopher Tidyman, unto my dear sisters Margery Stapylton and Martha Stapylton, spinsters, their heirs, executors, administrators, and assigns, for and during the term of their natural lives, or the lives of the several persons for whose lives the same are held, and the life of the longest liver of them (*a*) (subject to the yearly rent payable thereout), without impeachment of **[83]** waste: and, from and after the death of either of my sisters Margery Stapylton and Martha Stapylton without lawful issue, then I devise the whole of my said leasehold estate to the survivor of them, her heirs, executors, administrators, and assigns, absolutely, for ever: I give unto my said sisters my silver-hafted knives and forks, and my silver table-spoons, equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, estate, and effects of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts and the legacy hereinafter mentioned, and to pay the overplus (if any) to my said sisters Margery Stapylton and Martha Stapylton: I give and bequeath all my ready money, and the money arising by sale of my said premises at Middleham to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters and my brother Ralph Stapylton, of Leyburn aforesaid, Esquire, to be divided equally between them, share and share alike, thereout to pay my funeral expenses."

(*a*) Quære, of the sisters, or of cetteux a que vies?

And, after various specific bequests of furniture and chattels, the said will proceeded as follows:—

"I constitute my worthy and much-esteemed friends, the said John Robson and Jonathan Sleigh, executors in trust of this my last will and testament; and I hereby require of them to pay the sum of 2s. a-piece to every person in Leyburn whom they may deem fit and proper objects of charity,—which money I desire may be paid as soon after my decease as conveniently may be: And I give to them, the said John Robson and Jonathan **[84]** Sleigh, the sum of 10l. 10s. each, of which I beg their acceptance as small acknowledgments for the trouble they may have in the trusts and executorship of this my will: And I declare that they shall not be answerable or accountable the one for the other of them, nor for more money than they shall actually receive, and by no means for involuntary losses; and that they, their respective heirs, executors, administrators, and assigns, shall be allowed all their costs, charges, damages, and expenses to be occasioned by the execution of the trusts hereby in them reposed: And I do revoke all my former wills."

The testator was, at the time of making his aforesaid will, and continued down to and at the time of his death, seised of a moiety of certain freehold messuages, lands, and hereditaments, situate at Leyburn, Bellerby, and Harnby, in the county of York, for an estate for his life, with contingent remainders which failed, with the reversion to himself in fee-simple.

The testator died on the 12th of October, 1808, without having revoked or altered his said will.

The question for the opinion of the court was,—whether, under the above-stated will of Thomas Stapylton, the testator, any, and what, estate or interest in the hereditaments at Leyburn, Bellerby, and Harnby, passed to John Robson and Jonathan Sleigh, the devisees in trust therein named.

Copies of the respective wills of Thomas Stapylton the father, and the said Thomas Stapylton the son, accompanied the case,—to which the court were requested to refer, if they should think proper.

John Hodgson (with whom was S. F. Williams), for the plaintiff. The question in this case is, whether real estate passed by the word "estate" in the following clause of the will of Thomas Stapylton,—"I give unto my said sisters my silver-hafted knives and forks, and **[85]** my silver table-spoons, to be equally divided between them; and I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same may be at the time of my death, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising towards the payment of my debts and the legacy hereinafter mentioned, and to pay the surplus, if any, to my said sisters." This case was sent for the opinion of the court of Exchequer; and that court came to the conclusion that the real estate did not pass (*a*). But there is one very material case, decided in the privy council, to which the attention of that court was not called upon that occasion. The opinion of the court has long been, that the word "estate" primâ facie passes real estate,—with this qualification, that, to justify that construction, it must appear that the other words of the will suffice to convey all the testator's personal estate. The word "estate," it will in such case be assumed, was not put in without purpose. Formerly the rule, noscitur a sociis, prevailed; but a different view was propounded by Lord Hardwicke in *Tilley* v. *Simpson* (2 T. R. 659 (*b*)). There, the testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed all the rest and residue of his money, goods, chattels, and estate whatsoever to his nephew A. B. The question was whether a beneficial interest in a real estate, not before disposed of, would pass to the nephew by this devise. Lord Hardwicke was of opinion that it would. He said—"Where the **[86]** court hath restrained the word *estate* to carry personal estate only, hath been where it hath appeared that it was the intention of the testator it should be so understood: as, where it hath stood coupled with particular descriptions of part of the personal estate, as, a bequest of all my mortgages, household goods and estate, in which the preceding words are not a full description of the personal

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(*a*) See *Sanderson* v. *Dobson*, 1 Exch. 141.

estate: he did not know any of those cases where the preceding words were sufficient to pass the whole personal estate. If the testator had said, 'all the rest and residue of my personal estate and estates (*a*) whatsoever,' a real estate would have passed. This bequest amounts to the same, for, the word *chattels* is as full a description of the personal estate as the word *personal*. Therefore, when he hath used words comprehending all his personal estate, and then makes use of the word *estate*, that word will carry a real estate. The word *whatsoever* is used here; which is the same as if he had said, of whatever kind it be; and, if that had been the case, it would most certainly have carried the real estate. The case of *Tirrell* v. *Page* (1 Ch. Cas. 262) is very material to the present question, and I think cannot be distinguished; there, the gift was of 'all the rest and residue of my money, goods, and chattels, and other estates whatsoever, I give to J. L.' The only difference in the case is, that there is the word *other*, which I do not think can distinguish it. If it had been all the rest and residue of my household goods and mortgages, and all other estate, I do not think that would have carried the real." It is not necessary to shew that the testator had real estate in his contemplation: *Goodright d. The Earl of Buckinghamshire* v. *The Marquess of Down-*[87]*-shire* (2 Bos. & Pull. 600); *Mostyn* v. *Champneys* (1 N. C. 341, 1 Scott, 293). The defendant must satisfy the court that there is something in the will to prove, incontrovertibly, that the testator meant something else; as in *Jesson* v. *Wright* (2 Bligh, 1). In *Hogan* v. *Jackson* (Cowp. 299), S. C. in Dom. Proc. 3 Bro. P. C., 2nd (Toml.) ed. 388), the testator, after commencing his will with the words "as to my worldly substance," devised certain lands to his mother, M., for life; and, after giving certain legacies, to be raised out of those lands, concluded as follows,—"I give and bequeath unto my dearly beloved mother, M., all the remainder and residue of all the effects, both real and personal, which I shall die possessed of." It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects," and "possessed," were applicable rather to personal than real property: but the court held that the clause amounted to a disposition of the whole of the testator's real and personal estate. Lord Mansfield's judgment is a very valuable one, and fully sustains the present argument. That case was followed by *Jongsma* v. *Jongsma* (1 Cox, Ch. Cas. 362), where Sir Lloyd Kenyon decided in conformity with Lord Hardwicke's opinion in *Tilley* v. *Simpson*. [V. Williams, J. The will in *Hogan* v. *Jackson* commenced with the words "as to all my worldly substance."] It did so; and those words, it must be conceded, were very much dwelt upon. But it has since been determined that introductory words are of no importance. In *Doe d. Evans* v. *Evans* (9 Ad. & E. 719, 1 P. & D. 472), a lessee by demise to him and his heirs for lives, devised as follows (after legacies of money and furniture),—"I give, bequeath, and devise to my wife A. all my money, securities for money, goods, [88] chattels, and estate and effects, of what nature or kind soever, and wheresoever the same may be at the time of my death;" and I appoint my said wife executrix. The heir-at-law was not mentioned in any part of the will. It was held, that, by the word "estate," the residue of the term passed to the widow; although it was contended, that, by a covenant in the lease, such a disposal of the term would cause a forfeiture,—on which point the court expressed no opinion. In giving the judgment of the court, Lord Denman said: "We think, adverting to the doctrine of Lord Hardwicke, in *Tilley* v. *Simpson*, that of Lord (then Sir Lloyd) Kenyon in *Jongsma* v. *Jongsma*, and the later cases in which the same principle has been acted upon as in those decisions, that the realty does pass by the word 'estate' in this will; the term used being capable of passing it, and the accompanying words being satisfied by reference to the personal property." The court of Exchequer, in giving the reasons for the conclusion they came to, say: "There is no doubt but that the word 'estate,' when used in a will, is sufficient to pass real as well as personal property. A devise of 'my estate' or 'estates,' or 'all my estate' or 'estates,' primâ facie carries all the devisor's property, real as well as personal: but this primâ facie meaning may be cut down or explained by the context; and one ground which was relied upon for contending that the word is not meant to include real property, was, that it is associated with other words indicating personal property only. This distinction in such cases has been made, that, where the other words are

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(*a*) In apparent intention, no less than in grammatical construction, the adjective "personal" appears to connect itself with both the succeeding substantives, estates as well as estate.

sufficient of themselves to include all the personal estate, then the word 'estate' shall be deemed to refer to real estate, as it would otherwise have no operation. But, if the other words would not include all the personal estate, but only a part of it, then the word 'estate' has been taken to refer to personalty only, and to have **[89]** been used for the purpose of completing the, otherwise imperfect, enumeration of a testator's personal property. This was the principle propounded by Lord Hardwicke, in *Tilley* v. *Simpson.* Whether the doctrine thus laid down, is altogether satisfactory, we need not now determine; for, if in the present case the word 'estate' does extend to real property, and so include the reversion in question, it must be because it is nomen generalissimum, comprehending everything real and personal over which the testator had a disposing power. It is difficult to imagine a case in which the word 'estate,' by reason of its comprehensive character, would pass real property, but would not include all the personalty. Now, it is plain, that, in this case, the testator did not consider that he had used the word 'estate' in any sense which would include all his personalty: for in the clause which follows next after the one in question, he disposes of an important part of his personal property, namely, his ready money, the money coming to him from the sale of the Middleham estate, and all moneys due to him at his death; treating all these as something which he had not given by the previous clause. If, therefore, the word 'estate,' as here used, does not include all the personal estate, it is necessary to give it some more limited sense than that which would be its ordinary import; and this can only be done by applying the doctrine of noscitur à sociis, and holding that the word has reference exclusively to matters of the same nature as those with which it is associated, and so is merely in the nature of a tautologous repetition of the words 'chattels' and 'effects.' On this ground, we shall certify to the Master of the Rolls, that the trustees took no interest in the reversion in question." The Master of the Rolls has sent this case here, in consequence of this mistake into which the court of Exchequer had fallen as to the **[90]** effect of Lord Hardwicke's doctrine. The court of Exchequer further say: "It may be right to add, that there are two clauses in the will which appear to us strongly to confirm our view of the case. In the first place, the gift is to Robson and Sleigh, their executors and administrators, and not to their heirs; and, though, no doubt, a gift of real estate to trustees and their executors, would be sufficient to carry the fee, yet the omission of the word 'heirs' is certainly indicative of an intention to confine the operation of the clause to personal property: more especially as, in the prior parts of the will, where he is devising his real estate at Middleham, the testator uses the appropriate language, and devises to the same trustees, 'their heirs and assigns.' The other observation which occurs to us,—as shewing that the real estate was not contemplated,—is, the expression 'wheresoever the same shall be at the time of my death.' It is difficult to affix any rational meaning to these words, except on the assumption that the subject-matter of the gift was something the locality of which was or might be variable; and this can only be done by holding that the gift was confined to personal chattels, properly so called." The circumstance of the testator having used the words "executors and administrators," instead of "heirs," is hardly of sufficient gravity to need an argument; it clearly shews no intention to exclude the realty. And the other words relied on by the court of Exchequer, would be applicable, if the expression used were, "real estates."

This very point was decided,—as was before observed,—in the case of *The Mayor, &c., of Hamilton* v. *Hodsdon* (11 Jurist, 193), in the privy council. There, the testator, by his will, gave to J., his heir-at-law, an estate for life in one part of estate P., an estate during viduity **[91]** to his wife F. A., in the other part of estate P., remainder to N. in tail, remainder to the testator's daughters, for life; and, after giving certain specific chattels to his wife, F. A., he proceeded as follows:—"I give all the remainder of my estate, that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F. A.: and it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together," &c. N. died without issue. The heir-at-law of J. sold estate P. to the appellants, subject, as to part, to the daughters' estate for life. In a suit between the appellants and F. A.'s co-heiresses, it was held that the remainder in fee in estate P. passed to her under the residuary clause,—there being nothing in the context of the will to confine the natural and legal meaning of the word "estate" to personalty merely. Lord Brougham, in giving the judgment, there says: The real meaning of the word "estate" is not "real estate," but "real" plus "personal," and so, reddendo singula singulis, these words, which are to be restricted words, because they only apply to personal estate as they include future acquisitions, which would not, in the case of lands, pass under such a gift (*a*). As the words are not intended to be used as excluding personalty, those words which are added here will apply to the personal part of the estate; and it does not follow on that account, that, because there is personalty whereon they can operate, therefore the realty is to be excluded. Now, I might shew by several cases which have been mentioned at the bar, that that is the law upon the subject. Perhaps the one which shews it most clearly is *Barnes* v. *Patch* (8 Ves. 604), because there the Master of the Rolls, commenting on what is laid down in an early case **[92]** by Lord Holt (*Lady Bridgewater* v. *The Duke of Bolton* (1 Salk. 236)) says: "The word 'estate' is genus generalissimum, and includes all things real and personal. I admit that it has been so qualified by the context as to bear a narrower signification; as in *Doe d. Spearing* v. *Buckner* (6 T. R. 610), where the words were held insufficient to carry real estate, not as being of themselves insufficient to pass land, but, upon the context of the will, personal estate only being in contemplation of the testator. In *Shaw* v. *Bull* (12 Mod. 592), Lord Chief Justice Trevor, says: 'generally, the words *my estate*, *the residue of my estate*, or *the overplus of my estate*, may pass an inheritance, where the intent is apparent to pass it.' But that is no longer law. The law is not now, that the word 'estate' will not pass the realty, or realty together with personalty, unless there is an intent so to do: it is just the other way; it is, that it will pass the realty as well as the personalty, unless there be matter apparent to shew that the intent is that it shall not pass the realty. The report is here very inconveniently loose; for, it goes on, as if the Master of the Rolls was arguing, as follows:—'But such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will and circumstances of the case; for, if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir-at-law is not to be disinherited by the implication of such words, or any implication at all, but what is a necessary one' (vide 4 M. & R. 71 (*d*)). When I read this first, seeing that it was not in inverted commas, I was astonished: for, really, considering this was in 1808, it looked much more as if it was in the time of the early cases, when the law was not so settled as it is now. I will not say very different, but, at all events, not so **[93]** settled; but, when I came to the next sentence, I saw it was a mistake of Mr. Vesey's, in not putting inverted commas; for, there should be inverted commas, just as there is in the former part of it. This is Chief Justice Trevor's argument, not Sir W. Grant's. Sir W. Grant goes on as follows: 'But the doctrine of modern cases is, that, where there is nothing to qualify the word "*estate*," it will carry real as well as personal estate; and the contrary intention ought to appear, to induce the court to put upon that word a less extensive signification than it naturally bears.' So that he says you must prove the negative in such a case, not regarding, of course, anything dehors; but, the words themselves proving the intent, the proof must be thrown on the other side, and the intent to restrain must be established by the context—the rest of the instrument; otherwise, in a will, it would pass the realty." *Saumarez* v. *Saumarez* (4 Mylne & Cr. 331) shews that the natural effect must be given to general words, unless there be a clear and manifest intent to the contrary on the face of the will.

From the time of Lord Hardwicke, therefore, to the present time, we have a uniform series of decisions, that "estate" will, of itself, suffice to carry realty, unless there be, upon the face of the will, a clear indication of intention to the contrary. Here, it is true, the word "estate" is accompanied by words of personalty. These, however, are of themselves sufficiently satisfied by applying them to the rest of the testator's property.

Malins (with whom was Fleming), contrà. The decision of the court of Exchequer (1 Exch. 81) is based upon this sound and intelligible principle, that, in ascertaining the intention of the testator in the use of the ambiguous expression "estate," regard must be had to the whole of **[94]** the context. It is material also, with this view, to look at the situation of the testator. He had, at the time of making his will, real estate in possession, which he had contracted to sell; and he had the interest in question, which was a remote reversion in fee. It is imputing to him, therefore, a some-

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(*a*) In a will made before 1838.

what strange intention, to say that he meant, by the words in question, to pass a remote reversion, rather than an estate in possession. It is evident that he knew how to deal with real estate. [V. Williams, J. He gives an estate for life to heirs, executors, &c., and estates per auter vie, without impeachment of waste,—shewing that he had no knowledge of law.] When dealing with realty, he always uses the word "heirs." It is to be presumed, therefore, that, if he had intended to dispose of this property, he would have used appropriate terms.

In all the cases cited on the part of the plaintiff, where the word "estate," though associated with words more appropriately descriptive of personalty, has yet been held to carry the realty, it has occurred in a residuary or a universal devise; where, therefore, it was necessary to give the word the widest construction of which it was susceptible, in order to carry the testator's intention into effect.

The clause now in question begins with forks and spoons: and then it goes on,—"And I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts, and the legacy hereinafter mentioned, and to pay the surplus (if any) to my said [95] sisters Margery Stapylton and Martha Stapylton." The testator is here evidently dealing with his household chattels only, and clearly did not contemplate or intend to deal with anything else. [Maule, J. It is plain that that clause did not, in his apprehension, include his ready money and securities for money, for, these he disposes of by the next clause.] In truth, all the expressions after the words "household furniture, books, linen, and china," are redundant and idle. The use of the words "executors, administrators," &c., are no further important than this,—that, where you find expressions that are primâ facie applicable to personalty only, you require something more to shew that realty was intended to be included. The words "whatsoever and wheresoever" fairly justify the comment made upon them by the court of Exchequer, and also tend strongly to the same conclusion.

Jongsma v. *Jongsma* and *Doe d. Evans* v. *Evans* were both cases of universal devise. In *Woollam* v. *Kenworthy* (9 Ves. 137), the word "estate" in a residuary clause was restricted to personal property, by the controlling effect of the context, although the will contained a specific devise of lands. So, in *Bebb* v. *Penoyre* (11 East, 160), real estate was held not to be included in a devise of the rest and residue, on the ground of the restraining effect of the immediate context, although there was a previous devise of land in the same will. Lord Ellenborough there says: "Upon the meaning of the residuary clause, there can be no doubt. After giving several pecuniary bequests, the words are, 'I order the lease of my house, &c., to be sold, and all the rest and residue to be divided, &c.' Order whom? He must have meant his executors immediately afterwards named, by whom the lease of his house, &c., was to be sold. The words *rest and residue*, therefore, in the place in which they stand in [96] this will, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate." In *Timewell* v. *Perkins* (2 Atk. 102), the testator devised in these words,—"All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, or in any other thing whatsoever or wheresoever, I give unto A. H. and her assigns for ever." In the preamble of the will occurred the clause, "as touching the personal estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land, not described in the will, passed under the residuary clause. Fortescue, J., held that it did not,—relying on the analogy of the case to *Wilkinson* v. *Merryland* (*b*). Mr. Jarman, in his Treatise on Wills (vol. i. p. 662), thus remarks upon that decision: "In the case just stated, there was a preceding specific devise of land; but the intention to confine the word 'estate' to personalty, was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong

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(*b*) Cro. Car. 447, 449; Sir W. Jones, 380. Et vide S. C., per nom. *Wilkinson* v. *Merdam*, 1 Roll. Abr. 415 (translated, 5 Vin. Abr. 73, pl. 11).

than many which have been held sufficient to include real estate. Perhaps the introductory clause, referring to personal estate only, may be considered a circumstance of distinction; but that is rendered almost nugatory by the subsequent specific devise, which carried the dispositions of the will beyond personal estate. The case of *Timewell* v. *Perkins* is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent [97] occasions." *Doe d. Bunny* v. *Rout* (7 Taunt. 79, 2 Marsh. 397) is also a strong authority: the words of the will were,—"I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and, subject thereto, I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing, my property, of what nature or kind soever;" and the testator appointed A. R. executrix. This court held that an intention to pass land could not be clearly collected from these words. So, in *Roe d. Helling* v. *Yeud* (2 N. R. 214), where the testator, after giving certain legacies, and appointing certain persons executors, added, "and to whom I give all the remainder of my property, whatsoever and wheresoever, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts, and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book-debts, and securities in the Witham Drainage, in Lincolnshire, and funded property." The court held that real estate did not pass; considering that the enumeration at the end of the clause was explanatory of the words "remainder of my property." In *Doe d. Hurrell* v. *Hurrell* (5 B. & Ald. 18), a testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust, that they should, out of such residue of the moneys and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession, for the remainder of his term therein, [98] for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: it was held that the testator's real estate did not pass. Abbott, C. J., said: "There can be no doubt that words which, in their technical sense, generally denote personal property, will pass the real estate, if such appears from the whole of the will, taken together, to have been the intention of the testator. It is quite clear that the testator here intended that his personal property only should go to the trustees. The bequest is to them, their executors, administrators, and assigns; the word 'heirs' is not used. That circumstance is not, indeed, very strongly to be relied on; but it is not to be altogether rejected, in construing this will. The nature of the trusts clearly shews that the testator meant to bequeath his personal property only; for, the trustees are directed, out of such residue of the moneys and effects, to manage the farm for the remainder of his term. Now, the real estate was not applicable to such a purpose; for, the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then, the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects, or such effects as shall be upon his said farm. It appears to us, therefore, that, by using the latter word, he himself has furnished a comment upon the words *the residue of his estate and effects;* and that, by those words, he meant only such estate and effects as constituted personal property." And in *Doe d. Spearing* v. *Buckland* (6 T. R. 610), the testator prefaced his will with these [99] words,—"As to my estate and effects, both real and personal, I dispose thereof in manner following;" then, after giving some pecuniary legacies, and an annuity, which he charged on a freehold messuage in W., he concluded as follows: "All the rest, residue, and remainder of my estate and effects of any and what nature or kind soever and wheresoever, I give and bequeath the same unto C. B. and J. R., their executors or administrators, in trust that they shall from time to time add the interest thereof to the principal, so as to accumulate the same, as it is my will that the said residue shall not be paid or payable, but at the time, and in the manner, and to the several persons, as the said principal sum of 4000l. (which was a legacy before given) is before directed to be paid:" it was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause.

And Lord Kenyon observed that the limitation to executors and administrators, and particularly the direction to add the interest thereof to the principal, were wholly inapplicable to a real estate. In *Doe d. Haw* v. *Earles* (15 M. & W. 450), the testator devised as follows: "I dispose of all my effects as follows,—All my household goods, live stock, furniture, plate, wearing apparel, and other effects at this time in my possession, or that may hereafter become my property, unto my wife J. H. I bequeath to J. P. 200l., to be paid to her at the death of my wife. But, if my wife, after my decease, see fit to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or hereafter may be in my possession; but the above sum of 200l. shall be paid to J. P. at the time of my wife's marriage:" It was held,—by Pollock, C. B., and Parke, B. (Platt, B., dissentiente), that a remainder in fee in real estate, did not pass by this **[100]** devise. The case of *Saumarez* v. *Saumarez* is in perfect conformity with this rule.

With respect to the case cited from the Jurist, of *The Mayor of Hamilton* v. *Hodsdon*, there is clearly nothing in it that would or ought to have induced the court of Exchequer to come to any other conclusion than that which they did come to. The words of the residuary clause in that will were large enough to comprehend property of every description.

Hodgson was heard in reply.

The following certificate was afterwards sent to the Master of the Rolls (*a*):—

"This case has been argued before us by counsel. We have considered it, and are of opinion, that, under the above-stated will of Thomas Stapylton, the reversion in fee-simple in the hereditaments at Leyburn, Bellerby, and Harnby, passed to John Robson and Jonathan Sleigh, the devisees in trust therein named (*b*).

"THO. WILDE. C. CRESSWELL.
"W. H. MAULE. E. V. WILLIAMS."

[101] GRIFFIN *v.* GILBERT. Jan. 20, 1849.

Service of a rule to compute, by delivering it to "the landlord at the residence of the defendant," is not sufficient.

Rew moved to make absolute a rule to compute, upon an affidavit which stated, that, since the defendant had been served with the writ and notice of declaration, he had removed from his former residence at, &c., to the railway-station at Kingston, where he had taken lodgings in the house of one Holditch; that the deponent, on, &c., served the defendant with a true copy of the rule, by leaving the same with the said Holditch, at the residence of the said defendant at the railway-station at Kingston aforesaid, and at the same time produced and shewed to Holditch the original rule; and that Holditch stated that the defendant would return home on the following day, when he would deliver the said rule to him. He referred to *Taylor* v. *Whitworth* (9 M. & W. 478, 1 Dowl. N. S. 600), where an affidavit of service of a rule to compute, stating that the deponent served "the above-named defendant with a true copy of the rule, by delivering and leaving with one Hitchcock, at the defendant's residence, situate, &c., a true copy of the said rule, and at the same time shewing the original thereof, and that Hitchcock promised to deliver the said copy to the defendant,"—was held to be insufficient, as it did not shew a service on any person connected with the defendant's residence; and to *Lawes* v. *Seales* (2 Dowl. N. S. 342), where service of a rule to compute, on the daughter of the defendant's landlady, at the house, in which the defendant was personally served with notice of declaration, was held to be sufficient.

[102] WILDE, C. J. In *Gardner* v. *Green* (3 Dowl. P. C. 343) and *Salisbury* v. *Sweetheart* (5 Dowl. P. C. 243), service of a rule to compute, "on the landlady of the

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(*a*) For American cases, see *Jackson ex dem. Dicker* v. *Merrill*, 6 Johnson's Reports, 185, and cases cited (3rd edit.) in the reporter's note; *Jackson ex dem. Pearson* v. *Housel*, 17 Johnson, 181; *Morrison* v. *Semple*, 6 Binney, 94.

(*b*) Lord Langdale, M. R., not being satisfied with this certificate,—the grounds upon which the conclusion had been come to by this court, not appearing,—directed a third case to be sent for the opinion of the court of Queen's Bench.

house at which the defendant lodges," was held to be insufficient. Littledale, J., in the last-mentioned case, says—"Although she is the landlady of the house, it by no means follows that she is an agent for the purpose of receiving papers for her lodgers." I think service on the landlord, without more, will not do.

The rest of the court concurring,

Rule refused.

LEWIS *v.* BLURTON. Jan. 31, 1849.

Service of a rule to compute by delivering it to "the housekeeper at the residence of the defendant," situate, &c., is not sufficient.

Channell, Serjt., moved to make absolute a rule to compute, upon an affidavit of service of the rule nisi "by delivering to and leaving the same with the housekeeper at the residence of the defendant, situate No. 54 St. James's Street," and at the same time shewing her the original. He submitted, that, although service upon a mere laundress at a place where the defendant occupies chambers will not be good service (*a*), yet that it was different where the place of service was the defendant's residence.

MAULE, J. Service on a "housekeeper" at a place where several persons are residing, clearly will not do, without shewing that she had authority to receive papers for the defendant.

Rule refused.

[103] WOOLF *v.* THE CITY STEAM-BOAT COMPANY. Jan. 29, 1849.

[S. C. 18 L. J. C. P. 125; 13 Jur. 456.]

A company may be declared against by the name by which it is known, without alleging it to be chartered or incorporated or registered.

Assumpsit. The declaration commenced thus:—"The plaintiff complains of the City Steam-Boat Company, who have been summoned to answer the plaintiff," &c.

Special demurrer,—assigning for causes, that the names of the defendants were not stated, that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of parliament they were entitled to be sued by the name of a company.

Hugh Hill, in support of the demurrer. The question in this case is, whether the plaintiff may, in his declaration, describe the defendants as a company, without shewing whether or not they are a corporation, or a registered company. In the doubtful state of the allegation, the defendants could not safely plead nul tiel corporation. [Cresswell, J. Is not this the usual form of declaring against a corporation? It may be that the defendants are a chartered company: how does it appear that they are not?] In *Thompson* v. *The Universal Salvage Company* (1 Exch. 694),—which was an action against a registered company, upon a promissory note,—the declaration stated that the company had been duly registered under the statute 7 & 8 Vict. c. 110. [Maule, J. If the defendants in fact are a corporation, the declaration is correct: if they are not, they may traverse it.] In *The Queen* v. *West* (1 Q. B. 826), a coroner's **[104]** inquisition stating that certain goods and chattels were the goods and chattels of the proprietors of the Hull and Selby Railway, was held bad, because it did not shew that there was any corporation so intituled. [Cresswell, J. That case would have been more to the purpose, if the defendants here had been described as "the proprietors of the City Steam-Boats."] Since the statutes creating these registered corporations, it is essential that they should in all proceedings be described according to the truth. [Cresswell, J. How can the mode of describing them in pleading, be affected by the statutes?] It is important that the true character in which a party sues or is sued should appear upon the record.

Hawkins, contrà, was not called upon.

MAULE, J. The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of, which

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(*a*) See *Dodd* v. *Drummond*, 1 Dowl. P. C. 381.

requires such a mode of description as the defendants' counsel insists upon in this case: nor is the description which is given at all out of the usual form: it impliedly amounts to an allegation that the defendants are a corporate body. I think the plaintiff is entitled to judgment.

The rest of the court concurring,

Judgment for the plaintiff.

[105] MILLER AND ANOTHER v. SHUTTLEWORTH. Jan. 31, 1849.

Where a cause is referred, the arbitrator to be at liberty to state any point of law for the opinion of the court, and he declines to do so, the court will not interfere with his discretion.

This was an action brought by the plaintiffs, who were attorneys, to recover against the defendant, a member of the committee of management of a railway company, the amount of a bill of costs for business done for the company. The cause came on for trial at the last assizes at Guildford, when a verdict was found for the plaintiffs, by consent, for 2000l., subject to a reference to a barrister, who was to be at liberty to raise any question of law for the opinion of the court. The only evidence of retainer before the arbitrator, was, a resolution of the managing committee to which the defendant was not a party: and it was thereupon objected that the defendant was not liable, and the arbitrator was requested to raise the point upon his award; which he omitted to do, and made an award in the plaintiffs' favour for a considerable sum.

Pearson now moved to set aside the award, or to refer it back to the arbitrator to state the point. [Maule, J. Was the arbitrator bound to raise the question?] There are many things which a party is bound to do, though the language of the instrument is permissive only: for instance, in acts of parliament, and in marriage settlements, "may" is often construed to mean "shall." So, the court will control the discretion of an arbitrator where the point sought to be raised, and which he had power to raise, was a grave point of law.

WILDE, C. J. These orders are well understood. There is a material difference between a reservation of **[106]** power to the arbitrator to state points of law for the opinion of the court, and a direction that he shall do so. The parties are clearly bound by the decision of the arbitrator: and we have no power to interfere.

MAULE, J. It was in the discretion of the arbitrator to raise the point or not, as he might see fit.

The rest of the court concurring,

Rule refused.

DODD v. WIGLEY. Jan. 29, 1849.

To entitle a defendant to enter a suggestion to deprive the plaintiff of costs, under the county-courts act, 9 & 10 Vict. c. 95, the affidavit must in positive terms state that the defendant was resident within the local jurisdiction, and must negative the parties' respectively being officers of the county-court, at the time of the commencement of the action.—Quære, whether a case is brought within the second exception of the 128th section, where part of the cause of action arose (i.e. where some of the goods were delivered, or a portion of the work done,) within the jurisdiction of the court "within which the defendant dwells or carries on his business at the time of the action brought?" *

Joyce, on the fourth day of this term, obtained a rule nisi to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, upon an affidavit (*a*) which stated,—that this was a personal action for the recovery of a debt not exceeding 20l., that is to say the sum of 3l. 4s. 3d., in which no title to any corporeal or incorporeal hereditament, or toll, [107] fair, market, or franchise ever was or is in question, or the validity of any devise, bequest, or limitation under any will or settlement disputed, but that the action was an action of debt for medical attendance, and for medicine and goods sold and delivered; that the cause was tried, on the 1st of December last, at the Secondaries' Office, in Basinghall Street, in the city of London, when the plaintiff only gave evidence of medicines delivered to the defendant, and a verdict was found for the plaintiff for the sum of 2l. 10s., and no more, being the amount of medicines proved to have been delivered to the defendant; that the cause of action herein did arise, in some material point, within the jurisdiction of the Westminster county-court of Middlesex, in which (?) the defendant dwells and carries on his business, for, the deponent said that all the medicines, with the exception of about three small items, not exceeding 10s., were delivered to the defendant at the Union Club House, which is within the jurisdiction of the said Westminster county-court of Middlesex, and is the place where, before and at the time of the commencement of this suit, the defendant was and is employed, dwells, and carries on his business; that the plaintiff does not, nor did he at the time of the commencement of this suit, dwell more than twenty miles from the defendant, for, the deponent said that the plaintiff is, and then was, a surgeon, dwelling at, and carrying on his business at, the Westminster Road, Lambeth, in the county of Surrey, and the defendant is a clerk to the Union Club, and resides and dwells at the Union Club aforesaid, which is within the jurisdiction of the said Westminster county-court of Middlesex, and the places of residence last aforesaid are less than two miles from each other; that the plaintiff had, at the time the debt for which this action is brought was contracted, a residence or place of business within the jurisdiction of the said Westminster [108] county-court of Middlesex, that is to say, in Clifford Street, Bond Street, in the county of Middlesex; that some of the goods were proved to have been sent from Clifford Street; that neither the plaintiff nor the defendant is an officer of the said Westminster county-court of Middlesex, nor was any officer of the said county-court a party directly or indirectly concerned in the matters in question in this cause; that neither the plaintiff nor the defendant, as the deponent believed, is exempt from or out of the jurisdiction of the said Westminster county-court of Middlesex, but the defendant ought to have been summoned in the said cause by the plaintiff in the said Westminster county-court of Middlesex, the cause being a cause for which a plaint ought to have been entered in the said county-court; that judgment was signed herein on the 9th of January instant, but the plaintiff had not yet taxed his costs; and that the said Westminster county-court of Middlesex was, at the time of the commencement of this suit, and now is, a county-court for the recovery of debts and demands under and according to the provisions of an act made and passed, &c., intituled, &c., and had been before, and was at the time of, the commencement of this action, and now is, established, constituted, and holden in and for the district of Westminster, in the county of Middlesex.

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* But see *Wood* v. *Perry*, post, p. 114, n. (*a*).

(*a*) See *Walker* v. *Furnell*, 14 Jurist, 45, where it was held, by the court of Exchequer, that an affidavit for a rule to deprive a plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, may be made by a stranger, who is not shewn to be connected with, or have any peculiar means of knowledge of, either the facts of the suit, or of the parties to it.

G. T. White now shewed cause, upon an affidavit of the plaintiff, stating that his demand for which the verdict passed, commenced against the defendant in November, 1846, at which time, and from thence hitherto, the deponent resided and carried on his said profession and business of a surgeon and apothecary, &c., and still did so, at No. 91 Westminster Bridge Road, in the county of Surrey, which is a place not within the district or jurisdiction of the Westminster [109] county-court of Middlesex; and that certain specified items of the plaintiff's demand, together amounting to 12s. 6d., and which were included in the sum for which the verdict was given, were for medicines delivered to the defendant at No. 91 Westminster Bridge Road.

The general jurisdiction given to the county-court by the 58th section of the 9 & 10 Vict. c. 95, is limited and controlled by the exceptions contained in s. 128, which enacts that "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record,—where the plaintiff dwells more than twenty miles from the defendant,—or, where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought,—or where any officer of the county-court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed." The affidavit upon which this motion is founded, does not properly negative either the second or the third exception in that section, and therefore the defendant has failed to shew affirmatively, as he was bound to do, that the plaintiff's right to sue in the superior court is taken away: *Mathew* v. *Broughall* (ante, vol. v. p. 937): *Meeten* v. *Nicholls* (ante, vol. v. p. 848). As to the second exception, the affidavit states, that the cause of action arose, in some material point, within the jurisdiction of the Westminster court, in which the defendant dwells and carries on his business, for, that the goods (with a small exception) **[110]** were delivered to the defendant at the Union Club House, which is within the jurisdiction, and is the place where, before and at the time of the commencement of this suit, the defendant was and is employed, dwells and carries on his business. In no part of the affidavit is there any statement as to where the defendant dwelt at the time the action was brought. [Maule, J. Might not perjury be assigned upon this affidavit, if it were untrue that the deponent was employed at the Union Club House at the time of the contract, and dwelt there at the time of the commencement of the action?] It is submitted that it could not.

The third exception in the 128th section is—"where any officer of the county-court shall be a party." As to this, all that the affidavit states is, that "neither the plaintiff nor the defendant is an officer of the said Westminster county-court of Middlesex, nor was any officer of the said county-court a party directly or indirectly concerned in the matters in question in this cause." That refers to the time of swearing the affidavit whereas, the statute speaks as of the time of action brought. Besides, the exception applies to officers of any county-court; for, by the interpretation clause, s. 142, "county-court" is to be understood to mean "any court holden under this act." Wilde, C. J. I do not think you will make much of that point.

The true interpretation of the second exception in the 128th section is, that the jurisdiction of the superior courts is not taken away, unless the cause of action arises wholly, or in some material point,—that is, some material point which pervades the whole cause of action,—within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought. And this the affidavit does not shew. Alderson, B., suggested the point in *Butler* v. **[111]** *Corney* (2 Exch. 474, 17 Law Journ. N. S., Exch. 265), but it was not decided. In the course of the argument, the learned baron asked—"Is not the meaning of the 128th section, that the superior court shall not have jurisdiction, where any material part of the cause of action arises within the jurisdiction of the county-court?" And, subsequently, he adds—"The section is awkwardly worded: I am not certain that it does not mean, 'if no material part of the cause of action arises out of the jurisdiction,' instead of meaning as I at first thought, 'if any material part arises within it.'" [V. Williams, J. The expression in the statute is, "material point."] The plaintiff's affidavit shews that a material part of the cause of action arose in Surrey. [Maule, J. Suppose the plaintiff had sued in the superior court for the goods delivered in Surrey only?] In that case, the objection could not have arisen. [Maule, J. Then, is he to forfeit his right to sue in the superior court, because he has added a cause of action arising in Middlesex?] It is submitted he does not. [V. Williams, J. The plaintiff has his option, unless the whole demand arises within the county in which the defendant dwells. There is here no material point pervading the whole cause of action, that arose within the jurisdiction of the Westminster county-court.]

Joyce, in support of his rule. *Butler* v. *Corney* and *Hayter* v. *Fish* (ante, vol. vi. p. 568) are authorities to shew that the courts will not examine the affidavits in these cases with the same astuteness they would apply to pleadings on special demurrer. The affidavit here, it is submitted, is reasonably sufficient to satisfy all the requisitions of the statute. In *Hayter* v. *Fish*, the affidavit was held to be sufficient, although it did not shew within which of the eleven districts, into which the county of Middlesex is divided, the defendant dwelt. There is un-**[112]**-doubtedly a little grammatical inaccuracy in the frame of this affidavit: but it distinctly enough appears that the defendant's dwelling-place, as well at the time the goods, &c. were supplied, as at the time of action brought, was, the Union Club House. The negation of the parties' respectively being officers of the court, also, is sufficiently pointed and precise.

The words "cause of action" have already received a judicial interpretation in the case of *Grimbly* v. *Aykroyd* (1 Exch. 479, 17 Law Journ., N. S., Exch. 157), where they were held to mean "cause of one action." So, here, the cause of action is, the plaintiff's whole demand. The question is whether the cause of action, in some material point, arose out of the local jurisdiction. The words "material point" are evidently used by the legislature in the same sense as the courts use "material evidence" in the case of rules to restore the venue. "Some material point" means "some material portion" of the plaintiff's whole claim. This is the only sensible construction that can be put upon the words of the 128th section. [V. Williams, J. If your argument be correct, it would have been easier for the legislature to have said, "where the cause of action shall not have arisen wholly or partially within the jurisdiction of the county-court," &c.] Experience will hardly justify the court in assuming that the legislature is accustomed to adopt the readiest mode of expressing its meaning The construction contended for on the other side will tend very materially to impair the usefulness of this act of parliament. The precise point is now sub judice in the court of Exchequer (*b*).

Wilde, C. J. I think the affidavit upon which this rule was obtained is not sufficiently precise. We are **[113]** bound to see that the party distinctly pledges himself to the truth of the facts which he states. The affidavit in this case fails in the two particulars that have been pointed out. In the first place, it does not shew that the defendant was resident within the jurisdiction of the Westminster county-court of Middlesex at the time of the commencement of the action. In the next place, it merely negatives the parties being officers of the county-court at the time of making the affidavit. The material time, in respect of both, is the time of the commencement of the action. It becomes, therefore, unnecessary to determine the other point, which is one that might have required further consideration. The rule must be discharged.

Cresswell, J.(*a*)[1]. The question upon the merits is certainly one of difficulty. But I agree with the lord chief justice in thinking that the affidavit is insufficient. It is said that the meaning of the affidavit is obvious, though grammatically incorrect. If it be grammatically incorrect, and insensible unless construed in the way contended for on the part of the plaintiff, it must receive that construction. But I do not see why we should impute bad grammar to the defendant. If the defendant meant to say, that, at the time of the commencement of the suit, he was employed at the Union Club House, and that he is still employed there, and dwells and carries on his business there, he has used language apt enough to convey his meaning. In the case cited, of *Hayter* v. *Fish*, the affidavit did state the place of residence of the parties at the time of the commencement of the action: the defect that was principally relied on was, that it did not state within the jurisdiction of which of the eleven districts into which the county of Middlesex is divided, the cause of action arose, or the parties respectively carried on business.

[114] V. Williams, J. If any affidavit at all is required in these cases, the ordinary rules that are applicable to the construction of affidavits must be applied to them. It is to be regretted that the principal point should be left undecided (*a*)[2].

Rule discharged, with costs.

(*b*) In *Wood* v. *Perry*, vide post, p. 114, n. (*a*).

(*a*)[1] Maule, J., had gone to chambers.

(*a*)[2] The court of Exchequer has since decided, in a manner which is not in accordance with the evident impression of the majority of the court in the principal case: *Wood* v. *Perry*, 6 D. & L. 194. Alderson, B., delivering the judgment of the court there, says:—

"The plaintiff dwells within twenty miles of the defendant; and the question is, whether the cause of action arose 'wholly or in some material point' within the jurisdiction of the county-court of Brompton, where the defendant resided, or of Westminster, where he carried on his business when this action was brought. It seems clear, that, if each of the items is to be treated as constituting a separate cause of action, one whole cause of action arose out of either jurisdiction, and then it would seem to follow that the superior court was the only court in which the whole demand could be recovered in one action. But we think this must be determined in conformity with the rule laid down by this court in *Ackroyd, In re*, 1 Exch. 479. We there laid it down, that, where a tradesman has a bill against a party for any amount, in which

[116] SHEILS *v.* RAIT. Jan. 30, 1849.

One who resides in Scotland, and carries on business in London by means of an agent, is not bound to sue in the city small debts court established under the 10 & 11 Vict. c. lxxi., for a debt not exceeding 20l.

Simon, on a former day, obtained a rule nisi to enter a suggestion, under the 10 &

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the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continued, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be divided. In other words, we held that the words 'cause of action,' in this act of parliament meant 'cause of one action,' and were not to be limited to an action upon one separate contract. Now, here, the items in this bill are thus connected together, and the whole bill forms one cause of action. Then, if so, it follows that it is a cause of action not 'wholly' occurring within the jurisdiction of the county-court either of Brompton or of Westminster; for, a part of it occurs within the jurisdiction of Clerkenwell, where the defendant neither resides nor carries on his business. But, does it arise in some 'material point' within the first two jurisdictions, or either of them? We think it does; and we are disposed to determine the question by laying down some definite rule which may be easily acted upon; and to hold, that, if any one item arises within the jurisdiction of a county-court, in such a bill as this, the cause of action in some material point arises within that jurisdiction."

Where goods are ordered of a tradesman on the 1st of January, and distinct orders for other goods are given on the 2nd, 3rd, 4th, 5th, &c., **[115]** if, from the previous dealings between the parties, or from general usage, or otherwise, it is to be inferred that it was contemplated by the parties, that, in the event of the dealing continuing, the several items should be included in weekly, monthly, quarterly, or yearly bills, the result of such an arrangement, and the legal position of the parties, seems to be this,—upon the delivery and acceptance of the first parcel of goods, delivered on the 1st of January, an entire contract is created, and a complete cause of action accrues, the tradesman being under no engagement to sell other goods, or to give credit beyond the price of the articles then delivered: when, on a subsequent day, other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment for the goods delivered on the 1st of January, and the purchaser agrees to pay for both parcels as upon one entire sale, et sic toties quoties. After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action ex contractu will be the last. The distinction between a cause of action upon one entire contract, and one cause of action of contract, appears to be too refined to be readily appreciable. In *Ackroyd, In re*, there appeared to be one entire prevenient governing contract, of which the respective deliveries were merely the execution—the overt acts.

After the rule had been so frequently laid down in text-books and acts of parliament, that entire causes of action should not be split, for the purpose of bringing them within the competency of courts of limited jurisdiction, it may have been unnecessary to repeat the prohibition in the small debts act. The old rule was evidently directed against the splitting of one entire contract; as appears from the particular cases of abuse which are put: and there is nothing to shew that the legislature was not, on the present occasion, proceeding, however unnecessarily, in the same track. It has lately, indeed, been decided (*Vines* v. *Arnold*, post, M. T. 1849) that a plaintiff, having recovered in the county-court for part of one entire demand, is not precluded from afterwards suing in the superior court for the residue of that demand, where he has not signified his election to forego the residue of his demand, under s. 63.

In indebitatus assumpsit, the action is not founded directly upon the several debts included in, or rather covered by, the count, but upon the one entire contract founded on the promise, of which the several contracts form the consideration. The modern indebitatus count in debt is an inartificial perversion of the indebitatus count, in assumpsit.

And see F. N. B. 46; *Sinclair* v. *Bowles*, 9 B. & C. 92, 4 M. & R. 1; *The King* v. *The Sheriff of Herefordshire*, 1 B. & Ad. 672; *Roberts* v. *Havelock*, 3 B. & Ad. 404; *Neale* v *Ellis*, 1 D. & L. 163; *Wickham* v. *Lee*, 12 Jurist, 628.

11 Vict. c. lxxi., to deprive the plaintiff of costs, the sum recovered being under 20l., and the subject-matter being within the jurisdiction of the city of London small debts court. The affidavit upon which the motion was founded, stated, that the action was brought to recover 4l. for goods sold and delivered; that, at the trial before the sheriffs of London the plaintiff recovered a verdict for 3l. 16s. and no more; that, before and at the time of the commencement of the action, the defendant carried on his business, and still resides and carries on his business, at No. 25 Moorgate Street, in the city of London, within the jurisdiction of the court for the recovery of small debts, established in and for the city of London, under the 10 & 11 Vict. c. lxxi., and that a plaint might have been entered in the said court for the recovery of the sum so claimed by the plaintiff; that the plaintiff carries on his business as a spirit merchant at the Three Cranes Wharf, Upper Thames Street, in the said city of London, within the jurisdiction of the said court, and within twenty miles of the defendant's said residence and place of business; and that the goods were delivered at the residence and place of business of the defendant, from the said wharf. The affidavit then proceeded to negative the judge having certified under the 113th section (*a*)[1], and **[117]** also to negative the second exception in the 112th section (*a*)[2].

Phinn now shewed cause, upon an affidavit which stated "that the plaintiff does not now, and did not at the time of the commencement of this action, or at the time when the cause of action arose, or at any time since such cause of action arose, dwell or reside, or personally carry on his business at Three Cranes Wharf, or at any other place in the city of London, or at any place not more than twenty miles distant from the said city, but that the plaintiff, before and at the time when the said cause of action arose, dwelt or resided and carried on his business, and from thence hitherto continually hath dwelt or resided and carried on his business, in the borough of Leith, in Scotland, which said borough is much more than twenty miles distant from the city of London; that, since the year 1845, the plaintiff employed the deponent as his agent for the sale of goods, and for that purpose had a vault or store-cellar at Three Cranes Wharf, but that he never slept or resided at the said vault or store-cellar, and that he had not, at the time of the order for, and the sale and delivery to the defendant of, the goods in respect of which this action was brought, or at any time since, any residence or dwelling in the city of London, or within twenty miles thereof; that, to the best of the deponent's belief and knowledge, the plaintiff had not been in London, or within twenty miles thereof, for the last three years; and that the goods were ordered by and delivered to the defendant in the year 1847."

The affidavit upon which the rule was obtained does not negative the plaintiff's right to sue in the superior **[118]** court: it does not shew that the plaintiff, at the time of the commencement of the action, dwelt within twenty miles of the defendant's place of abode: *Peterson* v. *Davis* (ante, vol. vi. p. 235). To hold that a plaintiff who resides in Scotland, and transacts business in London by an agent, is bound to have recourse to the local courts to enforce debts contracted within the jurisdiction, would, in truth, amount to a confiscation, seeing that the judge of the local court usually requires the party himself to appear and give evidence in support of his claim.

Simon, in support of his rule. To hold a person carrying on business as this plaintiff does, not to be compelled to sue in the inferior court, will, in effect, be abrogating the statute, so far as regards all persons who are represented by agents here. It is submitted that the plaintiff substantially resides in London. [Wilde, C. J. Substantially, I should say, he dwells in Scotland. Cresswell, J. How can a man be said to "dwell" in London by an agent?] It is submitted that he may, within the meaning of this act. [Cresswell, J. How would you construe the word "dwells" in the 40th section? (*b*) Very much in the same way as in the 112th (*c*). [Cresswell, J.

(*a*)[1] Which corresponds with the 129th section of the 9 & 10 Vict. c. 95.

(*a*)[2] This section corresponds with s. 128 of the 9 & 10 Vict. c. 95, ante, p. 109, save in the particular pointed out, ante, vol. vi. p. 214 (*a*). See the section, post, p. 118 (*c*).

(*b*) Which enacts, "that such summons may issue, provided the defendant, or one of the defendants, shall dwell or carry on his business within the city of London, or the liberties thereof, at the time of the action brought: or provided the defendant, or one of the defendants, shall have dwelt or carried on his business therein at some time within six calendar months next before the time of the action brought; or if the cause of action arose therein."

(*c*) Which enacts, "that all actions and proceedings which before the passing of

That would be **[119]** giving to the city court a much larger jurisdiction than the county-court possesses. It would enable a man residing at St. Petersburgh to sue and be sued in the city of London for demands under 20l.]

Per curiam. Rule discharged (*a*)[1].

In re Baroness Dunsany. Jan. 31, 1849.

The court refused to direct the proper officer under the 3 & 4 W. 4, c. 74, to receive and file an acknowledgment, where the affidavit of verification was sworn before the British minister at Florence,—it not appearing that there was any difficulty in getting it sworn before some properly constituted authority at that place.

Talfourd, Serjt., moved that the proper officer might be directed to receive and file a certificate of acknowledgment of the execution of a deed under the 3 & 4 W. 4, c. 74, s. 79, by the Baroness Dunsany. The deed was executed under the direction of the court of Chancery, and the acknowledgment taken before commissioners at Florence. The affidavit was sworn before the British minister at that place, and there was no notarial certificate. He referred to *Pickersgill, In re* (6 M. & G. 250, 6 Scott, N. R. 831), where the court allowed an acknowledgment to be received, where the affidavit verifying the certificate was sworn before the minister of the British chapel at Moscow. [Wilde, C. J. There was an affidavit there, that there was no proper person at Moscow before whom **[120]** the affidavit could be sworn, there being no English notary or British consul within several hundred miles; and it appeared that no magistrate in Russia has power to administer an oath. Cresswell, J. Is there no ordinary authority at Florence to take affidavits? Has the British minister any such authority?] There is no affidavit that he has; but it undoubtedly is customary for him to administer oaths; and the court will probably take judicial notice that he has such authority.

Wilde, C. J. I know of no such authority. Nor do I think we can dispense with the ordinary rule, without some affidavit shewing that it cannot be complied with.

The rest of the court concurring,

Rule refused (*a*)[2].

In re Elizabeth Ellen Foster. Jan. 25, 1849.

Where property is sold under the compulsory provisions of an act of parliament, that part of the rule of Hilary term, 4 W. 4, which directs inquiry to be made of a married woman at the time of acknowledging a deed to convey her interest under the 3 & 4 W. 4, c. 74, whether any provision is made for her in consideration of her so giving up her interest is inapplicable.

Hall moved that the proper officer might be directed to receive and file a certificate of acknowledgment of the execution of a deed, under the 3 & 4 W. 4, c. 74, s. 79, by Sarah, the wife of Joseph Frith, Ann, the wife of Benjamin Rowley, Hannah, the wife of James Frith, and Elizabeth Ellen, the wife of Richard Thompson Foster.

[121] The affidavit verifying the certificate of acknowledgment, pursuant to the rule of Hilary term, 4 W. 4, stated, that, previous to the said Sarah, Ann, Hannah, and Elizabeth Ellen making the said acknowledgment, the deponent inquired of each

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this act might have been brought in any of Her Majesty's superior courts of record,—where the plaintiff dwells more than twenty miles from the defendant,—or where any officer of the court holden under the provisions of this act shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed."

(*a*)[1] It seems the proper form of motion in these cases is, "to set aside the judgment, if signed, on payment of costs, and then to enter the suggestion:" Per Parke, B., *Soames* v. *Cooper*, 3 Exch. 38.

(*a*)[2] See *In re Rebecca Darling*, ante, vol. ii. p. 347; *In re Sophia Crawford*, ante, vol. iv. p. 628.

and every of them the said Sarah, Ann, Hannah, and Elizabeth Ellen, whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate; and that, in answer to such inquiry, each of them the said Sarah, Ann, and Hannah, declared that she did intend to give up her interest in the said estate, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest (*a*)[1],—of which declaration of the said Sarah, Ann, and Hannah respectively, the deponent had no reason to doubt the truth, and he verily believed the same to be true; and that the said Elizabeth Ellen, in answer to such inquiry, declared that the purchase-money for her interest in the said estate was, she believed, paid into the Bank of England, by way of a provision for her, in consequence of her so giving up such her interest in the said estate: and the deponent further said, that, before the acknowledgment of her the said Elizabeth Ellen was so taken, he was satisfied, and did then verily believe, that such provision had been made (*b*)[1], by payment into the Bank of England, in the name and with the privity of the accountant-general of the court of Chancery, "ex parte the Sheffield town trustees," of the purchase-money and value of such her interest in the said estate, in **[122]** pursuance of the lands clauses consolidation act, 1845 (8 & 9 Vict. c. 18), s. 69 (*b*)[2].

The affidavit upon which this motion was founded, stated that the premises in question had been taken by the town trustees of Sheffield, under the statute 9 & **[123]** 10 Vict. c. cccxlviii., "An act for making certain new streets or thoroughfares, and widening and improving certain other streets or thoroughfares, within the town and borough of Sheffield, in the county of York," and were part of the lands mentioned and contained in the second section of the act; that the same premises were conveyed to the trustees under the provisions contained in the said act and in the lands clauses consolidation act, 1845, therewith incorporated (*a*)[2]; and that the purchase-money for

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(*a*)[1] See *In re Dixon*, ante, vol. iv. p. 631; *Ex parte Webber*, ante, vol. v. p. 179.

(*b*)[1] But the affidavit did not state that the terms had been reduced into writing and produced to the commissioners.

(*b*)[2] Which enacts, that—"with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title,"—"if the purchase-money or compensation which shall be payable in respect of any lands, or any interest therein, purchased or taken by the promoters of the undertaking, from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian committee of lunatic or idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of 200l., the same shall be paid into the bank, in the name and with the privity of the accountant-general of the court of Chancery in England, if the same relate to lands in England or Wales, or the accountant-general of the court of Exchequer in Ireland, if the same relate to lands in Ireland, to be placed to the account there of such accountant-general, ex parte the promoters of the undertaking (describing them by their proper name), in the matter of the special act (citing it), pursuant to the method prescribed by any act for the time being in force for regulating moneys paid into the said courts; and such moneys shall remain so deposited until the same be applied to some one or more of the following purposes, that is to say,—In the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes;—or, in the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid, stood settled;—or, if such money shall be paid in respect of any buildings taken under the authority of this or the special act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the court of Chancery shall direct;—or, in payment to any party becoming absolutely entitled to such money."

(*a*)[2] By s. 1 of the local act.

the respective interests of James Frith and of Elizabeth Ellen Foster, the wife of Richard Thompson Foster, amounting to 530l. (being 265l. for the interest of each of the said parties) was paid into the Bank of England on the 6th of November, 1848, by the said town trustees, under the 8 & 9 Vict. c. 18, intituled "An act for consolidating in one act certain provisions usually inserted in acts authorising the taking of lands for undertakings of a public nature," in the name and with the privity of the accountant-general of the court of Chancery, to be placed to his account there, ex parte the said Sheffield town trustees.

The registrar had objected that the affidavit of verification did not comply with the rule, which, amongst other things, provides, that, "where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing," &c.

Hall submitted that the rule did not apply to a case of this sort, where the sale was not by agreement. [Maule, J. The married woman cannot be said to concur in the conveyance: it is compulsory. Does the local act direct how the money is to be disposed of?] Only by reference to the lands clauses consolidation act, 1845.

[124] Wilde, C. J. The rule of court clearly does not apply to a case like this. The documents may be received.

Hall. There is another objection which may be taken by the officer, viz. that there is a supplemental affidavit upon paper, whereas the practice requires that it should be upon parchment. In *Ex parte Carr* (ante, vol. v. p. 496), this court decided, twelve months ago, that the affidavit might be upon paper (*b*).

Wilde, C. J. If this court decided twelve months ago that an affidavit upon paper would do, there will be no objection at the office on that ground.

Fiat.

[125] Doe *d.* Chippindale and Others *v.* Roe. Jan. 29, 1849.

In ejectment to recover possession of several houses comprised in one lease, the court, as to some of them, granted a rule nisi for judgment against the casual ejector, upon an affidavit shewing service of the declaration and notice, by affixing copies on the outer doors, the premises being unoccupied and shut up, and by serving two persons who claimed to be assignees respectively of part of the premises, and the attorney of one of them; and they afterwards made the rule absolute, upon affidavit of the service thereof in the same way.

Channell, Serjt., moved for judgment against the casual ejector. The premises consisted of eight houses, numbered respectively 12, 13, 14, 15, 16, 17, 18, and 19, in Little James Street, Marylebone. As to Nos. 13, 15, and 16, the service was either upon the tenants in possession personally, or upon their respective wives, upon the premises. As to Nos. 12 and 14, the affidavit stated that the premises were unoccupied and shut up, and that the deponent, being unable to discover the last tenants in possession thereof, affixed a copy of the declaration and notice on the door of each of the houses, such notices being directed to Hannah Elizabeth Woodford, the landlady thereof as hereinafter mentioned. And, as to Nos. 17, 18, and 19, the affidavit stated that they were uninhabited, deserted, and shut up, and in a very dilapidated state, and that the deponent, being unable to discover the last tenants in possession of such three last-mentioned houses, affixed a copy of the declaration and notice on the respective outer doors, directed to Phœbe Hall, the landlady thereof as hereinafter mentioned. The affidavit then went on to state, that the whole of the premises were comprised in and held under one lease thereof granted in the year 1808 to one Robert Drinkwater, for a term not yet expired by effluxion of time, but that the deponent had been informed, and believed, that such lease was forfeited; that the said Hannah Elizabeth

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(*b*) *Ex parte Carr* was the case of an acknowledgment to bar dower: it was not, therefore, a decision to the extent stated.

In the case at bar, however, the point did not arise; for the affidavit was, in truth, a mere affidavit to ground the motion to the court, and not, as stated, a "supplemental" affidavit. It was no part of the proceedings, and would properly be filed in a different office.

Woodford was, as the deponent had **[126]** been informed, and believed, the assignee of such lease as regarded the houses Nos. 12, 13, and 14: that the said Phœbe Hall, as the deponent had been informed, and believed, was the assignee of such lease as regarded the houses numbered 15, 16, 17, 18, and 19; that the said Hannah Elizabeth Woodford and Phœbe Hall were respectively duly served with copies of the said declaration and notice; and that one Charles Hall, the son of Phœbe Hall, who collected her rents, informed the deponent, on the 9th instant, that several of the copies of the declaration and notice so served and affixed by the deponent, and which had been received by him the said Charles Hall from several of the tenants, had been given over by him the said Charles Hall, to Mr. Arundell, who the deponent knew to be the solicitor of the said Phœbe Hall, from his having corresponded in that capacity with the attorneys for the lessors of the plaintiff respecting that portion of the premises of which the said Phœbe Hall claimed to be the owner.

The learned serjeant referred to *Doe d. Pope* v. *Roe* (7 M. & G. 602, 8 Scott, N. R. 321), where, in ejectment for seven houses adjoining each other, and all held under one lease, the tenants of four of them having been duly served, the court granted a serviceable rule absolute as to the other three, which were empty, upon an affidavit stating that the tenant [the lessee] had died intestate and insolvent, and that copies of the declaration and notice had been affixed on the outer doors of the three houses, and a copy served on one D., the attorney for one Jones, who had been accustomed to receive the rents: and he submitted, that, though not precisely similar in its facts, it was an authority for the present motion.

[127] Wilde, C. J. In that case the lessee had gone to America (*a*). Here, your affidavit does not shew what has become of Drinkwater, the lessee.

Maule, J. The premises being all held under one lease, the lessor of the plaintiff need not proceed as upon a vacant possession: *Doe d. Timothy* v. *Roe* (8 Scott, 126).

Wilde, C. J. Take a rule absolute as to the premises in respect of which the service has been regular; and, as to the rest, a rule nisi,—the service to be by affixing a copy on the door or other conspicuous part of the houses, and by serving a copy on Hannah Elizabeth Woodford and Phœbe Hall, and also upon Mr. Arundell.

On a subsequent day, upon affidavit of service in the manner directed, the rule was made

Absolute.

Doe *d.* Bennet *v.* Roe. Jan. 31, 1849.

The court granted a rule for judgment against the casual ejector, where the premises were held under lease by several persons trading under the firm of W., F., & Co., upon an affidavit of service of the declaration and notice upon the manager of the works, upon the premises, and of personal service on one of the firm,—the affidavit stating them to be joint-tenants of the premises.

Hewson, on a former day in this term, obtained a rule nisi for judgment against the casual ejector, upon an affidavit stating that the deponent, on the 5th **[128]** of January, 1849, served Michael Williams, one of the clerks in the office of Messrs. Williams, Foster, & Co., tenants in possession of the premises mentioned in the declaration annexed, with a true copy of the said declaration and notice; that the said office is at the copper-works of the said Messrs. Williams, Foster, & Co., part of which said works were on the premises mentioned in the declaration; that the deponent had been informed, and believed, that the said company called Williams, Foster, & Co., consisted of the several persons named in the notice thereunto annexed, viz. John Williams, Michael Williams, William Williams, John Michael Williams, Collan Harvey, Richard Harvey, Joseph Talwyn Foster, Sampson Foster, and John Sampson, and that they were joint-tenants of the premises mentioned in the declaration, a lease of the premises sought to be recovered in this action having been granted to the said John Williams, Michael Williams, William Williams, John Michael Williams, Collan Harvey, Richard Harvey, Joseph Talwyn Foster, Sampson Foster, and John Sampson, jointly, on the 8th of September, 1838; that the deponent had occasion to go to the

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(*a*) The marginal note so states, but mistakenly: the circumstance of the tenant having absconded to America, in truth occurred in *Doe d. Osbaldiston* v. *Roe*, a case which is cited in *Doe d. Pope* v. *Roe*.

said works of the said company on the 6th of January, 1849, when he saw James Pooley, the agent and manager of the said works, who produced to the deponent the said declaration and notice, and informed him that he the said James Pooley was about inclosing them to Joseph Talwyn Foster, one of the partners in the said firm of Williams, Foster, & Co., and acquaint him of the service thereof; that the said James Pooley also informed the deponent, that the only partner in the said company with whom he held communication relative to the business of the said company's copper-works was, the said Joseph Talwyn Foster; and that the deponent, on the 9th of January, 1849, personally **[129]** served the said Joseph Talwyn Foster with a true copy of the said declaration and notice.

Channell, Serjt., on behalf of three of the parties,—Michael Williams, Richard Harvey, and Sampson Foster,—shewed cause, upon affidavits that neither of them had been served with any declaration, or had any notice or knowledge of any ejectment having been brought against the firm, until served with the rule nisi; and also an affidavit of one of the attorneys of Williams, Foster, & Co., stating, that he was served with the rule nisi on the 27th instant; that the members of the firm of Williams, Foster, & Co., are resident at various places; that he had written to the various members, and had received from Michael Williams, Sampson Foster, and Richard Harvey, respectively, affidavits in opposition to the rule, but had received no affidavits from the other members of the firm; that he was unable to obtain a copy of the affidavit upon which the rule was obtained, until the 30th instant, and that, until he obtained an office copy of such affidavit, he was ignorant that it was alleged therein that the several persons therein named were joint-tenants of the premises for the recovery whereof this action was brought; that he had been informed, and believed, that two of the persons named in the said affidavit, viz. Collan Harvey and John Sampson have been long deceased; that Michael Henry Williams, who was a partner in the said firm of Williams, Foster, & Co., was not named in the affidavit upon which this rule was obtained, or in the notice to appear subjoined to the declaration in this action; that Joseph Talwyn Foster is not the managing or sole acting partner in the said firm; and that, although by reason of his the said Joseph Talwyn Foster's being resident in London, he generally acted in the London business of the said firm, there **[130]** were other partners resident in Cornwall who took at least as active a part in the general management of the business and concerns of the firm. The learned serjeant submitted that this was an attempt to fix all the parties by service upon one of them, without any evidence whatever to warrant the assumption that they were joint-tenants.

Hewson, in support of his rule. We rely upon the service of the declaration and notice upon Joseph Talwyn Foster, one of the joint-tenants, and the most active and prominent member of the firm. The case is not affected by the death of two of the partners, and the introduction of another. In *Doe d.* ——— v. *Roe* (1 D. & L. 873), where the proprietors of a company, not incorporated, were tenants, and a third person was in actual occupation of a piece of land for which the ejectment was brought, service of the declaration on several of the proprietors, and on the clerk and treasurer of the company, and on the occupier, was held sufficient service,—it being sworn that the proprietors of the company were believed to be joint-tenants of the land in question. [Maule, J. The service was upon the manager of the works, upon the premises, and there was also personal service on a member of the firm. Wilde, C. J. The affidavits in opposition to the rule do not deny that the parties are tenants in possession, as alleged. Channell, Serjt. The rule being served so very recently, there has in reality been no time to answer the affidavit.]

Wilde, C. J. I incline to think the affidavit in this case is sufficient to entitle the plaintiff to judgment. The case of *Doe d.* ——— v. *Roe* (1 D. & L. 873) seems to be an authority.

The rest of the court concurring,

Rule absolute.

[131] Baker *v.* Coghlan. Jan. 31, 1849.

The indorsement of the time of service of a writ of summons, pursuant to the statute 2 W. 4, c. 39, s. 1, and the rule of court of M. T., 3 W. 4, r. 3, may be made by a marksman.

In this case an order was made by Coltman, J., at chambers, to set aside the appearance entered for the defendant sec. stat., and all subsequent proceedings, for irregularity, on the ground that the indorsement of service on the original alias writ of summons, was not written by the party by whom the writ was served, she being unable to write, but having placed her mark at the foot of such indorsement,—the learned judge considering that this was not a sufficient compliance with the statute and rule of court.

The statute 2 W. 4, c. 39, s. 1, which provides for the service of the writ of summons, directs that "the person serving the same shall and is hereby required to indorse on the writ the day of the month and week of the service thereof:" and the rule of Michaelmas term, 3 W. 4, r. 3, provides "that the person serving a writ of summons shall, within three days at least, after such service, indorse on such writ the day of the week and month of such service; otherwise, the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made."

Hawkins, on a former day in this term (Jan. 13), moved for a rule to shew cause why the above order should not be set aside, upon an affidavit of Hannah Baker, the wife of the plaintiff, and the person who served the writ, stating, "that, previously to the deponent serving the defendant with the copy alias writ of summons in this **[132]** action, this deponent read over and well understood the purport and effect of the same; that, previously to attaching her mark to the indorsement of service on the original alias writ of summons, she, this deponent, read over and well understood the printed and written words contained in the said indorsement of service; and she, this deponent, further saith that she is well able to read writing and printing, and is in the constant habit of perusing letters and papers connected with her husband, the said plaintiff's, business as a tailor and breeches-maker." [Wilde, C. J. Is there any memorandum accompanying the indorsement, shewing that what she attested by affixing her mark to it, was read over and explained to her? I do not think the want of that could be helped by a subsequent affidavit.] The rule as to that only applies to jurats (*a*). [Wilde, C. J. Persons who cannot strictly comply with the rule, should not be employed to serve process. Maule, J. If this person were indicted for perjury in the affidavit of service, it would probably be said, that she was only a poor ignorant marks-woman, who could not very well understand the nature of what she was doing. The object of the rule of court is, to pin the party to a precise date of service. It is much more likely that mistake or shuffle will be avoided by holding that the indorsement must be written by the party effecting the service. It would probably be a construction more consonant with the spirit of the rule. However, there may be some doubt about it.]

A rule nisi having been granted,

Piggott now shewed cause. He submitted that the indorsement in question was no compliance with the statute and rule of court, which evidently intended that **[133]** the persons serving process should not be so grossly illiterate as to be unable to make the required indorsement himself.

Hawkins was not heard upon this point.

Wilde, C. J. We must read the words of the statute which require the indorsement, as we would read the same words elsewhere. The indorsement of a bill or note, or the execution of any other contract, may be by a mark. I should incline to say, therefore, that this must be taken to be the indorsement of the party. I do not see the extent of the consequences of holding the act not to be complied with, unless the whole of the indorsement is in the hand-writing of the person serving the writ. The conclusion I have come to, therefore, is, that the act is complied with where all but the mark is either printed or in the hand-writing of a stranger. The party putting

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(*a*) See 2 Archb. Pr. 8th edit., by Chitty, p. 1454.

his mark to it thereby becomes responsible for the whole. This objection, therefore, fails.

The rest of the court concurring,

The rule was referred to the master upon another point.

[134] Doe d. Dixon *v.* Roe. Jan. 31, 1849.

[See *Phillips* v. *Bridge*, 1873, L. R. 9 C. P. 53.]

In ejectment brought upon a right of re-entry, under the 4 G. 2, c. 28, s. 2, it must appear that the landlord had a power to re-enter, in respect of the non-payment of half a year's rent, at the time of affixing the declaration and notice upon the premises.

This was an action of ejectment brought to recover the possession of a messuage, &c., in the parish of St. Mary Abbotts, Kensington, which had been held by one Samuel Marks under and by virtue of a lease, bearing date the 13th of September, 1847, at the yearly rent of 200l., payable quarterly, on the usual quarter-days. The lease contained a clause of re-entry for non-payment of the rent within twenty-one days next after any of the days whereon the same ought to be paid, or for other breach of covenant.

' Hawkins moved, under the 4 G. 2, c. 28, s. 2 (*a*), for **[135]** judgment against the casual ejector, upon an affidavit shewing that the premises were deserted, that there was due, in respect of half a year's rent, at Christmas-day last, the sum of 100l., that there was no sufficient distress upon the premises, that the landlord had a right of re-entry under the lease, and that the declaration and notice had been served on the 10th instant, in the manner prescribed by the statute. [Cresswell, J. The landlord can have no right of re-entry for non-payment of the half-year's rent, the twenty-one days not having elapsed at the time of affixing the declaration and notice. The statute says that there shall be half a year's rent in arrear, and that the landlord shall have a right to re-enter for the non-payment thereof.] He has a right of re-entry by the terms of the lease, and half a year's rent is in arrear; and that satisfies the words of the act.

Wilde, C. J. The case is not brought within the words of the statute. The right of re-entry must be for non-payment of the half-year's rent.

The rest of the court concurring,

Rule refused.

(*a*) Which enacts, "that, in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage, or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then, and in every such case, the lessor or lessors in ejectment shall recover judgment and execution (i.e. shall, in the name of the plaintiff in ejectment, suing as on the demise of such lessor or lessors, recover, &c.), in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

See *Doe d. Powell* v. *Roe*, 9 Dowl. P. C. 548; *Doe d. Gretton* v. *Roe*, ante, vol. iv. p. 576.

[136] In re Cattlin. Jan. 31, 1849.

[S. C. 6 D. & L. 566.]

By a judge's order (made a rule of court), A., the former attorney of B., was directed within ten days to deliver to C. & D., B.'s present attorneys, a bill of costs, &c.:—Held, that an attachment could not issue against A. for disobedience of the rule of court, upon a mere demand by a clerk of C. & D.

On the 10th instant, an order was made by a judge at chambers, upon hearing the attorneys for Mrs. Briggs, and Mr. Cattlin in person, "that Cattlin do, within ten days, deliver unto Messrs. Borradaile & Dinsdale, Mrs. Briggs's present attorneys, a bill of costs in all causes and matters wherein he has been concerned for the said Mrs. Briggs," &c. This order was made a rule of court on the 22nd; and, on the 24th, J. Brown obtained a rule nisi for an attachment against Mr. Cattlin, for disobedience of this rule, upon an affidavit of a clerk to Messrs. Borradaile & Dinsdale, stating "that he did, on the 23rd, personally serve Mr. Cattlin, with a true copy of the rule, and at the same time shewed him the original, and demanded of him the bill of costs mentioned in the said rule, but that Cattlin did not then deliver, nor had he since delivered either to the deponent or to the said Messrs. Borradaile & Dinsdale the bill of costs mentioned in the said rule, or any other bill of costs, of all causes and matters wherein he had been concerned for Mrs. Briggs in the said order named, but had wholly neglected so to do;" and also an affidavit of one of the firm of Borradaile & Dinsdale, negativing the delivery of a bill to him or to his partner (a)[1].

Dearsley now shewed cause, upon an affidavit that the bill had actually been delivered before the rule for [137] the attachment was served. An attachment is not granted for the mere disobedience of a rule of court; it must appear that the default has been wilful. Besides, here has been no proper demand. None is shewn to have been made at the time of the service of the order (a)[2]; and the demand sworn to have been made when the rule was served, was not made by a person authorised to make it. In *Doddington* v. *Hudson* (1 Bingh. 410, 8 J. B. Moore, 510), where the defendant was served with an order of court to reinstate forthwith premises belonging to the plaintiff,—it was held that an attachment could not issue against him for disobedience of the order, unless the service of it was accompanied with an oral demand of performance. Gifford, C. J., there said: "All the authorities shew, that, before an attachment can be enforced, the party proceeded against must be proved to have committed a wilful disobedience of the order of the court: as, in the case where a party engaged to pay money at a coffee-house between the hours of ten and twelve, he was bound to be there within the appointed time, and, if he failed, he could have no defence against an action; but, the law being otherwise with respect to an attachment, Eyre, C. J., with great reluctance, refused to compel performance by that means, considering the practice imperative which requires personal service of the rule, and a personal demand and refusal, before the party can be deemed in contempt (c). It has been forcibly argued in the present case, that the analogy between an order for payment of money, and an order for the repair of an edifice, is not complete, and that the reasons which make a demand es-[138]-sential in the one case do not exist in the other: but the difficulty I feel is, that, in order to justify an attachment, some wilful disobedience of the order of the court must be shewn." And Burrough, J., said: "This being a criminal proceeding, wilful disobedience of the order of court must be established before an attachment can issue." [Wilde, C. J. The demand, I apprehend, must be made by the person mentioned in the rule: a demand by a clerk will not do. I certainly never knew an attachment granted upon such materials as these.]

J. Brown, in support of his rule, submitted, that the party had clearly been guilty of a contempt, in disobeying the rule of court; and that, this not being the case of a rule for payment of money, a demand by the attorneys themselves was not necessary.

Wilde, C. J. There clearly has been no such demand in this case, as the practice of the court requires, in order to bring a party into contempt. In *Doe d. Hickman* v. *Hickman* (8 Dowl. P. C. 833), it was held, in this court, that an attachment will not issue against an attorney, for not delivering up papers pursuant to a rule of court, unless it be shewn that the person making the demand, was duly authorised to do so, and that he stated that fact to the attorney. Whether the order is for the delivery of a bill, or for payment of money, makes no difference. The practice is, in both cases, the same.

(a)[1] See *Potter* v. *Back*, 8 Dowl. P. C. 872.

(a)[2] None appears to have been necessary: nor was it necessary, for this purpose, even to serve the order. *Greenwood* v. *Dyer*, 5 Dowl. P. C. 255.

(c) *Brandon* v. *Brandon*, 1 Bos. & Pull. 394.

The rest of the court concurring,

Rule discharged, with costs.

[139] MENIAEFF AND ANOTHER v. READE AND ANOTHER. READE AND ANOTHER v. MENIAEFF AND ANOTHER. Jan. 16, 1849.

In assumpsit by the sellers against the buyers for the breach of two contracts for the shipment, at a foreign port, of two several quantities of rye-meal, the declaration stated, that, "after the making of the said contracts, and before the performance of them, or of any part thereof, it was agreed between the plaintiffs and the defendants that the said two contracts should be deemed and taken to be, and to operate as, one contract, and should be performed as if the same had been one contract for the amount of the said two quantities of meal:"—Held, that this allegation was not sustained by proof that the buyers had sent out three vessels to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill drawn on them for the stipulated proportion of that particular cargo.—The judge at the trial having refused to allow the declaration to be amended, by striking out the words "or of any part thereof,"—the court, to whom the propriety of that refusal was referred, declined to interfere.—By two contracts, entered into at different times, the defendants engaged to ship at Cronstadt, for the plaintiffs, 250 tons and 350 tons respectively of rye-meal,—each contract stipulating that the shipment should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel and getting the goods down to Cronstadt; that payment should be made one third at three months from the date of bill of lading; but that, should the vessel not arrive in time for the goods to be shipped before the 30th of June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above.—In an action by the buyers against the sellers for the breach of these two contracts, the defendants pleaded, amongst other pleas, that the plaintiffs were not, at and after the arrival of the said vessels at Cronstadt, and from thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the meal, in manner and form as alleged; and that the plaintiffs had not performed the said contracts and promises in all things on their part to be performed, in manner and form as alleged:—Held, that the circumstance of the buyers' having sent out three vessels, neither of which was of capacity sufficient to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times, did not entitle the defendants to a verdict upon these two issues; but that the buyers were entitled to maintain an action against the sellers, although they had not sent out one vessel to receive the quantity mentioned in each contract.

The case of *Meniaeff* v. *Reade* was an action of assumpsit upon two contracts for the sale by the plaintiffs to the defendants of Russian rye-meal.

The declaration stated, that, on the 4th of March, 1847, by a certain contract or agreement then made between the plaintiffs and the defendants, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a large quantity, to wit, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat bags, and in good condition when shipped, at 8l. 7s. 6d. per ton, free on board at Cronstadt, that is to say, at a certain place in parts beyond the seas, to wit, in the empire of Russia, called Cronstadt: shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt: the sellers (if required by the buyers) to take up ship-room at St. Petersburgh, at the current rate of freight, for account of the buyers: to be paid for by the buyers' **[140]** acceptances of the sellers', or agent's, drafts, one third of the above sale at three months from date of contract, and the remainder by their acceptance at three months from date of bill of lading, on handing the same: but, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to procure a ship by that date, then the sellers were to be at liberty to draw for the remainder, as specified above: should the exportation of rye-meal be prohibited from St. Petersburgh, so as to prevent the shipment of the same, then the said contract was to be void, the money paid in advance to be returned (the due return of which the agent thereby undertook): and it was thereby further agreed, that, in case of any dispute as regarded quality, the same was to be left to the arbitration of two respectable parties in London, with liberty to call in a third, whose decision was to be final: That also theretofore, to wit, on the 9th of March, 1847, by a certain other contract or agreement then made between the plaintiffs and the defendants, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a large quantity, to wit, 350 tons [setting out a second contract in precisely the same terms as the first]; That, after the making of the said contracts or agreements, and before the performance of them, or of any part thereof, to wit, on the said 9th of March, 1847, it was agreed between the plaintiffs and the defendants, that the said two contracts or agreements should be deemed and taken to be, and to operate as, one contract or agreement for the sale of the two quantities of rye-meal therein mentioned, and should in all respects be performed and fulfilled by them the plaintiffs and the defendants respectively as if the same had been one contract for the sale of the amount of the said two quantities of meal upon the terms therein mentioned: That thereupon, afterwards, to wit, on the **[141]** day and in the year last aforesaid, in consideration of the premises, and that the plaintiffs then promised the defendants to perform and fulfil the said two contracts, so deemed and taken as aforesaid as one contract, in all things on their parts, they the defendants undertook and faithfully promised the plaintiffs to perform and fulfil the same, so likewise deemed and taken as aforesaid as one contract, in all things on their part: That, after the making of the said promise, to wit, on the day and in the year last aforesaid, they the defendants did, in pursuance of the said contracts, send and despatch three vessels, called, to wit, the "Margaret Roberts," the "Rienzi," and the "Concordia," to Cronstadt aforesaid, and that the said vessels afterwards, and long before the 30th of June, 1847, to wit, on the 1st of June in the year aforesaid, arrived at Cronstadt aforesaid, and were then ready to receive the said quantities of rye-meal mentioned in the said contracts or agreements: That the plaintiffs did afterwards, and before the said 30th of June, to wit, on the 1st of June, 1847, in pursuance of the said promise on their parts, ship free on board the said ships, at Cronstadt aforesaid, the said quantities in the said agreements mentioned, of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition, that is to say, 166 tons and four equal seventh parts of a ton of rye-meal, on board the said ship called the "Margaret Roberts," 187 tons and three equal seventh parts of a ton, on board the said ship called the "Concordia," and 264 tons and five equal seventh parts of a ton, on board the said ship called the "Rienzi"; and that such quantities of rye-meal were so shipped by them the plaintiffs, at the first open water after the making of the said contracts or agreements, allowing a fair and reasonable time for the arrival out of the said vessels, and for getting the goods down to Cronstadt, within the true intent and meaning of the said contracts or **[142]** agreements: That, after the making of the said promise, to wit, on the said 9th of March, 1847, they the defendants, in part performance of the said promise on their parts, did accept certain bills of exchange, to the amount, to wit, of one third of the said price of the said quantities of rye-meal so agreed to be sold as aforesaid, to wit, to the amount of 1675l: That afterwards, and within a reasonable time after the said quantities of rye-meal were so shipped on board the said ships as aforesaid, to wit, on the 1st of July, 1847, they the plaintiffs caused the bills of lading for the quantities so shipped on board the vessels called the "Margaret Roberts" and the "Concordia," to be delivered to the defendants, and were then and at all reasonable times ready and willing to deliver to them the bill of lading for the said quantity so shipped on board the said ship called the "Rienzi," upon their the defendants' paying for the said rye-meal by accepting bills of exchange for the same according to the said agreements and promise in that behalf,—That thereof the defendants then, to wit, on the day and year last aforesaid, had notice: That the price of the said quantities of rye-meal so shipped as aforesaid, according to the terms of the said agreements, amounted to a large sum of money, to wit, the sum of 5194l. 12s. 6d., and that they the plaintiffs did, in pursuance of the said agreements, after the said rye-meal had been so shipped, to wit, on the 1st of July, 1847, draw three certain bills of exchange upon the defendants, which said bills of exchange were such bills of exchange, and bore respectively such dates, and were payable at such times, as were in the said agreements in that behalf mentioned, and which said bills of exchange were for sums amounting together to the sum of 3519l. 12s. 6d., being the difference between the said price of all the said rye-meal so shipped, and the said sum, to wit, of 1675l., so **[143]** paid by the defendants in manner aforesaid: And that they, the plaintiffs, did afterwards, and after the said two bills of lading had been delivered to the defendants as aforesaid, and at a reasonable time in that behalf, to wit, on the 1st of July, 1847, request the defendants to accept the said bill of lading for the said rye-meal so shipped on board the ship called the "Rienzi" as aforesaid, and to pay them the plaintiffs for all the said rye-meal so shipped, by accepting the said three last-mentioned bills of exchange, according to their said promise in that behalf: Yet that the defendants, not regarding their said promise, although they then accepted one of the said bills of exchange, to wit, the said bill of exchange for 931l. 6s. 8d., did not nor would accept the said last-mentioned bill of lading, and did not nor would accept the said two other bills of exchange, or either of them, but had hitherto wholly refused so to do, and that, except as to the said bill of exchange for 931l. 6s. 8d., the said rye-meal still remained wholly unpaid for.

The defendants pleaded,—first, non assumpsit,—secondly, that the said quantities of rye-meal in the declaration mentioned, were not shipped by the plaintiffs at the first open water after the making of the said contracts or agreements, allowing a fair and reasonable time for the arrival out of the said vessels, and for getting the goods down to Cronstadt, within the true intent and meaning of the said contracts or agreements, in manner and form as in the declaration alleged; concluding to the country.

The cause was tried before Wilde, C. J., at the sittings in London, after the last term. The facts were as follows:—

On the 4th and 9th of March, 1847, one George Draper, a merchant in London, as agent for the plain-**[144]**-tiffs, entered into the following contracts with the defendants, through one Smith, a broker:—

"Sold for Messrs. P. Meniaeff & Son, of St. Petersburgh, by order of George Draper, of London, to Messrs. Reade & Grove, of London, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat-bags, sweet, and in good condition, when shipped, at 8l. 7s. 6d. per ton, free on board at Cronstadt. Shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt. The sellers (if required by the buyers) to take up ship-room at St. Petersburgh, at the current rate of freight, for account of the buyers. To be paid for by the buyers' acceptance of the sellers', or agent's, drafts, one-third of the above sale at three months from date of contract, and the remainder by their acceptance at three months from date of bill of lading, on handing the same. But, should the vessel not arrive in time for the meal to be shipped by the 30th of June next, or the sellers not be able to procure a ship by that date, then the sellers are to be at liberty to draw for the remainder as specified above. Should the exportation of rye-meal be prohibited from St. Petersburgh, so as to prevent the shipment of the above, then this contract is to be void, and the money paid in advance to be returned; the due return of which the agent hereby undertakes. In case of any dispute as regards quality, the same is to be left to the arbitration of two respectable parties in London, with liberty to call in a third, whose decision is to be final."

The second contract was similar in all respects to the above, except that the quantity of rye-meal contracted for was 350 tons.

Upon the first contract being entered into, Draper, as agent of the plaintiffs, drew upon the defendants, and **[145]** they accepted, a bill, dated the 4th of March, 1847, for 697l. 18s. 6d. being one third of the estimated amount of the money to be paid for the meal comprised in the first contract, and, on the 21st of March, 1847, he drew another bill of exchange, for 977l. 1s. 8d., being one third of the estimated amount of the money to be paid for the goods comprised in the second contract, payable, respectively, three months after date; and which bills, making together 1675l., were duly paid at maturity.

The defendants chartered three vessels, respectively named the "Margaret Roberts," the "Concordia," and the "Rienzi," to proceed to Cronstadt, and load the quantities of rye-meal mentioned in the said two several contracts.

The "Margaret Roberts" arrived at Cronstadt on the 9th of May, and was declared ready to load on the 17th, and completed her loading on the 28th, went to sea on the 31st (*a*), was loaded with $166\frac{4}{7}$ tons of rye-meal, and the bill of lading for the same was transmitted to London, and delivered to the defendants, who received and disposed of the cargo; and they accepted Draper's drafts for 500l. and 431l. 6s. 8d., respectively, dated the 8th of June, 1847, and making together 931l. 6s. 8d., being the amount of the remaining two-thirds of her cargo after appropriating 465l. 13s. 4d., part of the sum of 697l. 18s. 4d., the amount of the bill of exchange dated the 4th of March, already drawn for the first third of the amount of the contract of that date; and such drafts for 931l. 6s. 8d. were paid by the defendants at maturity.

Draper, on the 31st of May, 1847, gave the defendants notice of the arrival of the "Margaret Roberts" at Cronstadt; and on the 21st of June, he addressed them as follows:—

[146] "Messrs. Reade & Grove.

"Gentlemen,—I beg to inform you that I am advised by Messrs. P. Meniaeff & Son, of St. Petersburgh, that, on the (29th of May) 10th of June, the three vessels chartered by you for the rye-meal sold to you, had arrived; and that, on the (30th of May) 11th of June, they had loaded the 'Margaret Roberts,' of whose cargo I hand you inclosed invoice, amounting to your debit 1397l. I inclose bill of lading of the same, and copy of charterparty, indorsed with the number of late days consumed in lading. On your agreeing the amount of invoice, I shall value on you at three months from date of bill of lading,—say (27th of May) 8th of June. After deducting one third of the amount included in your acceptance of my draft of 4th March, for 697l. 18s. 4d. Say, amount of invoice, 1397l.; less one third, 465l. 13s. 4d. = 931l. 6s. 8d. You will oblige me by informing me if you find this amount correct.—Yours, &c."

(Signed) "GEORGE DRAPER."

The "Rienzi" arrived at Cronstadt on the evening of the (17th) 29th of May, and was declared to be ready to load on the (29th of May) 10th of June: and the "Concordia" arrived on the (28th of May) 9th of June, and was declared ready to load on the (4th) 16th of June.

In consequence of the great influx of vessels to that port in the season of 1847, and the large quantities of grain and rye-meal shipped from thence, it was impossible to despatch them with the expedition that would have been used in other years; and lighters could not be obtained to convey such large quantities of grain down the Neva to Cronstadt: and, in consequence of these difficulties, although every effort was made to despatch these vessels, the loading of the "Rienzi" was not completed until the (4th) 16th of July, and **[147]** that of the "Concordia" until the (26th of June) 8th of July.

The "Concordia" took $187\frac{3}{7}$ tons, and the "Rienzi" $264\frac{5}{7}$ tons.

On the 12th of July, 1847, the defendants wrote to Draper as follows:—

"Dear Sir,—We beg to inform you that we have lately received several letters from the Irish houses for whose account we purchased rye-meal, complaining of the great delay in the shipment of the same per 'Rienzi' and 'Concordia.' The buyer of the 'Rienzi's' cargo intimates his intention not to receive the documents, your friends at St. Petersburgh not having made the shipment in due course. And the buyer of the 'Concordia's' cargo has, we regret, been compelled to suspend payment. Waiting your instructions in this matter,—We remain, &c."

(Signed) "READE & GROVE."

To this Draper replied, on the following day, as follows:—

(*a*) These four dates are according to the old style.

"Messrs. Reade & Grove.

"Dear Sirs,—As regards the two parcels of rye-meal you purchased of me, you are aware that you provided ship-room, and that the parties for whose account I sold the same are not bound to ship them by any specified time: and I beg to inform you that they have used and are using all possible despatch in putting them on board. With the great influx of vessels at the port of Cronstadt this season, owing to the unusual export of corn from thence, shipments of goods do not go on so fast, perhaps, as usual; but no delay has occurred on the part of the sellers, whose goods were ready at St. Petersburgh before the vessels arrived, and whose interest it is to have them shipped as quickly as possible. I should regret if you experience any trouble with the houses for whom you bought, but with whom **[148]** I or my friends are not concerned. I shall, nevertheless, be ready to render you all the assistance in my power, to enable you to compel them legally, if necessary, to the honourable fulfilment of their engagements. Touching your remark, that you are waiting my instructions, I have none to give, and can but refer you to what I have already stated.—Yours, &c."

(Signed) "GEORGE DRAPER."

On the 17th of July, the defendants again wrote to Draper, as follows:—

"Dear Sir,—We beg to acknowledge receipt of your favour of the 13th, the contents of which we communicated to Mr. C. Sugrue, of Cork, the party for whom we purchased the cargo of rye-meal that should have been shipped by the 'Rienzi,' and from whom we have to-day received a reply, the purport of which you will perceive on reading the extract from his letter given at foot.

"Referring to your respects of the 13th, wherein you say that no time is specified for the shipment of the goods purchased of you, we beg to refer you to your contract, which states that the shipment shall be made 'at first open water;' and, as our vessels were at Cronstadt shortly after,—the 'Rienzi' on the 18th of May, by your own advice,—we quite agree with our Irish correspondent in thinking that the shipments have not been made in due course, and that the delay is unjustifiable, depriving the buyer of all chance of disposing of the cargoes before the coming harvest. All other purchases that we made on exactly similar terms, have been shipped more than a month since, and the vessels arrived and discharged at their various ports of destination; among others, the 'Margaret Roberts' (loaded by your friends, Messrs. Meniaeff & Co.) arrived in Dublin last Monday week,—whose cargo, by **[149]** the by, was in very bad order, and great waste incurred, owing to the wretched condition of the mats, most of which were old and broken, and upon which point the captain stated that he remonstrated with the shippers several times in vain. Referring to the extract at foot, we are, &c.,—Yours, &c." (Signed) "READE & GROVE."

The extract from Sugrue's letter to the defendants, referred to above, was as follows:—

"I now beg again to call your attention to the subject of the rye-meal which you bought for me last March, and to confirm to you my determination to repudiate the contract, which has to all intents and purposes been broken by the seller, who cannot be justified for the great delay in making the shipment. I therefore request you will on no account accept the shipping documents, should they be presented to you now: but that you will forthwith obtain the repayment of the one third advance which you came under for that contract; and that you will regularly notice the contractor, Mr. G. Draper, that I hold him accountable for the freight of the 'Rienzi,' which vessel was at Constradt so early in May. I therefore beg of you to be quite peremptory and decisive on my part in this matter, and get back the advance without delay; for, I am resolved not to be forced to observe a contract which has not been fulfilled on the part of Mr. Draper or his connexions at St. Petersburgh."

To this letter, Draper replied on the 20th of July, as follows:—

"Dear Sirs,—With regard to your observations to me about the delay of the shipment per 'Rienzi,' I can but confirm to you what I said in my last on this subject, viz. that no delay has occurred on the part of my friends, and that the delay (if any) arises from the circumstance, this year, of the immense transactions of **[150]** corn at St. Petersburgh, rendering it impossible, with the ordinary means at command there (which sufficed for the business of that place hitherto), and the increased demand for lighters, labour, &c., and the immense influx of shipping, to get the goods down to Cronstadt as quickly as in former years. As to your correspondent expecting that I should return the advances made upon the purchase, the contract of which would be fulfilled, he cannot surely have been in earnest in making such a request. I may remark, that, had the rye-meal been shipped earlier, no advantage, considering the state of the markets, would have accrued, and no prejudice can arise, on the other hand, from its coming later.—Yours, &c." (Signed) "GEORGE DRAPER."

On the 23rd of July, Draper sent the defendants the invoice and bill of lading for the "Concordia's" cargo; and, on the 27th, the invoice of the "Rienzi's" cargo. These (with the exception of the bill of lading of the goods per "Concordia," which the defendants retained as security for the advance they had made on account of the cargo,) were returned by the defendants on the 28th, on the ground that "the conditions of the contracts had not been complied with." And, on the 30th, bills for the balance were tendered to the defendants for acceptance, but refused; the defendants, on the other hand, demanding re-payment of the advances already made.

The "Concordia," with her cargo of $187\frac{3}{7}$ tons of rye-meal on board, arrived in London on the 30th of July; and the "Rienzi," with her cargo of $264\frac{5}{7}$ tons, on the 15th of August.

On the part of the defendants, it was objected that there was no evidence to sustain the allegation in the declaration, that, "after the making of the said contracts or agreements, and before the performance of them, or of any part thereof, it was agreed between the plain-**[151]**-tiffs and the defendants that the said two contracts or agreements should be deemed and taken to be, and to operate as, one contract or agreement for the sale of the two quantities of rye-meal therein mentioned, and should in all respects be performed and fulfilled by the plaintiffs and defendants respectively as if the same had been one contract for the sale of the amount of the said two quantities of meal upon the terms therein mentioned."

For the plaintiffs, it was insisted that the letters and acts of the parties were evidence of such an agreement.

The lord chief justice intimating an opinion that there was no evidence of an agreement to deal with the two contracts as one, as alleged, the plaintiffs' counsel proposed to amend the declaration by striking out the words "or of any part thereof." This, his lordship declined to allow; and the jury having expressed an opinion that the vessels had not been loaded within a reasonable time after their arrival at Cronstadt, the plaintiffs elected to be nonsuited,—leave being reserved to them to move to set aside the nonsuit, if the court should be of opinion that there was evidence of such an agreement as that alleged, or that the amendment should have been allowed, and would have availed, if allowed.

Byles, Serjt., now moved accordingly. The whole correspondence and acts of the parties clearly shewed an implied understanding that the two contracts were to be dealt with as one. The buyers sent out three ships to receive the meal,—the first one not being of capacity sufficient to receive the whole quantity mentioned in the first contract. Separate bills of lading were given for each cargo; and the bills of exchange were in like manner drawn with reference to each specific cargo. It was evident, therefore, that the par-**[152]**-ties were agreed, that, as far as concerned the performance of the contracts, they should be treated as one. [Maule, J. That seems rather like splitting them into three. The facts shew that the two contracts had been in part performed.] This stipulation is stated to have been made after the second contract had been entered into, but before performance,—which means performance by the plaintiffs in delivering the goods. [Maule, J. How can you amalgamate the two contracts?] The real agreement was, that the whole should be taken as one contract, except as to the two bills already drawn. [Maule, J. Suppose there had been one contract only. You must either do what you contract to do, or do something equivalent.] The amendment clearly ought to have been allowed. [Maule, J. That would not have helped you.]

The case of *Reade* v. *Meniaeff* was a cross-action brought by the buyers against the sellers for not shipping the meal within a reasonable time.

[153] The first count of the declaration,—which was founded upon the first contract,—stated, that, on the 4th of March, 1847, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to buy of the defendants, a large quantity, to wit, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition when shipped, at 8l. 7s. 6d. per ton, free on board at Cronstadt, that is to say, in parts beyond the seas, to wit, at Cronstadt, in Russia; shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt; the sellers, if required by the buyers, to take up ship-room at St. Petersburgh, at the current rate of freight, for account of the buyers; to be paid for by the buyers' acceptance of the sellers', or agent's, drafts,—one third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of the bill of lading, on handing the same; but, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to procure a ship by that date, then the sellers should be at liberty to draw for the remainder, as specified above. After setting out other stipulations in the contract, and averring mutual promises, the count proceeded to allege—that the plaintiffs did, afterwards, and within a reasonable time, to wit, on, &c., pay for one third of the price of the said 250 tons of meal in the said contract mentioned, by their accepting the draft of G. Draper, the agent of the defendants, to wit, a bill of exchange dated on the day of the date of the said contract, and made and drawn by the said G. Draper, as agent of the defendants, and at their request, upon the plaintiffs, for the payment to the **[154]** order of the said G. Draper of the sum of 697l. 18s., being one third of the price of the said 250 tons of meal, at three months after the date thereof, which was three months from the date of the said contract; that the defendants then took and received the said bill of exchange, so accepted by the plaintiffs, of and from them, in payment of the one third of the price of the said 250 tons of meal as aforesaid, which said bill of exchange the plaintiffs duly paid on the day when the same became due; that the plaintiffs, within a reasonable time, to wit, &c., sent divers, to wit, three vessels, to Cronstadt aforesaid, for the said meal, to wit, a vessel called the "Margaret Roberts," a vessel called the "Concordia," and a vessel called the "Rienzi," which said several vessels arrived at Cronstadt before the 30th of June aforesaid, to wit, on the 6th of May, in the same year, and in time for the said meal to be shipped by the said 30th of June; that, although the defendants, in part performance of their promise, duly shipped on board the "Margaret Roberts" 166$\frac{4}{7}$ tons, part of the said meal, and the plaintiffs afterwards, to wit, on the 8th of June in the year aforesaid, accepted the said part of the said meal, and then duly paid the defendants the remainder of the price of the said part of the said meal, by their accepting a bill of exchange drawn by G. Draper, the agent of the defendants, at their request, and dated the day and year last aforesaid, being the date of the bill of lading of the said part, for the payment to the order of the said G. Draper, at three months after the date thereof, of the sum of 931l. 6s. 8d., being the remainder of the said price of the said part of the said meal, which last-mentioned bill the defendants then took and received as such payment, and the plaintiffs duly paid the same when due; and that, although the said vessels called the "Rienzi" and the **[155]** "Concordia" were capable of receiving, loading, and carrying the remainder of the said meal, and the plaintiffs were, after the first open water, and before the 30th of June in the year aforesaid, and at and after the arrival of the said vessels respectively at Cronstadt, and from thence until and at and after a fair and reasonable time had elapsed for getting the said goods down to Cronstadt, ready and willing to buy and accept the remainder of the said meal, and to receive the bill or bills of lading thereof, and to pay the remainder of the price thereof according to the said contract, and the plaintiffs' promise in that behalf,—of which the defendants always had notice; and although the plaintiffs had performed the said contract, and their said promise, in all things on their part to be performed, and although a fair and reasonable time for the defendants to ship the remainder of the said meal on board the said vessels had elapsed after the said first open water, and after the arrival of the said several vessels at Cronstadt aforesaid, and before the commencement of this suit, a fair and reasonable time for getting the said goods down to Cronstadt being allowed, and although the shipment of rye-meal was not prohibited from St. Petersburgh, so as to prevent the shipment of the remainder of the said meal, or any part thereof; yet the defendants disregarded their promise, and did not nor would, at the first open water, allowing a fair and reasonable time [for the arrival out of the said vessels, and for getting the said goods down to Cronstadt, or within a fair and reasonable time] in that behalf, ship the remainder of the said meal, or any part thereof, on board the said vessels, or either of them, or on board of any other vessel or vessels, or in any way sell or deliver the remainder of the said meal to the plaintiffs within a fair and reasonable time **[156]** in that behalf, but wholly neglected and refused so to do, and therein wholly failed and made default; whereby the moneys paid to the defendants in part of the price of the said remainder of the said meal, and in discharge of so much of the said bills of exchange as were given on account of such price, became and were wholly lost to the plaintiffs, and divers moneys and expenses, amounting to a large sum, &c., which the plaintiffs laid out and incurred in and about hiring the said vessels, and sending them to Cronstadt aforesaid, became and were wholly lost and useless to the plaintiffs, and the plaintiffs lost divers great gains which might, and otherwise would, have accrued to them from the said remainder of the said meal being shipped and delivered within such reasonable time as aforesaid.

The second count was upon a contract, in terms precisely the same, for 350 tons of rye-meal, and was similar in all respects to the first count, except that the words within brackets in the breach, ante, p. 155, were omitted.

There was also a count for money had and received, money paid, interest, and money found due upon an account stated.

The defendants pleaded,—first, that the plaintiffs did not pay for one third of the price of the 250 tons of meal in the first count mentioned, by accepting the draft of the said G. Draper upon the plaintiffs for the payment to the order of the said G. Draper of the said one third of the price of the said 250 tons of meal, nor did the defendants take or receive the said bill of exchange in the said first count in that behalf mentioned in payment of one third of the said price of the said meal, in manner and form in the said first count alleged;—secondly, that the plaintiffs were not, at and after the arrival of the said vessels at Cronstadt, and **[157]** from thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the remainder of the said meal, in manner and form in the said first count alleged;—thirdly, that the defendants had not notice that the plaintiffs were so ready and willing as in the said first count mentioned, in manner and form in the said first count alleged;—fourthly, that the plaintiffs had not performed the said contract and promise in the said first count mentioned, in all things on their part to be performed, in manner and form as in the said first count alleged;—fifthly, that they, the defendants, did, at the first open water, allowing a fair and reasonable time for getting the said goods down to Cronstadt, and within a fair and reasonable time in that behalf, ship the remainder of the said meal on board the said vessels in the first count mentioned, to wit, the "Rienzi" and the "Concordia."

Similar pleas were pleaded to the second count, and non assumpsit to the third.

This cause also was tried before Wilde, C. J., at the sittings in London after the last term. The facts were substantially the same as in the last case.

At the close of the plaintiffs' case, it was objected, on the part of the defendants, that the plaintiffs had failed to prove the averments traversed by the second and fourth (and seventh and ninth) pleas, viz. that they were ready and willing to buy and to accept and pay for the remainder of the meal, and that they had performed the respective contracts in all things on their part to be performed; for that they could not be ready and willing to receive the meal, nor could they perform the contract, without sending out one ship to receive the quantity mentioned in each contract.

The learned judge overruled the objections, but re-**[158]**-served to the defendants leave to move to enter a verdict for them upon those issues; and the jury found for the plaintiffs upon all the issues; answering in the negative these two questions,—first, whether, supposing the defendants not bound to have the goods ready before the arrival of the vessels, they had loaded them within a reasonable time after their arrival,—secondly, whether, supposing the reasonable time to run from the day when the vessels were declared ready to load, the defendants had loaded them within such reasonable time.

Byles, Serjt., now moved for a rule nisi accordingly. The plaintiffs in their declaration allege precise performance of the contracts as set out. They were, therefore, bound to prove performance as alleged. It clearly was no performance of the contract,—which speaks of "the vessel," and "the bill of lading," in the singular number,—to send out three vessels, to arrive at Cronstadt at different times. The evidence is, that the parties were performing a contract totally inconsistent with the contracts alleged in the declaration. This is not the case of a contract rescinded by mutual consent. Having been in part performed, the parties could not be placed in statu quo. The plaintiffs, therefore, are clearly not entitled to a verdict on the third count: *Hunt* v. *Silk* (5 East, 449, 2 J. P. Smith, 15); *Taylor* v. *Hare* (1 N. R. 260): *Beed* v. *Blandford* (2 Y. & J. 278).

Maule, J. With respect to the case of *Meniaeff* v. *Reade*, the court has already expressed a strong opinion that the nonsuit was right, inasmuch as there was no allegation in the declaration, that, before the **[159]** performance of any part of the contracts, it was agreed that the two should constitute one. It certainly is quite possible that the parties might have so contracted: but there is a total absence of evidence to shew that they have done so. The obvious inconvenience of such an arrangement, affords strong ground for thinking that none such was made. The words "before performance" are most material. It is quite clear there was no such agreement before the performance. I therefore think the lord chief justice was bound to nonsuit the plaintiffs.

As to the second action,—*Reade* v. *Meniaeff*,—which is brought by the buyers against the sellers, the main point upon which the rule was asked for is, that the plaintiffs did not shew that they were ready and willing to accept and to pay for the meal. It does not appear to me that there was any evidence of that. One of the pleas was, that the plaintiffs were not ready and willing to receive and to pay for the meal; another was, that they had not performed the agreement in all things on their part to be performed. The latter plea is the one upon which the defendants mainly relied. It appears that the plaintiffs sent out three ships to Cronstadt, and were ready to receive the meal on board; and there was nothing to shew that they were not perfectly ready to accept the bills pursuant to the contract. The question upon both pleas turns mainly upon the meaning of the contract,—whether the plaintiffs could perform all that they were bound to do by way of condition precedent, without sending out one vessel to receive the quantity of meal mentioned in each contract. The contracts were to this effect:—"Sold for P. Meniaeff & Son, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition when shipped, at 8l. 7s. 6d. per ton, free on board at Cronstadt. Ship-**[160]**-ment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt. The sellers, if required by the buyers, to take up ship-room at St. Petersburgh, at the current rate of freight, for account of the buyers: to be paid for by the buyers' acceptance of the sellers', or agent's, drafts, one third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of the bill of lading, on handing the same. But, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a ship by that date, then the sellers should be at liberty to draw for the remainder, as specified above," &c. The contract for the 350 tons was in similar terms.

Now, these are mercantile contracts between two dealers, for the shipment of goods from a foreign port. The substance of the contracts is, I think, this,—that 250 and 350 tons of meal respectively were to be shipped at Cronstadt, for Reade & Co. The defendants were to put it on board at Cronstadt: and, further, if required, were to take up ship-room at St. Petersburgh, at the current rate of freight. That is a stipulation for the benefit of the buyers. The buyers were to pay for the meal, one third by acceptance at three months from the date of the contract (which has been done), and the residue by acceptance at three months from the date of the bill of lading, on handing the same. There is no stipulation here, on the part of the buyers, that they will send a ship, or any thing of the kind. But for an expression I will presently advert to, the effect would be, that the buyers might point out any reasonable mode of shipping the goods they pleased,—whether in one ship or in more. That would have been beyond doubt, if, in speaking of the mode of payment, **[161]** the contract had not said that the residue was to be paid for by acceptance at three months from the date of the bill of lading,—and, further, that, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a ship by that date, then the sellers should be at liberty to draw for the remainder as specified above. That is, if the buyers do not send a ship in time, or the sellers cannot engage ship-room at St. Petersburgh, the latter were to draw for the balance, although the meal should not have been shipped. There is no agreement, in terms, that the plaintiffs shall send out a vessel. The use of the words "the vessel," and "the bill of lading," may be considered reasonably to shew that the parties contemplated that the plaintiff would send out one ship only to receive the quantity mentioned in each contract. That being the probable state of things they contemplated (but did not stipulate for), they in terms provide for that mode of performance. It seems to me, however, that we should be giving an undue degree of narrowness to the construction of a contract of this sort, if we were to hold the buyers bound to adopt that mode of performance as a condition precedent to their right to maintain an action against the sellers for a breach of the contract on their part. The true construction seems to me to be this,—the parties, contemplating a certain mode of performing the contract, have pointed out how the payment is to be made in that event; but they leave the mode of payment, in case of performance of the contract in any other way, unprovided for, except so far as an analogy may be drawn from that which is provided. The substance of the contract is, that the one party shall deliver certain meal, and the other shall pay for it. Contracts of this sort would be expanded to a most unreasonable and inconvenient length, if they affected to provide specifically **[162]** for every possible contingency, and for every possible mode of performance. The practice is,—and it might be illustrated by some cases that have lately been before this court (*a*),—to point out precisely what is to be done on the one side, and then to stipulate or provide for the most probable mode of performance on the other; leaving other ways of performing the contract unprovided for, and to be settled as the case might happen. In all probability the parties here did not anticipate any dispute or difficulty as to the mode of payment. If the construction I suggest be the true one,—and I have no doubt it is,—the circumstance of a single ship not having been sent to receive the meal which was the subject-matter of each contract, does not shew that there has been a failure of performance of any thing that ought to have been performed by the plaintiffs: there is, therefore, no inconsistency in saying that the plaintiffs have performed the contract in all things on their part, although they sent three ships, no one of which was of capacity sufficient to take on board the entire subject-matter of each contract. I therefore think that the verdict on these two issues was properly entered for the plaintiffs.

CRESSWELL, J. I am entirely of the same opinion. With respect to the first action, of *Meniaeff* v. *Reade*, there was no evidence of any agreement, before performance of any part of the contracts, that the two should be treated and considered as one. I therefore think the nonsuit was right.

As to the second action,—there was no express bargain between the parties that one ship, and one ship only, should be sent to Cronstadt, to receive the quantity of meal comprised in each contract. The whole **[163]** argument arises from the use of the words "ship" and "bill of lading," in the singular number. We may infer, that, at the time of entering into the contracts, the parties contemplated that one ship only should receive each lot; but not that the plaintiffs contracted, as a condition precedent, that this should be done. I think there was abundant evidence that the plaintiffs were ready and willing to perform the contracts in all that they were bound to perform.

V. WILLIAMS, J. I am of the same opinion. In the first action, the nonsuit was clearly right. As to the second, the defendants had not courage to plead directly that the plaintiffs sent three ships instead of two; but they plead, amongst other things, that the plaintiffs were not ready and willing to buy and accept and pay for the remainder of the meal,—and that the plaintiffs have not performed their contract and promise in all things on their part to be performed. It appears to me that the plaintiffs were ready and willing, and that they did in substance perform the contract in all respects; and therefore that they are entitled to the verdict upon those two issues.

WILDE, C. J. It is very satisfactory to find that the legal construction of the contracts, is in accordance with that which the parties themselves had put upon them.

(*a*) See *Cockburn* v. *Alexander*, ante, vol. vi. p. 791.

I concur with the rest of the court in thinking that the conclusion arrived at in each case, was correct.

Rules refused.

[164] HOARE, a Pauper, *v.* DICKSON. Jan. 27, 1849.

[S. C. 6 D. & L. 577; 18 L. J. C. P. 158. Referred to, *Cobbett* v. *Warner*, 1866, L. R. 2 Q. B. 110; *Morton* v. *Palmer*, 1882, 9 Q. B. D. 92; *Bywater* v. *Dunne*, 1883, 10 L. R. Ir. 383.]

Where the plaintiff in an action of slander had been nonsuited upon the merits, and afterwards brought a second action against the defendant substantially for the same supposed cause of action, though slightly varying the words charged to have been spoken,—the court stayed the proceedings in the second action, until the costs of the first should have been paid.

In the year 1838, the plaintiff, who represented herself to be the daughter of a naval officer, became an applicant to the Royal Naval Benevolent Society, for pecuniary relief, which she received upon several occasions, down to the year 1844. The defendant, Captain Dickson, was secretary to the society, and, upon his reporting to them the result of inquiries he had made into the character and circumstances of the plaintiff, a resolution was come to, declaring her to be undeserving of further relief. At the instance of the plaintiff, a special committee was appointed to inquire into her claims upon the society; and the result was, that that committee, through their chairman, Captain Dickinson, reported to the society that she was not a fit object for relief.

In the year 1847, the plaintiff commenced an action against the defendant, for alleged slander, the declaration in which contained eight counts. The words charged in the first count were, "I have received letters from her brother, saying she is a wicked and abandoned woman,"—in the second, "she is an improper character, an impostor, and swindler,"—in the third, "you are an impostor,"—in the fourth, "she has caused a report of her death to be circulated, and has procured a subscription for her supposed funeral,"—in the fifth, "she pretended herself to be dead, and caused a bill to be made out for her supposed funeral expenses, which bill I paid to a party whom (sic) I ultimately discovered had handed the money over to her,"—in the sixth, "she is an abandoned and wicked creature." The seventh count stated, that, before and **[165]** at the time of the committing of the grievance by the defendant as thereinafter next mentioned, a certain benevolent society, to wit, the Royal Naval Benevolent Society, had been and was established, for the relief of the distressed widows and children of deceased naval officers; and that the plaintiff, before and at the time of the committing of the grievances by the defendant as thereinafter next mentioned, was a recipient of pecuniary relief from the said society; yet that the defendant, well knowing the premises, but further contriving to injure the plaintiff, afterwards, to wit, on, &c., in a certain other discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of relief as aforesaid, in the presence and hearing of divers other good and worthy subjects of this realm, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient as aforesaid, these other false, scandalous, malicious, and defamatory words following, that is to say, "she (meaning the plaintiff) keeps an elegantly furnished bawdy-house, and, when she (meaning the plaintiff) either wants money, or for her (meaning the plaintiff's) reputation's sake, she (meaning the plaintiff) goes into lodgings, and applies to the society (meaning the said Royal Naval Benevolent Society) for relief." In the eighth count, the words charged were, "She is an unprincipled person, and her character is so bad that she can get no situation." The declaration then alleged for special damage, that, "by means of which said several premises, the said benevolent society, to wit, the Royal Naval Benevolent Society, wholly refused to make to the plaintiff divers charitable gifts which they might, **[166]** and otherwise would, have done, and which the plaintiff during all the time aforesaid was, and continued to be, greatly in need of; and also, by means of the premises, the Rev. W. V. wholly refused to employ the plaintiff, which he might and otherwise would have done, for profit and reward to the plaintiff in that behalf, or to have any dealings, transactions, acquaintance, or discourse with her, and thereby the plaintiff lost, and was prevented from acquiring, divers great gains and profits which she might and otherwise would have thereby acquired; and also, by means of the premises, one Mrs. W., whose christian name was unknown to the plaintiff, with whom the plaintiff had theretofore lodged, wholly refused any longer to lodge the plaintiff, and forced and compelled her to leave, and cease to lodge in, the house of the said Mrs. W.; and the plaintiff was and is, by means of the premises, otherwise greatly injured, &c.

To this declaration, the defendant pleaded,—first, not guilty,—secondly, that the said Benevolent Society did not, by reason of the committing of the said supposed grievances by the defendant, or of any or either of them, refuse to make to the plaintiff the said charitable gifts, or any or either of them; nor did the said Rev. W. V. wholly refuse to employ the plaintiff, or to have any dealings, transactions, acquaintance, or discourse with her, nor did Mrs. W. refuse any longer to lodge the plaintiff, or force or compel her to leave, or cease to lodge in, the house of the said Mrs. W., in manner and form as in the declaration alleged,—thirdly, that the said several causes of action in the declaration mentioned did not, nor did any or either of them, accrue at any time within two years next before the commencement of this suit, &c. Upon which pleas issue was joined.

The cause came on for trial, at the summer assizes for **[167]** Surrey, in 1847, before Parke, B. During the progress of the plaintiff's case, the jury (a special jury) expressed so strong an opinion,—in which the learned judge coincided,—that there was no ground for the action, that the plaintiff's counsel consented to be nonsuited.

The defendant's costs were afterwards taxed at 408l. 10s.

On the 12th of January, 1848, the plaintiff commenced a second action of slander against the defendant, suing in formâ pauperis.

The declaration in the second action alleged, by way of inducement, "that the plaintiff, before and at the time of the committing by the defendant of the several grievances thereinafter mentioned, was the orphan daughter of Nicholas Hoare, deceased, who in his lifetime had been a lieutenant in the Royal navy; that the plaintiff, before and at the time of the committing by the defendant of the said grievances, had been, was, and continued to be, poor and in distressed circumstances; that a certain benevolent society, called, to wit, the Royal Naval Benevolent Society, before the time of the committing by the defendant of the said grievances, or any of them, had been and then was, and continued established for the relief of distressed widows and children of deceased naval officers; that the plaintiff had theretofore, and before and at the said time when, &c., been, and then was, a recipient of pecuniary relief from the funds of the said society; that the plaintiff, before and at the said time when, &c., was an applicant for pecuniary relief to the said society; that the plaintiff, before and at the said time when, &c., had been and was a person of good name, credit, and reputation, and deservedly enjoyed the respect, esteem, and good opinion of divers persons and all her neighbours and acquaintance to whom she was in any wise known, and **[168]** had always behaved and conducted herself in a moral, truthful, and virtuous manner, and had never been guilty, or, until the said time when, &c., suspected, of immorality, fraud, imposture, or falsehood." The declaration then proceeded to allege that the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff, and to bring her into public scandal, infamy, and disgrace with and amongst all her neighbours, friends, and acquaintance, &c., and to lose their countenance, hospitality, and friendship, which she had theretofore and then enjoyed, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been guilty of immorality, fraud, imposture, and falsehood, and to vex, harass, impoverish, and wholly to ruin the plaintiff, theretofore, to wit, on the 10th of July, 1845, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of pecuniary relief as aforesaid, and of and concerning the plaintiff as such applicant for pecuniary relief as aforesaid, and of and concerning the premises, in the presence and hearing of divers persons of this realm, then, in the presence and hearing of those persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of pecuniary relief as aforesaid, and of and concerning the plaintiff as such applicant for pecuniary relief as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, &c. The words charged in the first count were, "she is an abandoned woman, a vitiated character, an impostor, unworthy of belief, and deserted by her friends,"—in the second, "she keeps an elegantly furnished bawdy-house, and, when **[169]** she either wants money, or for her reputation's sake, she goes into lodgings, and applies to the society for relief,"—in the third, "she has caused a report of her death to be circulated, and has procured a subscription for her supposed funeral,"—in the fourth, "she obtains money in an improper way," innuendo, by prostitution,—in the fifth, "she has been living in an improper family," innuendo, that she had lived with a family who kept a house of ill-fame,—in the sixth, "Hoare is her name, and that (meaning a whore) is her profession," alleging the words to have been spoken in the presence of one P. S., and with intent to injure the plaintiff in his estimation,—in the seventh, "she is an unprincipled and dangerous woman, and the greatest liar on the face of the earth,"—in the eighth, "she is an unprincipled person, and her character is so bad that she can get no situation, because that her character will not bear investigation,"—in the ninth, "I have seen a letter from her brother, and she is, in consequence of her wickedness, abandoned by her family,"—and in the tenth, "she is a person of vitiated character, an unprincipled woman; and she holds deistical opinions; and she is an adventurer, a thorough impostor; and her wickedness and extravagance are unbounded; and she has applied to every branch of her family, but in vain." The special damage alleged was, amongst other things, as follows:—that, "by means of the premises, the plaintiff had been and was prevented and hindered from printing and publishing a certain religious work, written by the plaintiff, entitled 'Fear not, being a humble endeavour to simplify and impress the gracious promises of Divine aid to the believer, as conveyed by those two words, in numerous parts of Holy Scripture,' and also a certain other religious work, in four volumes, written by the plaintiff, entitled 'Thoughts on the Litany,' which she might and otherwise would **[170]** have done, for profit and reward to the plaintiff in that behalf; and the plaintiff was and is thereby prevented from acquiring divers great gains and profits which she might, and otherwise would, have thereby acquired," &c.

Shee, Serjt., in Michaelmas term last,—upon affidavits stating that both this and the previous action arose out of the plaintiff's said applications to the Royal Naval Benevolent Society for relief; that the plaintiff had no meritorious cause of action against the defendant, but that she was only resorting to legal proceedings against him for the purpose of harassing and annoying him; that she had adopted a similar course of annoyance against Captain Dickinson, that no part of the costs of the former action had ever been paid by the plaintiff, but the whole of them remained due from the plaintiff to the defendant; that the alleged causes of action in this cause mentioned, each and every of them, if any such causes of action existed, accrued to the plaintiff before the commencement of the first action; and that the alleged causes of action in the first, second, third, eighth, and ninth counts of the declaration in this cause, were substantially the same causes of action for which the said former action was brought,—moved for a rule calling upon the defendant to shew cause why all further proceedings in this cause should not be stayed, until the costs of the former action had been paid, on the ground that the proceeding was vexatious. He referred to *Melchart* v. *Halsey* (3 Wils. 149, 2 W. Black. 741). There, the plaintiffs brought an action upon the case in the King's Bench against the defendants, upon a contract made between the plaintiffs and the testator of the defendants, for forage found and provided by the plaintiffs for the **[171]** British troops in Germany, in the last war, at the instance and request of the testator, to the amount of 10,000l., which action was tried before Lord Mansfield, at the sittings after Easter term, 1770, when his lordship being of opinion, upon the evidence then given, that the contract was made upon public faith and the credit of the government, and not upon the credit of the testator of the defendants, the plaintiffs were nonsuited. In Trinity term, the plaintiffs moved for a new trial, which was refused, the whole court being of opinion, upon Lord Mansfield's report, that the contract was made upon the credit of the government, and not of the testator of the defendants. In Michaelmas term, 1771, the plaintiffs brought another action upon the case against the defendants, and declared upon the very same contract, and also filed a bill in Chancery. Upon a motion to stay the proceedings in the second action, until the costs of the former action were paid, on the grounds—that the plaintiffs were foreigners, residing in Germany, out of the reach of the process of the courts here—and that the second action was vexatious,—Lord Chief Justice De Grey said: "If the court can be warranted by law to make this rule absolute, they ought to do it: the rule in *Lord Biron's case* (1 Vent. 100) was made upon this ground, that the second action was alleged to be vexatious, and shews that the court would have interposed in that case, if, upon shewing cause, it had been sufficiently made appear to the court that it was brought for vexation. By the case in Lord Raymond (*Bass* v. *Firmen*, 1 Ld. Raym. 697), it seems to me the court would there have interposed, if the plaintiff had been nonsuited upon the merits at the trial. The case of *Gravenor* v. *Cape* (Easter, 9 G. 3, C. B.) was well considered by the late Lord Chief Justice Wilmot and the **[172]** court, and the rule was made absolute upon this ground, viz. that they were of opinion the second action was vexatious; therefore, if this second action be vexatious, we are sufficiently warranted by law and precedent, to interpose and make this rule absolute. It appears to the court by affidavit, that the former action hath been fairly tried before Lord Mansfield, that the whole merits of the case were entered into and discussed at the trial, that his lordship was of opinion the contract was made upon public faith and the credit of government, and not upon the credit of the testator of the defendants; that, upon a motion for a new trial, the whole court of B. R. were of the same opinion, and refused to grant a new trial; that the costs of the nonsuit have been taxed at 48l. 10s., which (though demanded) have not been paid to the defendants or their attorney, by the plaintiffs or their attorney, which by law ought to be paid; that the plaintiffs have delivered a declaration upon the very same contract, that they have not produced any affidavit to shew the court that they have any new case to make upon this second action, nor indeed have they produced any affidavit at all; so that we must take it for granted that no new case can be made upon a second trial; but it must be determined by the jury upon the same evidence which has already been given at the former trial: I am, therefore, of opinion that the plaintiffs ought to be content with the judgment of B. R., and that the present action is vexatious, and upon that ground only, proceedings therein ought to stay until the plaintiffs pay the costs taxed upon the nonsuit. I would have it understood that I lay the matter of the plaintiffs being foreigners, quite out of the case, and think the rule ought to be made absolute for this reason only, viz. because the present action is vexatious." Gould, J., said: "I am entirely of the same opinion with my lord chief justice, that the court ought **[173]** to make this rule absolute. The old law points out this to the court as a duty: the statute of Marlebridge, 52 H. 3, c. 6. Lord Coke, in his comment thereon (2 Inst. 112), says, there is no greater injustice 'than when, under colour of justice, injury is done:' that multi litigant in foro, non ut aliquid lucrentur, sed ut vexent alios, &c. Although the court will not oblige a foreigner to give security for costs, yet, where he has had the merits tried and determined against him, and will not do justice by paying the costs, he becomes vexatious by bringing a second action to try the same matter; and, for that reason alone, I think the rule ought to be absolute: I lay the circumstance of the plaintiffs' being foreigners, quite out of the case." And Blackstone, J., said: "I lay plaintiffs being foreigners out of the case, and am exactly of the same opinion with my lord and my brother Gould. I will say one thing for myself only,—that I think, in all cases where the merits have been tried, plaintiffs should not be permitted to commence a second action to try the same matter, before costs paid in the first: but this is not now before the court; vexation is now the single point we determine upon."

A rule nisi having been granted,

S. Carter now shewed cause, upon affidavits by the plaintiff and her attorney, stating that the alleged causes of action in the first, fourth, fifth, sixth, seventh, ninth, and tenth counts of the declaration in this cause, were not the same, but were different to the causes of action for which the former action was brought; and that the costs of the former action had been fully paid or satisfied to the defendant or his attorneys, by the Royal Naval Benevolent Society, and that no part of the same was due or owing to the defendant or his attorneys from **[174]** the plaintiff. It may be conceded that the court has power to interfere summarily to prevent an abuse of its process: and there are cases where proceedings have been stayed until payment of costs of a former action between the same parties, founded upon the same subject-matter of complaint: *Weston* v. *Withers* (2 T. R. 511); *Liversidge* v. *Goode* (2 Dowl. P. C. 141); *Haigh* v. *Paris* (16 Law Journ., N. S., Exch. 511). But, in those cases, as in *Melchart* v. *Halsey*, the plaintiff had clearly acted vexatiously. In *Harrington* v. *Johnson* (Cowp. 744), in a qui tam action, for insuring lottery tickets, contrary to the statute 16 G. 3, c. 34, the court refused to stay the proceedings, upon an affidavit of the defendant, that a former action had been brought against him in the Common Pleas for the same offence, in which he had leave to compound. So, in *Cooke* v. *Dobree* (1 H. Black. 10), the court refused to stay proceedings against the defendant, until the debts and costs recovered by him in a former action against the plaintiff, were paid. In *Dawson* v. *Sampson* (2 Chitt. Rep. 146), the defendant was arrested at the suit of the plaintiff, who, becoming bankrupt, the proceedings were dropped, and the assignees having again arrested the defendant, the proceedings were set aside, the chancellor having superseded the commission; but, a fresh commission having issued, and another set of assignees being chosen, they arrested the defendant again, and were proceeding in the action. The court refused to stay the proceedings, until the costs of the proceedings at the suit of the first set of assignees were paid. [Maule, J. The parties there were not identical.] In *Doe d. Rees* v. *Thomas* (2 B. & C. 622, 4 D. & R. 145), the court say that "the rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible." [Maule, J. **[175]** The circumstances of that case were very peculiar.] In *Bearen* v. *Robins* (8 D. & R. 42), the plaintiff, being nonsuited, was taken in execution by the defendant for the costs, and, whilst in execution, brought another action for the same cause,—the court refused to stay further proceedings in the second, until the costs of the first action were paid. In *Dicas* v. *Jay* (6 Bingh. 519, 4 M. & P. 285), the plaintiff had sued the defendant for negligence, per quod the plaintiff became liable to pay certain sums, and lost the custom of A., B., and C. The cause was referred, under an order of nisi prius, by which the plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of the plaintiff, who, nevertheless, sued the defendant again, the new declaration differing from the old one, in stating that the plaintiff had paid the money he before alleged himself liable to pay, and had lost the custom of D., E., and F. This court refused to stay the proceedings in the second action. In *Yates* v. *The Dublin Steam-Packet Company* (6 M. & W. 77), which was an action by the owners of goods which were on board a vessel, and were lost by a collision with the defendants' vessel, the jury having found a verdict for the defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record: and the court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated, on affidavit, that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other;—the judge being satisfied with the verdict. And in *Wade* v. *Simeon* (ante, vol. i. p. 610), an action by A. against B., to recover **[176]** the amount of two cheques and interest, being at issue in the Exchequer, and the trial appointed for the 7th of December, a negotiation took place between the attorneys on the 6th, when it was arranged, that the record should be withdrawn, and that B. should submit to a judge's order for payment of the amount claimed on the 14th, otherwise judgment, and that certain proceedings in Chancery taken by B. against A. should be withdrawn. An order was accordingly drawn up and served. B. subsequently discovering evidence which he conceived would enable him to substantiate his defence to the action, obtained a rule to set aside the judge's order, upon payment of costs. Those costs were taxed, and paid to A., who afterwards brought an action in this court against B., for breach of the agreement under which the judge's order was drawn up. The court, on motion, refused to stay the proceedings in the second action,—considering that it was not founded upon the same cause of action as the first. Tindal, C. J., in the course of the argument, observes: "We must not, on light grounds, deprive a plaintiff of his common law right of trying his action." [Maule, J. Can you find any case where a second action has been allowed to proceed, after a decision upon the merits has been had and acquiesced in?] There was no decision upon the merits here. The plaintiff was nonsuited. [Maule, J. Not upon a technical objection. Can you shew that the second action is not vexatious?] The court will not assume that it is vexatious. The plaintiff may reasonably desire to rescue her character from the calumnious aspersions that have been cast upon it. The plaintiff's own affidavit shews, that, as to several of the counts at least, the cause of action is different.

Shee, Serjt., and Lush, who were to have supported the rule, were stopped by the court.

[177] Wilde, C. J. The principle upon which this case must be decided is, I believe, perfectly well recognised in all the courts. Where a party has brought an action, and has had an opportunity of trying that action upon the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for the same cause, leaving the costs of the first action unpaid,—the court will interpose its authority to prevent him from so harassing his opponent. The facts appear to be these:—The defendant was the secretary of a charitable institution called the Royal Naval Benevolent Society. The plaintiff, who represents herself to be the daughter of a deceased naval officer, and as such a proper object for relief, had applied to the society for assistance. The defendant, whose duty it was to make inquiry as to the character and means of such applicants, in the course of such inquiry obtained information which induced the society to withhold from the plaintiff the relief she sought. The plaintiff thereupon brought an action of slander against the defendant, in respect of the representations so made by him in his character of secretary to the society. The cause went down to trial, and the plaintiff's case was heard at some length, and ultimately her counsel consented to a nonsuit,—not upon any technical ground, but on the merits, and from a conviction, from which it was impossible to escape, that the plaintiff could not establish her right to a verdict. In his defence, it appears, the defendant has incurred costs to the amount of 408l. 10s, an amount sufficient to ruin many persons. The plaintiff has not paid these costs; but she has, nevertheless, commenced a second action against the defendant, which upon the face of the declaration evidently appears to be founded substantially upon the same supposed cause of action, and the object of which can only be to harass and annoy the defendant, **[178]** and to put him to further expense. It is said the causes of action in the two cases are not identically the same, and therefore that the court has not power to interfere. It is true that some of the counts in the new declaration charge the defendant with having spoken words slightly differing from those charged in the former action. How easy it is in an action of this sort,—and especially where the plaintiff's object is such as is here suggested,—so to vary the words as to make that which is in reality the same, appear to be a new cause of action. We must, however, form a reasonable judgment, from the whole of the surrounding circumstances, whether the difference is substantial or merely colourable. No facts are laid before us, on the part of the plaintiff, to induce us to believe that she has any cause of action that did not exist at the time of the former declaration. And, on the other hand, we have the defendant's affidavit, which states that all the words alleged to have been spoken by him, if spoken at all, were spoken before the commencement of the first action. If, therefore, any part of the slander charged in the second declaration does differ from that charged in the first, there is no reason why it should not have formed part of the declaration in the first action. It appears to me that this action is substantially brought for the same cause as the former; and that the defendant, who has already been subjected to so large an outlay for costs, ought not to be further harassed,—particularly by an opponent, who, suing in formâ pauperis, herself incurs no expense.

It is said that the costs of the former action have been paid by the Royal Naval Benevolent Society. Suppose they have; that is not a payment made on behalf of the plaintiff, but merely to relieve an officer who has incurred them in the course of the due discharge of the duties of his office as secretary. As **[179]** between the plaintiff and the defendant, the costs have not been paid.

The rest of the court concurring,

Rule absolute (*a*).

Turquand and Others, Assignees of Peter Claussen, a Bankrupt, *v.* Hennet
Jan. 30, 1849.

Upon a demand of oyer of a deed prolat. in curiam by the plaintiffs, their attorney delivered to the defendant's attorney a copy of the deed, with erasures and alterations in red ink, as they appeared on the face of the deed, although such alterations

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(*a*) Upon a similar application made in a second action of slander brought by the same plaintiff against Captain Dickinson, for words alleged to have been spoken by him under the same circumstances as are stated above, a similar rule was pronounced.

had been made without authority. The defendant thereupon set out the deed in his plea, as altered:—The court refused to set aside the plea, but allowed the plaintiff to re-deliver oyer, in such form as he might be advised, on payment of costs.

This was an action of debt upon an indenture. Before the delivery of the declaration, the defendant's attorneys applied to the plaintiffs' attorneys for a copy of the indenture, and the latter accordingly delivered to the former a copy with alterations in red ink (precisely as they appeared in the original deed), which alterations were alleged by the defendant's attorneys, to have been made in the indenture after its execution by his client. This the plaintiffs' attorneys admitted; but they insisted, that, as these alterations had been made without the knowledge of the bankrupt, the plaintiffs were not bound or prejudiced thereby, but were entitled to treat the indenture as if it had not been altered.

The declaration was delivered on the 18th of April last. On the 20th of May, the defendant demanded **[180]** oyer and a copy of the indenture, when it was agreed between the respective attorneys that the copy so as aforesaid delivered, should be considered as delivered pursuant to the demand of oyer. The defendant pleaded on the 5th of June, setting forth the indenture, not in the words in which it stood when executed, but as it read with the alterations. The plaintiffs' attorneys thereupon wrote to the defendant's attorneys, as follows:—

"We beg to give you notice, that, in setting out in the pleas the indenture between the bankrupt and the defendant and others, you have, as we are advised by counsel, set it out incorrectly. If you have done so in consequence of the copy delivered to you shewing the red ink alterations which so appear upon the deed, we beg to inform you that the true copy is in the original black ink, and that you are at liberty to rectify the pleas accordingly; the parts in red ink having been given to you to shew the true state of the paper. We, therefore, now apply to you to alter the oyer; and, unless you do so, we shall treat the pleas as setting out the deed falsely."

To this, the defendant's attorneys replied, that they had conferred with counsel on the subject, and were advised, that, having set out the indenture in the pleas as delivered on demand of oyer, no alteration ought to be assented to by them.

Bramwell, for the plaintiffs, on the 22nd of November last, moved for a rule calling upon the defendants to shew cause why this plea should not be set aside, or why the setting out of the deed on oyer should not be amended, with costs. It clearly cannot be right to set out the deed as altered. [Coltman, J. If the defendant has not properly set out the deed on oyer, is not the proper course, for the plaintiffs to pray that the deed may be inrolled, and then set it out truly?] In 1 Wms. **[181]** Saund. 9 c. (6th edition), it is said; "If the defendant, after craving oyer of a deed, do not set forth the whole deed, or misrecite it, the plaintiff may either sign judgment as for want of a plea,—*Wallace* v. *The Duchess of Cumberland* (4 T. R. 370. But see 3 M. & R. 86, n.),—or he may, by his replication, pray that the deed may be inrolled, and procure it to be truly inrolled, and demur: Com. Dig. Pleader (P. 1). See *Ferguson* v. *Mackreth* (4 T. R. 370, n. (*b*)). For, by craving oyer, the defendant undertakes to set out the whole; the distinction being, that, where a party, having craved oyer of a deed or other instrument, does upon such oyer misrecite it, the other side may relieve himself, by praying that the deed, &c., may be inrolled in hæc verba; but, where a person who is bound to set out a deed or other instrument (as, in the case of a bond conditioned for performance of covenants contained in an indenture), sets it out with a profert, and misrecites it, the other side may relieve himself by praying oyer of the deed or other instrument, and setting it out in hæc verba: *Ferguson* v. *Mackreth*; *Stibbs* v. *Clough*" (1 Stra. 227). Referring to Comyns's Digest, it will be found that this rests upon the following passage,—for which no authority is cited,—"If the defendant demands oyer of a deed, which is granted, and in his plea recites the deed different from the true deed, the plaintiff, by his replication, may pray that the deed may be inrolled, and so procure it to be truly inrolled." [Maule, J. Lord Chief Baron Comyns is generally esteemed no mean authority. The matter was recently discussed here in a case of *Kepp* v. *Wiggett* (ante, vol. vi. p. 280).] It is difficult to see how the statement in Comyns can be correct. Upon a demand of oyer, the deed is supposed to be read in court by the officer. How, in reading it, is the officer to convey a notion of an erasure **[182]** by drawing the pen through a part, or of an insertion in red ink? [Maule, J. In the same page of Comyns to which you refer, it is said: "If a man craves oyer of a deed shewn in a declaration, which is granted, the other cannot say that the deed read is not the same on which he declared; for, the reading is the act of the party himself, by which he is concluded (*a*)[1]. If a party undertake to set out a deed on oyer, he must set forth the whole of it, recital and all; if he omit any part, either the court will quash the plea, or the other side may sign judgment (*b*). Where there is any variance between the letters of administration set forth in the declaration, and the letters, &c., actually granted under the seal of the spiritual court; if the defendant will take advantage thereof, he must crave oyer thereof before the rule to plead is out, must set the same out on record, and demur for the variance (*c*). Otherwise, if oyer is demanded of a writ, &c., he may say that it is not the same; for, the reading is the act of the court. Per three justices (*d*), Tracy, contrà" (*a*)[1]. [V. Williams, J. It was stated in argument in *Newton* v. *Wilmot* (8 M. & W. 720), that, "in the case of an omission to set out the whole of the deed upon oyer, the plaintiff may pray that the deed may be inrolled, and may then demur generally for the variance between the deed as inrolled, and the deed as appearing upon oyer:" and nobody seems to have doubted it. Cresswell, J. The plea appears to have been quashed in *Wallace* v. *The Duchess of Cumberland* (*g*).] In that case, as well as in *Ferguson* v. *Mackreth*, the decision proceeded upon the **[183]** ground that the defendant had been guilty of misconduct; and therefore they are not, perhaps, very much to the purpose. If we adopt the course suggested,—that of praying inrolment,—the defendant will come to the court to have our inrolment set aside; and so the question must ultimately be disposed of on motion.

A rule nisi having been granted,

Hindmarch and Hugh Hill now shewed cause. This is not a case in which the defendant has falsely set out the deed on oyer. He has, in fact, set it out correctly, according to the copy furnished by the plaintiffs themselves. He has set out all that the officer of the court is supposed to have read to him. He was bound to set it out in its altered form. The granting of oyer is the act of the plaintiffs themselves. In *Simpson* v. *Garside*, in debt on bond, the defendant prayed oyer of the original writ, which was set out, bearing teste the 16th of April, 2 Ann.; whereupon the defendant pleaded, that by the writ and declaration it appeared that the original was sued out before the date of the bond; to this the plaintiff replied, that the writ upon which he declared, was another writ, bearing teste the 7th of May, 2 Ann.: and, upon demurrer "Fuit tenus per le Ch. Justice Trevor, Nevil and Blencow, justices, que le replicat' en ceo case fuit bone; car, le brief esteant file, le lyer de ceo est le act et office del court; et ceo ne prejudicera le pl., ne luy conclude a monstre le voyer brief: et ceo n'est semble al oyer d'un fait; car, le lyer de ceo est le act de pl. mesme; et pur ceo il ne serra admit adire que le fait issint lye al def. n'est le fait sur que il ad count" (*a*)[2]. When the deed is read by the **[184]** officer, it must be read as it stands: that which

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(*a*)[1] *Simpson* v. *Garside*, Lutw. 1644.

(*b*) This position,—for which *Wallace* v. *The Duchess of Cumberland*, 4 T. R. 371, is cited,—is an addition made by a late editor to the text of Lord C. B. Comyns.

(*c*) Also an addition, for which *Garrard* v. *Early*, 2 Wils. 413, is cited.

(*d*) Trevor, C. J., and Nevil and Blencow, JJ. Vide post, 183.

(*g*) Vide 3 M. & R. 86, n.

(*a*)[2] "Mes Justice Tracy fuit d'auter opinion; car, quand le def. pria oyer del brief, et ceo est lye a lui,—come le brief en cest action, ceo est le act del court; et quand ceo est enter sur le record, le pl. ne serra admit adire que ceo n'est le voyer brief en cest action, et issint fauxifie l'act del court. Mes si le brief ust estre misprise, l'attorney pur le pl. sur le delivery del paper-book a luy, duissoit aver ceo rectifie, ou puissoit aver apply al court a ceo rectifier. Mes quand il n'ad ceo fait, mais ad ceo allow et permit ceo d'estre enter sur record in hæc verba, il serra conclude apres adire que ceo ne fuit le voyre brief."

And the reporter adds this—"Nota, que un ne poit demand oyer d'un fait mes durant le temps que ceo est en court, et ceo est per tout le terme en que ceo fuit produce en court: *Wimark's case*, 5 Co. Rep. 74: issint que est autant en le poyar de court a doner oyer d'un fait, come d'une brief. Quære, donc, le reason del difference enter oyer de brief et oyer de fait." A deed brought into court, remains in the hands of the bringer; a writ is in the custody of the court.

is erased forms no part of the deed. Besides, how is the court to try upon affidavit whether certain portions which are struck out do or do not form part of the defendant's deed? [Wilde, C. J. How can we decide whether the alterations were made before or after the execution of the deed by the defendant? If the plaintiffs choose to deliver the deed without the alteration, the defendant will know how to deal with it.] *Longmore* v. *Rogers* (Willes, 288, Barnes, 263) shews that the defendant was entitled to a strict and perfect copy of the instrument, on oyer. [Wilde, C. J. *Wallace* v. *The Duchess of Cumberland* and *Ferguson* v. *Mackreth*, though not authorities exactly in point, shew how strictly a defendant is bound by the copy delivered to him.]

Bramwell, in support of his rule. The case of *Waugh* v. *Bussell* (1 Marsh. 214) shews that the plaintiffs must fail, if they were to go down to trial upon the record as it now stands,—assuming, of course, that the alterations in the deed took place after its execution by the defendant. There, to an action of debt on bond, the defendant prayed oyer of the condition, which was, "for the payment of 100l. by instalments, till the said **[185]** sum of 100l. be paid;" and then pleaded non est factum: the word "hundred" had been omitted in the second place where it occurred in the condition, and was afterwards inserted without the defendant's knowledge: and it was held, that, though this alteration did not avoid the instrument, yet it made such a variance between the oyer and the condition, as precluded the plaintiff from recovering. "When you declare on a deed," says Gibbs, C. J., "you state the legal effect of it; and, as I said before, one might declare without using a word which is contained in the deed, except the names of the parties, and the sum. The defendant, by his plea, asks to look at the instrument by which the plaintiff alleges that he is bound. It is necessary, then, not merely to shew the legal effect, but the very words by which the defendant is bound; and that makes the distinction between the case where the oyer and declaration disagree, and where the statement in the oyer is not supported by the deed itself. You can cite no case where it has been held that a variance between the deed and the oyer is not fatal; the court, therefore, cannot assist you. You had your remedy in your own hands; for, you might have explained the mistake by averments." [Wilde, C. J. It occurs to me that the proper course would be, to allow the plaintiffs to amend the copy delivered by them, as they may be advised.] The defendant here clearly has not adopted the proper course. The doctrine of oyer is thus stated by Mr. Serjeant Stephen (Stephen on Pleading, 5th ed. 73): "When the profert was actually made in open court, the demand of oyer, and the oyer given upon it, took place in the same manner; and the course was, that, on demand by one of the pleaders, the deed was read aloud by the pleader on the other side (*b*)¹. By the present practice, the attorney for the **[186]** party by whom it is demanded, before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer; on which the latter is bound to carry to him the deed (*a*), and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court" (*b*)².

Wilde, C. J. It appears to the court that the circumstances attending the delivery of the copy of the deed in this case, were such that the plaintiffs ought to be at liberty to amend it, on payment of costs; the costs of this motion to be costs in the cause; with liberty to the defendant to plead de novo.

The rule was drawn up as follows:—"That the oyer and the defendant's pleas respectively be set aside, and that the plaintiffs be at liberty to re-deliver oyer as they may be advised, the defendant also being at liberty to plead de novo; that the plaintiffs pay to the defendant all such costs and charges as shall be occasioned or lost to the defendant by the said oyer and pleas being set aside as aforesaid, to be taxed,

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(*b*)¹ Citing, with a semble, Com. Dig. Pleader (P. 1); *Simpson* v. *Garside*, Lutw. 1644. To which the learned serjeant adds: In *Jevons* v. *Harridge*, 1 Sid. 308, the reading of the deed is said to be the act of the court: but the true doctrine is probably that laid down in Lutwyche. The rule seems to have been that writs were read by the court, but deeds by the pleader.

(*a*) Citing *The Archbishop of Canterbury* v. *Tubb*, 3 N. C. 789, 4 Scott, 543.

(*b*)² Citing *Page* v. *Divine*, 2 T. R. 40; 1 Tidd's Practice, 8th edit. 635; 1 Selw. 264; *The Archbishop of Canterbury* v. *Tubb*, ubi supra; *Daly* v. *Mahon*, 4 N. C. 235; 5 Scott, 606; *Smith* v. *Goldsworthy*, 1 Dowl. N. S. 288.

&c., and paid immediately after the defendant shall have so pleaded de [187] novo, or immediately after the sooner discontinuance or other determination of the cause; and that the costs of and occasioned by this application abide the event of the cause" (*a*).

SIR GODFREY WEBSTER, BART., AND DAME CHARLOTTE WEBSTER, *v.* DELAFIELD. Jan. 31, 1849.

[S. C. 6 D. & L. 597; 18 L. J. C. P. 186; 13 Jur. 635.]

Upon an application for a rule or order under the interpleader act, an affidavit by the claimant himself, in support of his claim, is not indispensable. And, semble, per Maule, J., that no affidavit at all is necessary.—The sheriff having seized goods under a fi. fa., a claim was made on behalf of A., who was resident in Paris. Upon an interpleader summons, A.'s attorney made an affidavit, that he had been informed, and, from documents, vouchers, and receipts in his possession, believed, that the goods seized were the bonâ fide property of A.:—Held,—V. Williams, J., dissentiente,—that this was a sufficient maintaining of the claim, to justify the judge (or the court, on the judge's refusal,) in directing an issue.—And it was made part of the rule, that the claimant should give security for costs.

The sheriff having, on the 4th instant, seized, under a writ of fi. fa. issued upon a judgment obtained by the plaintiffs against the defendant, certain furniture and effects upon the premises known as Willow-Bank, Fulham, in the county of Middlesex, a notice of claim was, on the 7th instant, served upon him by the solicitors of one Henry Arthur Webster. The sheriff thereupon made application to a judge at chambers, for protection, under the interpleader act, 1 & 2 W. 4, c. 58, s. 6.

Accordingly, at the return of the summons, the parties attended before Coltman, J., on the 10th, when the solicitor of the claimant produced an affidavit, in which he (the claimant) stated that "he is the absolute [188] owner and proprietor of the mansion-house, &c., called Willow-Bank, at Fulham, and that all the goods, chattels, properties, and effects in and upon the said mansion-house, &c., and now seized and held by the sheriff of Middlesex under and by virtue of a writ of fi. fa. issued in this action, are the absolute property of this deponent, and by him were left in the care and custody of his housekeeper and servants at Willow-Bank, Fulham, aforesaid, when he, this deponent, left England for the continent, in the autumn of last year."

On the part of the execution-creditor, it was objected that this affidavit was not sworn before a competent authority, it having been sworn before the British consul at Paris. The learned judge thereupon adjourned the hearing until the next day.

The parties again attended on the 12th, when an affidavit of Mr. Rickards, the claimant's solicitor, was produced, which stated, that, to the best of the deponent's knowledge, information, and belief, the goods, chattels, and effects levied in this action, were the property of the said Henry Arthur Webster, and not of the defendant; that the title-deeds of the mansion-house, buildings, and premises, in and about which the goods were, were in the deponent's possession; that the same mansion-house and premises were conveyed to the said Henry Arthur Webster in the year 1847, by one General Conyers, with whom the said Henry Arthur Webster had nearly two years previously contracted for the purchase, and were still his property; that, from the nature of the property, a sale by the sheriff would be most injurious; that Henry Arthur Webster left England for the continent, in the autumn of the last year; and that the said mansion-house, furniture, and effects were then left in the possession, care, and custody of the housekeeper and servants of the said Henry Arthur Webster.

Not being satisfied with this affidavit, the learned [189] judge again adjourned the hearing until the 19th, when a second affidavit of Mr. Rickards was produced, stating that he was the attorney of Henry Arthur Webster; that he claimed the said goods, as such attorney, on behalf of the said Henry Arthur Webster; that, from various documents, vouchers, receipts to invoices, and papers belonging to the said Henry Arthur Webster, in the possession of the deponent, he, the deponent, verily

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(*a*) See *Loveland* v. *Knight*, 3 C. & P. 106: *Paine* v. *Emery*, 2 C. M. & R. 304, 5 Tyrwh. 1097, 4 Dowl. P. C. 191; *Ashton* v. *Freestun*, 2 M. & G. 1, 2 Scott, N. R. 273.

believed that the goods so seized by the said sheriff were the bonâ fide property of the said claimant Henry Arthur Webster; that he had made great exertion to obtain a further affidavit from the claimant, but without effect; that he had employed one Smith, an attorney of this court, residing in Paris, to procure from the said Henry Arthur Webster an affidavit duly sworn, but that, for the reasons set forth in a letter which he had received from Smith,—the substance of which was, that, though formerly it had been the practice to swear affidavits in suits pending in our courts before the Juges de Paix, about fifteen years since the then minister of justice had issued a circular to those functionaries, prohibiting them from administering oaths in the case of foreign affidavits, and that the only course was, to send a "commission rogatoire" from the court here to the "Tribunal de Première Instance" of the department of the Seine, to administer the oath,—the deponent verily believed that it was impracticable to obtain such affidavit, and that he had been informed, and believed, that the said Henry Arthur Webster was in such a state of health as not to be able to travel with safety.

The learned judge, after hearing all the parties, made the following order:—

"Upon hearing the attorneys or agents for the plaintiffs, for Arthur Webster, the claimant, and for the sheriff of Middlesex, and upon reading the affidavits **[190]** of E. H. Rickards, of John Baker, of Henry Arthur Webster, and the further affidavit of E. H. Rickards, I do order that the said claimant be barred his claim herein; and that the said sheriff do not proceed to a sale for two days."

M. Smith, on the 20th, moved for a rule nisi to rescind the above order, or for a commission to take the affidavit of the claimant at Paris. He submitted that it was not absolutely essential that the claimant himself should make an affidavit. [Maule, J. The statute does not say that the claimant shall make an affidavit. It has been the practice to do so: but I do not see what authority there is for requiring it, or what power the judge has to bar the claimant merely because he makes no affidavit. Wilde, C. J. Where a party is required to state something in the course of a judicial proceeding, I think it must be understood that the matter shall be authenticated by an oath.] The question is, whether the oath of the claimant himself is indispensable. [Cresswell, J. It seems to have been so held in *Powell* v *Lock* (3 Ad. & E. 315).]

Wilde, C. J. I think there should be a rule nisi. Whether or not an affidavit by the claimant himself is absolutely necessary, I will not at present say. But I think some affidavit, at all events, there must be. Throwing aside Webster's affidavit, it certainly does appear to me that those of Mr. Rickards amount to nothing. I must confess I do not see any good reason why an affidavit upon a matter of this kind should not be sworn before the British consul, as well as in the case of acknowledgments taken under the 3 & 4 W. 4, c. 74.

[191] Maule, J. I think the execution-creditor has a right to the production of proper materials to enable him to form a correct judgment as to the nature of the claim.

Bramwell now shewed cause. The questions for consideration upon this rule, are two,—first, whether any affidavit at all is necessary upon an interpleader summons,—secondly, whether the affidavits that were produced before the learned judge upon this occasion, were sufficient to justify him in directing an issue. By the 1st section of the act, the party making a claim is to be called upon to appear before the court or the judge, and to state the nature and particulars of his claim, and to maintain or relinquish the same. It is important that the claim should be made in an authentic shape; and, unless that be so, there would be no such record of the proceedings as the legislature (by s. 7) seem to have thought necessary. In *Powell* v. *Lock*, the court of Queen's Bench held an affidavit, and an affidavit of the claimant himself, to be necessary. Littledale, J., says: "The act requires the party to appear and state the nature and particulars of his claim. Must not that be on affidavit? Can we take it on the statement of counsel?" [Maule, J. The party is dragged before the judge. It does seem to me a most monstrous thing, to say that his claim, which he has a right to have tried by a jury, should be disposed of by the judge, upon his own affidavit.] The claim is his own voluntary act. [Maule, J. He loses his goods if he abstains from claiming.] Will any statement by any person suffice? [Maule, J. I should think so. By the 3rd section, it is enacted, that, "if such third party (that is, the claimant) shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the **[192]** court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators," &c. And s. 1 enacts that "it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable." Power to bar the claim, if given at all, should be given in express terms. It is one thing to call on the party to state the nature and particulars of his claim; to maintain it, is another.]

Unless the court see clearly, that, in the conclusion he came to, the judge was wrong in point of law, or mistaken in his view of the facts, his decision will not be interfered with. Where the matter is one that is entirely for his discretion, to decide upon the materials that are laid before him, the court must have very strong and convincing reasons before they will disturb the judge's order. The affidavits that were before the judge in this case, are not such as would have sufficed to induce any one of the court to grant an issue, if the matter were now brought before him for the first time. **[193]** [Maule, J. The third party is to "maintain his claim." He is not to prove it; but to state the nature and particulars of it. Is the judge to try the claim by a sort of demurrer?] The judge must have reasonable proof that the claim is well founded; otherwise, the going before him is a mere farce.

M. Smith, in support of his rule. By the 1st and 6th sections, the judge is impowered to call the parties before him. If, upon being served with the rule or summons, the claimant "shall not appear upon such rule or order, to maintain or relinquish his claim," or "shall neglect or refuse to comply with any rule or order to be made after appearance," then it shall be lawful for the court or the judge to declare the claimant barred. Here, the claimant has properly appeared by attorney; and he has not neglected or refused to comply with any rule or order made after appearance. [Maule, J. That means disobedience of either of the three principal orders the court (or judge) is authorised by s. 1 to make, viz. the order to appear and state the nature of the claim, the order directing an issue, and the order for disposing of the merits by consent: the other orders spoken of are orders incidental to these three.] This order, then, does not, upon the face of it,—as it should do; *Harrison* v. *Wright* (13 M. & W. 816, 2 D. & L. 695),—shew that the learned judge had jurisdiction: it does not shew that the claimant did not appear to maintain his claim, or that any order was made which he has disobeyed. [Cresswell, J. It does not appear whether my brother Coltman refused to pay any attention to Mr. Rickards's affidavit, or whether he thought it insufficient.] It does not. But, at all events, it is submitted,—assuming that the judge rightly rejected **[194]** Webster's affidavit (*a*),—the nature and particulars of the claim are sufficiently stated in the other affidavits. It was not the province of the judge to try the validity of the claim. [Maule, J. The party may have a very good claim, and yet may be unable himself to make a positive affidavit.]

Burchell appeared on the part of the sheriff. He submitted that the court ought not simply to rescind the order, as prayed by the rule, for, that would prejudice the sheriff. [Maule, J. You wish us to do what the judge ought to have done, that is, to direct an issue. M. Smith expressed his readiness, on the part of the claimant, to accept an issue.]

Wilde, C. J. Upon the best consideration I am able to give to this case, I think the order of my brother Coltman should be set aside. I found my opinion upon, and am desirous to limit it to, the facts of the particular case. It appears that the

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(*a*) It is somewhat singular that the order is drawn up on reading this rejected affidavit, amongst others. The rule is, of course, drawn up according to the order.

claimant is a gentleman residing in a foreign country, where there are no means at present available for making a proper affidavit. He appears, therefore, before the judge to support his claim, by attorney, who proposes to put in a statement of the claim by his client, which the learned judge declines to receive because not duly authenticated. In the absence of the claimant himself, the only person who can give any information upon the subject, is the attorney; and he accordingly states upon his oath, that, from documents that are in his possession, he verily believes the goods seized to be the property of his client. It may well be, considering **[195]** that the party could not make his claim personally, that the utmost information that could be given is founded upon the attorney's belief arising from an examination of the documents in his possession. Looking, therefore, at all the circumstances of the case, I think the affidavits which were used before the learned judge, should have been deemed sufficient to entitle the claimant to an issue. I therefore think the rule should be made absolute to set aside the order; and that it should be part of the rule, that the parties proceed to the trial of an issue, in which the claimant shall be plaintiff and the execution-creditors defendants, with all the other usual terms.

MAULE, J. I am of the same opinion. The statute no where says that the claim shall be made by affidavit. But, at all events, assuming an affidavit to be necessary, the affidavit here produced was, I conceive, sufficient. This was an application made on behalf of the sheriff, under s. 6: but I do not think the power of the judge to bar the claimant, differs in the case of the sheriff from that of any other person. The 1st section of the statute enacts, that, upon application made by or on the behalf of any defendant,—such application being made after declaration, and before plea, "by affidavit or otherwise," shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct,—it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party **[196]** to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable. The true construction of that clause appears to me to be this: The court or judge is to make an order upon the claimant to appear and state the nature and particulars of his claim. This, it seems to have been held,—though I think that doubtful,—must be by affidavit. He is also to maintain or relinquish his claim. If he fails to appear, or, appearing, relinquishes his claim, he is, by s. 3, to be barred. If the claimant appears and maintains his claim, he is to be made defendant, or the judge is to direct an issue, or, with the consent of the parties, to dispose of the claim upon its merits. The judge has no power to make any other orders than these, except incidental orders, subservient to, and not inconsistent with, the order to try. The 2nd section provides that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them. Then comes the 3rd section, which alone gives the judge or court the power of barring the claimant. It enacts, "that, if **[197]** such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable." That, I conceive, applies only, if the party shall not appear, or, appearing, shall neglect or refuse to comply with any rule or order that shall be made after appearance. So that, the 2nd section having provided for the finality of the summary decision made where the parties consent, the 3rd section provides for the case of non-compliance with an order made by the judge after appearance. Here, there has been no decision by consent upon the merits, and no order after appearance: therefore no case has arisen, in which the judge had power to bar the claimant. That appears to me to be the literal construction of the act; and it is also quite in conformity with the spirit of the act. This act is a substitute for the old proceeding by bill of interpleader in the court of Chancery (Com. Dig. Chancery (3 T.)), in which the object simply was the protection of a disinterested party standing between two hostile claimants. His relief accomplished, the next object was, to leave the rights of the two conflicting parties as nearly as possible as they were before the interpleader. The construction, therefore, which holds that the claimant is to be barred if he makes no affidavit, or if he produces [198] an insufficient affidavit, is evidently contrary to the spirit of the act. At the time of making the claim, the party had a clear and undoubted right to bring an action, and could not be compelled, except in the regular course, to disclose the nature of his claim. To qualify or take away from him any portion of that right, has no tendency to benefit the defendant, who applies for the interpleader. Why, then, should any such difficulty be imposed upon the one party rather than upon the other? The object of the statute was, not to limit or control the common law rights of the suitors, any further than was necessary for the security of the defendant or of the sheriff. But, it may be asked, what is the use of giving power to the court or the judge to make an order, if the party may disobey it with impunity? In answer to that, I say the punishment for such disobedience,—whatever it may be,—is not the forfeiture of his claim. The judge is impowered to call on the claimant to state the nature and particulars of his claim, in order to enable the plaintiff to see whether or not he will persist. The disobedience of the order to appear for that purpose, may possibly influence the judge's discretion as to the costs. That seems to me to be an answer to the suggestion that the enactment would be idle, unless the judge had power to bar the claimant for not appearing and stating the nature and particulars of his claim to his satisfaction. A case of *Powell* v. *Lock* (3 Ad. & E. 315) has been referred to. That was an application to the court for an interpleader. There, no affidavit at all was produced on the part of the claimant. It was objected, on the part of the plaintiff, that the party was therefore not before the court. The matter underwent some little discussion; and the court decided that an affidavit was necessary, and gave the party time to produce one. Nothing, however, was [199] said as to the claimant's being barred (*a*). That point was not entered into. I do not think the court at all intended to go into the consideration of whether, contrary to the words and the spirit of the act, they should take away from the party a right she had, and subject her to a jurisdiction to which there was no necessity to subject her. Upon the broad ground, therefore, that no affidavit at all is necessary as a condition-precedent to the right of the judge to direct an issue, and to make the other subsidiary orders thereon, I think this order should be rescinded. But, assuming that I am wrong in this view, I agree with the lord chief justice in thinking that an affidavit by the claimant himself, at all events, is not indispensable. There is certainly nothing in the act that requires the claimant to make an affidavit in person: and there would be nothing reasonable or just in making that a condition-precedent. I cannot suppose that the order was made on the ground that my brother Coltman thought it necessary that the claimant himself should make an affidavit. I should rather think he proceeded upon an opinion that the claim was insufficiently made out. If that were so, I do not think he was warranted in the conclusion he came to.

CRESSWELL, J. I concur with my lord and my brother Maule in thinking that an affidavit by the claimant himself was not necessary, and that the affidavit of claim

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(*a*) In the report of this case in 1 Harr. & W. 281, it appears that the claimant did make an affidavit, though an insufficient one, inasmuch as it only stated generally that she had a valid claim, but did not state the nature and particulars thereof. It appears also that the power of the court to bar the claimant upon this ground, was discussed.

here brought to the notice of the learned judge, was sufficient. As at present advised, however, [200] I do not concur with my brother Maule in thinking that no affidavit at all is necessary to entitle the judge to entertain the claim. I have always, at chambers, acted upon the case of *Powell* v. *Lock.* If the party has no locus standi to maintain his claim, the power to bar him would seem necessarily to be called into existence. The question, however, is one of much importance: and I should be sorry now, without time for fuller consideration, to commit myself to a final opinion upon it. It is enough upon the present occasion to say, that, taking into account the claimant's absence from England, the affidavit of his attorney is sufficient to shew that the claim is not groundless and illusory.

V. WILLIAMS, J. I have the misfortune in this case to differ from the rest of the court. The court ought not to rescind an order made by a judge at chambers, unless they are satisfied that his decision is erroneous. I should conceive that the decision of the learned judge here was erroneous, if I thought he decided upon the ground of the absence of an affidavit by the claimant himself. But he appears to me to have decided on the ground that he thought the claimant had not sufficiently brought the claim before him: and, if so (*a*)[1], I think he was right. I forbear to express any decided opinion upon the subject: but the inclination of my mind is, that the statute requires the party, not to state a sufficient claim, but to state his claim sufficiently. I think he does not appear and maintain his claim, unless he states the nature and particulars of it with such a degree of precision and certainty as to enable the judge to form an opinion as to the propriety [201] of putting it in a course of inquiry. The judge must determine whether the statement is sufficient or not: and, to enable him to entertain it, it must be upon affidavit. If, therefore, the learned judge has in this case decided that the claim was not sufficiently stated, I am not satisfied that the conclusion he came to was wrong. As, however, the majority of the court entertain a different opinion, the rule will be made absolute in the ordinary form of an interpleader rule.

Bramwell, for the execution-creditor, asked that it might be made part of the rule, that the claimant should give security for costs, he being resident abroad (*a*)[2].

Per curiam. Be it so.

Rule absolute accordingly.

POWELL *v.* BRADBURY AND ANOTHER. Jan. 22, 1849.

[S. C. 18 L. J. C. P. 116; 13 Jur. 349. Overruled, *Lush* v. *Russell*, 1850, 7 D. & L. 228; *Horton* v. *M'Murtry*, 1860, 5 H. & N. 673.]

In an action for the breach of a contract to employ the plaintiff for a given time, charging the defendants with having wrongfully and without reasonable or probable cause dismissed the plaintiff, the defendants pleaded, that they did not, wrongfully, without reasonable or probable cause, dismiss the plaintiff, modo et formâ:—Held that this merely put in issue the fact of the dismissal, the rest being immaterial.

Assumpsit upon a contract by the defendants to employ the plaintiff for two years as joint-editor of a newspaper called the *Daily News:* Breach, that, during the two years, the defendants, wrongfully, and without reasonable cause, dismissed and discharged the plaintiff from their employ.

The defendants, amongst other pleas, pleaded that [202] they did not wrongfully, and without reasonable or probable cause, dismiss or discharge the plaintiff from their employ, in manner and form as alleged in the declaration.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1847, when the jury returned a verdict for the plaintiff, damages, 500l.

The Attorney-General, in the following Easter term, obtained a rule nisi for a new trial, on the ground that evidence tendered on the part of the defendants, to shew that the plaintiff had been guilty of misconduct that justified them in discharging him,

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(*a*)[1] The circumstance of the learned judge having adjourned the summons a second time, to enable the attorney to amend his statement of the claim, shews that this was so.

(*a*)[2] See *Benazech* v. *Bessett*, ante, vol. i. p. 313.

had been improperly rejected; and also, on the ground that the verdict was against evidence, and that the damages were excessive.

Wilkins, Serjt., Huddlestone, and Hugh Hill, shewed cause. Affirmative evidence was not by law admissible upon a plea of justification like this. In *Frankum* v. *The Earl of Falmouth* (2 Ad. & E. 452), the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant "wrongfully and injuriously" diverted the same; and it was held, that, on a plea of not guilty, the only matter in issue was, the fact of the diversion; and that the right to the use of the stream, as claimed, was admitted. In *Howden* v. *Standish* (ante, vol. vi. p. 504), in case against the sheriff, the declaration set out a writ of capias, issued by the order of a judge under the 1 & 2 Vict. c. 110, s. 3, against one K., and alleged that K. was within the bailiwick, and that the defendant could and might and ought to have arrested him, but did not, although often requested, take him or cause **[203]** him to be taken, and afterwards falsely returned that he was not found in his bailiwick. The defendant pleaded, amongst other pleas, not guilty, and that he could not nor might have arrested K.: and it was held, that it was not competent to the defendant, under either of these pleas, to adduce evidence of directions given by the plaintiff to the officer not to arrest K., at a time when he might have taken him; such evidence consisting of affirmative matter in excuse of the breach of duty complained of, and therefore not being admissible under not guilty; and the effect of the other plea being merely to deny that K. was in the sheriff's bailiwick under such circumstances that there was an opportunity to arrest him. *The Bishop of Meath* v. *The Marquess of Winchester* (3 N. C. 183, 3 Scott, 561), is an authority to the same effect. [V. Williams, J. You must contend that the plea is entire, otherwise your argument is not material.]

The Attorney-General and Wells, in support of the rule. It was not necessary to prove the whole of the plea. In Chitty, on Pleading (6th edit. vol. i. pp. 228, 229, 7th edit. vol. i. pp. 251, 252), it is said: "The statement of immaterial or irrelevant matter or allegations, is not only censured as creating unnecessary expense (*c*), but also frequently affords advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. If, however, the matter necessarily stated be wholly foreign or irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as **[204]** surplusage, and it need not be proved" (*a*). Thus, in *Davis* v. *Chapman* (2 M. & G. 921, 3 Scott, N. R. 238), a plea to a declaration against a gaoler for the escape of J. S., a debtor in execution, after stating a return into custody before action brought, alleged that the defendant did thereupon keep and detain, and from thence hitherto hath kept and detained, and before and at the commencement of the suit kept and detained, and still doth keep and detain the said J. S. in his custody, in execution at the suit of the plaintiff. It was held that the latter words were surplusage, and did not render an escape, after the commencement of the suit, and before plea pleaded, admissible in evidence, upon a replication de injuriâ. And see 2 Wms. Saund. 295 c., n. (2).

Maule, J. The whole court are agreed in opinion that this plea only puts in issue the fact of the plaintiff's dismissal from the employ of the defendants; and that, whether or not that dismissal was wrongful and without reasonable or probable cause, was altogether immaterial, and need not be proved. But, as to whether the verdict was warranted by the evidence, there is some doubt in the mind of the court; and, that being so, and the lord chief justice, who tried the cause, not being satisfied with the result, there must be a new trial, upon payment of costs.

Rule absolute accordingly.

(*c*) Citing *Dundas* v. *Lord Weymouth*, Cowp. 665, *Price* v. *Fletcher*, Cowp. 727, *Bristow* v. *Wright*, 2 Dougl. 665; and see the note [F. 2 p.] 668.

(*a*) Citing *Dukes* v. *Gostling*, 1 N. C. 588 (1 Scott, 570, 1 Hodges, 120); *Constable* v. *Clowbury*, Noy, 75 (Palmer, 397, Hardnes, 69); Jenk. Cent. 260. pl. 59; *Edwards* v. *Hammond*, 3 Lev. 132; (2 Shower, 398, per nom. *Stocker* v. *Edwards*, 1 N. R. 324, n.); *Scatterwood* v. *Edge*, 1 Salk. 229; Plowd. Com. 30 a., 32 b.; 2 Stark. Evid., 2nd edit. p. 686.

[205] PILGRIM *v.* THE SOUTHAMPTON AND DORCHESTER RAILWAY COMPANY. Jan. 31, 1849.

[S. C. 18 L. J. C. P. 139; 13 Jur. 575.]

A declaration in case charged the defendants, in the first count, with digging trenches across a lane over which the plaintiff had a right of way: in the second, with severing pipes which conveyed water to the plaintiff's messuage; and in the third with stopping a drain for carrying away the foul water from the premises.—Plea, that, by a certain act of parliament, the defendants were authorised to construct a certain railway; that they had agreed with the plaintiff for the purchase of a portion of the land of the plaintiff near to her messuage; that the making of the railway, and carrying the same near to the plaintiff's messuage, being likely to occasion injury and inconvenience to the plaintiff, it was agreed that the defendants should pay to the plaintiff, for and in respect of the purchase of the said land, such a sum as should be sufficient to compensate her, not only for the value of such land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the said messuage of the plaintiff; that, in pursuance of such agreement, and before the committing of the alleged grievances, by a deed between the plainiff and certain other persons having an interest in the said land, the plaintiff and those other persons, in consideration of 575l., &c. conveyed the land to the defendants for the purpose of making the railway; that it was declared by the deed, that the 575l. so paid should be, and then was, accepted and taken by the plaintiff and the other persons, for the purchase of the land, and by way of full compensation for all damage, loss, or inconvenience which could or might be sustained by them, or any of them, by severance, or otherwise by reason of the exercise of any of the powers of the act,—the said 575l. being the sum so theretofore agreed to be paid as aforesaid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the plaintiff's messuage. The plea then went on to aver, that the grievances complained of were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same near to the plaintiff's messuage, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid as aforesaid.—The plaintiff, in her replication, craved oyer of the deed, and demurred generally.—The deed, as set out on oyer, recited that the plaintiff and others had agreed to sell the land in question, and the defendants to purchase the same for the purposes of their railway, for the residue of a certain term therein; and that the plaintiff and the others had agreed to accept and take, and the defendants had agreed to pay 575l. for the said land, &c., "by way of full compensation for all damages, loss, or inconvenience whatsoever which could or might be sustained by any person or persons (except the reversioners), by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, &c; so agreed to be purchased as aforesaid." It then proceeded to state that the plaintiff and others, in consideration of 575l., conveyed all their interest in the said portion of the said land to the defendants:—Held, that the plea, as a plea of compensation, was bad in substance, inasmuch as the deed did not shew that the 575l. was paid and received as compensation for the grievances complained of in the declaration:—Held also, that the plea was not so framed as to shew that the acts complained of were done under the authority of the act of parliament.

This was an action upon the case against the defendants, for an alleged obstruction of the plaintiff's enjoyment of certain easements. The declaration contained three counts.

[206] The first count stated, that, before and at the times of the committing of the grievances by the defendants thereinafter in that count mentioned, the plaintiff was, and from thence continually had been, and still was, lawfully possessed of a certain messuage and yard, with the appurtenances, situate, &c.; that the plaintiff,

during all the time aforesaid, ought to have a certain way from the said messuage and yard, unto, into, through, over, and along a certain common field in the said county, and from thence unto, into, through, and along a certain close in the said county, used as a lane, and from thence unto and into a certain common or public highway there, and so from thence back again from the said common highway, unto, into, through, and along the said close, and from thence unto, through, and along the said common field, unto the said messuage and yard respectively so in the possession of the plaintiff, for herself and her servants, and for all others occupying or resorting to the said messuage and yard, on foot and with horses, mares, and geldings, carts, waggons, and other carriages, to go, return, pass, and repass every year, and at all times of the year, at her and their free will and pleasure; yet that the defendants, well knowing the premises, but intending to injure the plaintiff **[207]** in that behalf, and to deprive her of the use and benefit of her said way, whilst the plaintiff was so entitled and possessed as aforesaid, to wit, on the 1st of June, 1846, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly broke and entered into and upon the said way, and with feet in walking, and with cattle, carts, and carriages, subverted and spoiled the soil of the said way, and also then cut, dug, and made, in, upon, and across the said way divers, to wit, fifty holes, fifty trenches, and fifty excavations, of the length, depth, and breadth respectively, to wit, of 500 feet, and also then put and placed in and upon the said way, to wit, 50 cartloads of stones, 50 cartloads of lime, 50 cartloads of rubbish, and 50 cartloads of wood, and kept and continued the same in and upon the said way, to wit, thence hitherto, and thereby during all the time aforesaid, the said way was, and still remained, greatly obstructed and stopped up, and the plaintiff could not, nor can she, enjoy the same, and was and is deprived of the use and benefit thereof.

The second count stated, that, before and at the time of the committing of the grievances by the defendants thereinafter in that count mentioned, the plaintiff was, and from thence continually had been, and still was, lawfully possessed of the said messuage and yard, with the appurtenances, and the plaintiff, during all the time aforesaid, ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of certain water for the supply of the said messuage, which water, during all that time, ought to have run and flowed, and still of right ought to run and flow, through and along certain pipes from a certain reservoir, in, through, and along a certain close near and adjoining to the said messuage and yard of the plaintiff, and unto and into the said messuage and yard of the **[208]** plaintiff, for the supply of the same messuage with water, for the necessary purposes thereof; and that, theretofore, and whilst she the plaintiff was so possessed and entitled as aforesaid, to wit, on the 1st of June, 1846, the defendants, well knowing the premises, but contriving and intending to injure the plaintiff in this behalf, wrongfully and unjustly cut, dug, and made a certain excavation or cutting, of great length, breadth, and depth, to wit, of the length of 500 feet, of the breadth of 100 feet, and of the depth of 60 feet, in and across the said close in, through, and along which the said water so flowed as aforesaid, and cut and severed the said pipes, and intercepted and cut off the flow of the said water, and kept and continued the same so cut, severed, and intercepted for a long space of time, to wit, from thence hitherto, and thereby, during all that time, wrongfully and injuriously hindered and prevented the said water from flowing, as it might and otherwise would have done, unto and into the said messuage and yard of the plaintiff, and the plaintiff was, during all that time, wholly deprived of the benefit and advantage of the said water for the supply of the said messuage.

The third count stated, that the plaintiff, before and at the several times of the committing of the grievances thereinafter mentioned, was, and from thence continually had been, and still was lawfully possessed of the said messuage and yard, with the appurtenances, and that the plaintiff, for the necessary use and employment of her said premises, ought, during all those times, and from thence continually, to have had, and still of right ought to have, the use and benefit of a certain channel, drain, waste-pipe, or sewer, in the county aforesaid, leading and running by and from the said messuage and yard of the plaintiff, unto and into certain other drains, by and along which the channel, drain, waste-pipe, or sewer the refuse and foul water and other filth running and **[209]** proceeding from the said messuage and yard of the plaintiff, during all that time, ought to have run and flowed and passed off, and still of right ought to run and flow and pass off into the said other drains, away from the said message and yard; yet that the defendants, well knowing the premises, but contriving to injure the plaintiff in this behalf, whilst the plaintiff was so possessed of the said message and yard, to wit, on the 1st of June, 1846, wrongfully and injuriously closed, stopped up, and obstructed the said channel, drain, waste-pipe, or sewer, and wrongfully and injuriously kept and continued the same so closed, stopped up, and obstructed, for a long space of time, to wit, from thence hitherto, and thereby, during all the time aforesaid, divers large quantities of the refuse and foul water and other filth arising from the said message and yard of the plaintiff, had been and were prevented and hindered from running, flowing and passing off in their usual course, and as they otherwise would have done, through and along the said channel, &c., and from thence into the said other drains, in the manner aforesaid: by reason whereof, not only divers noisome, noxious, offensive, and unwholesome smells and vapours, during all the time aforesaid, had ascended and come into the said message and yard of the plaintiff, but also thereby the said premises of the plaintiff became and were thereby greatly overflowed, and the plaintiff and her family thereby had been and were greatly annoyed and inconvenienced and prejudiced in the occupation, enjoyment, and possession thereof, and the plaintiff was and is otherwise injured.

The defendants pleaded, ninthly, as follows:—That, before, and at the time of the committing of the said several alleged grievances in the declaration mentioned, the defendants, under and by virtue of a certain act of parliament, made and passed in the eighth year of the [210] reign of Queen Victoria, for making a railway from Southampton to Dorchester, with a branch to the town of Poole, were authorised and impowered to make the said railway in the said act mentioned, and to make and carry the same near to the said message and premises of the plaintiff in the declaration mentioned,—whereof the plaintiff then had notice; that, for the purpose of making the said railway, according to the provisions of the said act of parliament, the defendants, before the committing of the said alleged grievances, to wit, on the 25th of April, 1846, with the consent of the plaintiff, contracted and agreed with the plaintiff, by a certain agreement then made in writing, for the purchase of a certain portion of the land of the plaintiff near to her said message and premises; that, whereas the making of the said railway according to the provisions of the said act of parliament, and carrying the same near to the said message and premises of the plaintiff, were likely to occasion certain injury and inconvenience to the plaintiff, it was thereby then also agreed by and between the plaintiff and the defendants, that the defendants should pay to the plaintiff, for and in respect of the purchase of the said portion of land, such a sum of money as should be sufficient to compensate the plaintiff, not only for the price and value of the said portion of land they so purchased as aforesaid, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the said railway, and carrying the same near to the said message and premises of the plaintiff, as aforesaid; that, in pursuance of the said contract and agreement, afterwards, and before the committing of the said alleged grievances in the declaration mentioned, to wit, on the 27th of June, 1846, by a certain deed of assignment then made by the plaintiff and certain other persons then having an interest in or title to the said portion of land,—and which said deed of assignment, sealed with the [211] seal of the plaintiff, the defendants then brought there into court, the date whereof was, to wit, the day and year last aforesaid,—the plaintiff and the said other persons, in consideration of a certain large sum of money, to wit, the sum of 575l., then paid by the defendants to the plaintiff, and of a certain deed of covenant then made and executed by the defendants, the plaintiffs, and the said other persons in the said deed of assignment mentioned then conveyed and assigned to the defendants, their successors and assigns, the said portion of land, for the purpose of making the said railway in the manner aforesaid; that it was then declared and agreed in and by the said deed of assignment, that the said sum of 575l. so paid as aforesaid, should be accepted and taken by the plaintiff and the said other persons, and the plaintiff and the said other persons did thereby then accept and take the said sum of 575l. for the purchase of the said portion of land, and by way of full compensation for all damage, loss, or inconvenience whatsoever, which could or might be sustained by them, or any of them, by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the lands, hereditaments, and premises so agreed to be purchased, and so purchased, as therein mentioned,—the said sum of 575l. being the sum so theretofore agreed to be paid as aforesaid, to compensate the plaintiff, not only for the price and value of the said portion of land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid; and that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from and incidental to the making of the said railway, and carrying the same near to the said messuage and premises of the **[212]** plaintiff as aforesaid, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the said act, and intended to be compensated by, and included in, the said compensation and money so paid to the plaintiff by the defendants as aforesaid, the defendants doing no unnecessary damage to the plaintiff on the occasions aforesaid,—verification.

The plaintiff craved oyer of the deed of assignment mentioned in the ninth plea. The deed, as set out on oyer, recited an indenture of lease on the 29th of September, 1807, whereby certain lands and hereditaments (including the messuage and premises of the plaintiff) were demised by one William Fitzhugh to Maria Deborah Grosvenor for fifty years from the date thereof, the residue of which term was assigned to C. Pilgrim, in 1834, who died in 1845, leaving the plaintiff, Maria Pilgrim, his widow, a life-interest in the term, with remainder to Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose; it then recited that the said Maria Pilgrim and the said Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, had agreed to sell, and the Southampton and Dorchester Railway Company, incorporated by the Southampton and Dorchester Railway Act, 1845, had agreed to purchase, for the purposes of their railway, the lands and tenements thereinafter described, and thereby assigned, or intended so to be, with their appurtenances, for the residue of the said term of fifty years; and that the said Maria Pilgrim and Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, had agreed to accept and take, and the company had agreed to pay, the sum of 575l. for the purchase of the said lands and tenements, and by way of full compensation for all damages, loss, or inconvenience whatsoever which could or might be sustained by any person or persons whom-**[213]**-soever (except the person or persons entitled to the reversion and inheritance expectant on the determination of the said term), by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, hereditaments, and premises so agreed to be purchased as aforesaid; and that, upon the said treaty, it was further agreed between the said parties last aforesaid, and it was part of the consideration for the said sale, that the said company should, at their own expense, make, do, and perform, and, during the residue of the said term, maintain, certain works and communications, and which by an indenture of covenant bearing even date with those presents, and made between the said company of the one part and the said Maria Pilgrim, Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, of the other part, were covenanted to be made; but that it was, upon the said treaty, fully understood and agreed that the said company should not at any time or times thereafter be called upon or required by any person or persons whomsoever, except the person or persons entitled to the reversion and inheritance expectant on the determination of the said term of fifty years, to make or allow to be made any communication or works whatsoever (except the communications and works mentioned in the said indenture of covenant) over, under, or across the said railway, for the accommodation of the said lands and hereditaments adjoining the lands and hereditaments thereby assigned, or intended so to be. The indenture then witnessed, that the said Maria Pilgrim, the plaintiff, and the said Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, in consideration of the sum of 575l. paid to them by the said company, and of the deed of covenant thereinbefore mentioned, did thereby assign to the said company, their successors and assigns, all, so much, and such **[214]** parts of all those pieces or parcels of land, situate, &c., as were comprised in the thereinbefore in part recited indentures of lease and assignment, and in the map or plan of the said railway deposited in the office of the clerk of the peace of the county of Southampton, numbered respectively, 21, 27, 28, and 29, as have been staked or otherwise marked out and selected for the purposes of the said railway, and containing, &c. &c.,—a plan of which said lands and hereditaments intended to be thereby assigned, was drawn in the margin of those presents, wherein the same lands, hereditaments, and premises were coloured red, and were numbered as in the said map or plan so deposited in the office of the clerk of the peace as aforesaid, together with all ways, rights, and appurtenances thereto belonging; and all such estate, right, title, &c., as the said act impowered them to assign,—to hold the same to the said company, their successors and assigns, for all the residue then to come and unexpired of the said term of fifty years, according to the true intent and meaning of the said act. Upon the back of the deed was indorsed a receipt for the 575l. (signed by Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose), "being the full consideration money within mentioned to be paid by the company to us." The plaintiff then demurred, and the defendants joined in demurrer.

Greenwood, in support of the demurrer (*a*). The declaration complains of three several acts done by the **[215]** defendants upon lands not belonging to her,—first, the cutting of trenches across a lane over which she had a right of way,—secondly, the severing of pipes which conveyed water to the plaintiff's premises,—thirdly, the stopping of a drain for carrying away the foul water from the same premises. The plea in substance states, that, by a certain act of parliament, the defendants were authorised to construct a certain railway; that they had agreed with the plaintiff for the purchase of a portion of the land of the plaintiff near to her messuage; that the making of the railway, and carrying the same near to the plaintiff's messuage, being likely to occasion injury and inconvenience to the plaintiff, it was agreed that the defendants should pay to the plaintiff, for and in respect of the purchase of the said land, such a sum as should be sufficient to compensate her, not only for the value of such land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the said messuage of the plaintiff; that, in pursuance of such agreement, and before the committing of the alleged grievances, by a deed between the plaintiff and certain other persons having an interest in the said land, the plaintiffs and those other persons, in consideration of 575l., &c., conveyed the lands to the defendants for the purpose of making the railway; that it was declared in and by the deed, that the 575l. so paid should be, and then was, accepted and taken by the plaintiff and the other persons for the purchase of the land, and by way of full compensation for all damage, loss, or inconvenience which could or might be sustained by them, or any of them, by severance, or otherwise by reason **[216]** of the exercise of any of the powers of the act,—the said 575l. being the sum so theretofore agreed to be paid as aforesaid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the plaintiff's messuage. The plea then goes on to aver that the grievances complained of were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same near to the plaintiff's messuage, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid as aforesaid. The deed, as set out on oyer, states the 575l. to have been paid and accepted as the price of the portion of land contracted to be sold, and "by way of full compensation for all damages, loss, or inconvenience which could or might be sustained by any person or persons whomsoever (except, &c.), by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, &c. so agreed to be purchased as aforesaid." The plea, in effect, seeks to extend the justification by reference to the prior agreement. The question that arises

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(*a*) The points marked for argument on the part of the plaintiff, were,—That the deed of assignment was not set out in the ninth plea, either in its terms, or according to its legal effect, and that there was a material variance, in several particulars, between the deed as stated in the said ninth plea and the deed as set out on oyer; that the ninth plea did not shew, either by direct allegation, or inferentially, that the grievances committed were so committed upon any part of the said premises purchased and assigned; and that it appeared from the deed, as set out, that the sum of 575l., which was the consideration for the said purchase and assignment, was not, nor was any part thereof, paid or accepted by way of compensation for the said grievances, or any part thereof.

therefore, is this,—where parties have agreed by parol that a given sum shall be paid as the price of certain land, and as compensation for prospective damages generally, and they afterwards make that agreement the subject of a deed which limits the compensation to particular damage in respect of acts done upon the land so purchased, the agreement can be pleaded as an answer to an action for damage not covered by the deed. It is submitted that it cannot; or, in other words, that the agreement becomes merged in the deed. **[217]** The plea is therefore bad in substance, inasmuch as it does not cover the grievances in the declaration.

There is a fatal variance between the statement of the deed in the plea, and the deed itself. The plea alleges that the plaintiff and certain other persons conveyed the land to the defendants; whereas, the deed shews that all that passed by the deed was, the residue of a term of years.

Further, the plea alleges that the conveyance was made in consideration of 575l. paid by the defendants to the plaintiff; whereas, the deed shews that it was in consideration of 575l. paid to the plaintiff and the other persons. An allegation of seisin, in pleading, is always understood to mean that the party is sole seised (vide, 7 M. & G. 173, n.). In trover, the declaration stated that the plaintiff was possessed as of his own property of certain cattle, to wit, four horses, which the defendant converted and disposed of to his own use. The defendant pleaded,—first, that the horses were not the property of the plaintiff,—secondly, that a judgment was recovered against J. F., and that the defendant (a sheriff's officer) seized them under an execution against the said J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the plaintiff. The plaintiff replied, that they were the cattle and property of the plaintiff, modo et formâ. At the trial, the jury found that the horses were the property of the plaintiff and J. F. jointly: and it was held, that the issue raised by the defendant was, whether the cattle were the sole property of J. F., and, the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover: *Farrar* v. *Beswick* (M. & W. 682). [V. Williams, J. To enable you to take advantage of it, **[218]** the variance must be such as would be fatal on non est factum: *Paine* v. *Emery* (2 C. M. & R. 304).

Badeley, contrà (*b*). The plea is good in substance. The argument on the other side assumes that the subject-matter of the agreement is merged and concentrated in the deed. That is not so. The plea is founded upon the agreement: the deed only shews how one portion of the agreement was carried into effect. The agreement is in the nature of an accord executed between the parties. The plea shews an agreement for compensation, a deed carrying out that agreement, and a payment to the plaintiff under the deed. In Phillipps on Evidence (9th edit. vol. ii. p. 353), it is said: "It is an established rule, that a party may prove some other consideration besides that expressed in the deed, provided it is consistent with the consideration expressed. Thus, if a deed of bargain and sale is expressed generally to be made 'for divers good considerations,' it may be averred and proved that the bargainee gave money or other valuable consideration (*d*). That such an averment may be taken, which stands with the deed, says **[219]** Lord Coke, although it be not expressly comprised in the deed, is proved by the case of *Villers* v. *Beamont* (*a*), where the consideration of a deed of

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(*b*) The points marked for argument on the part of the defendants were,—That the ninth plea is sufficient,—that the deed of assignment is properly set out therein according to its legal effect,—that the plea sufficiently shews that the grievances alleged in the declaration were included in, and compensated by, the sum of money mentioned in the deed of assignment, and the money paid thereon is sufficiently shewn to be a fulfilment of the agreement mentioned in the said plea,—that the plaintiff is not entitled to maintain the action, inasmuch as it appears upon the record that the injuries alleged arose necessarily from carrying out the provisions of an act of parliament, and that, if she was entitled to any compensation for such injuries, she could only claim or be entitled to it in the manner provided by such act.

(*d*) Citing 2 Roll. Abr. 786 (N.); *Mildmay's case*, 1 Co. Rep. 175 a.; *Lord Cromwell's case*, 2 Co. Rep. 76 a.; *Bedell's case*, 7 Co. Rep. 38; *Doe d. Milburn* v. *Salkeld*, Willes, 677; *Hartopp* v. *Hartopp*, 17 Ves. 192.

(*a*) Citing *Villers* v. *Beamont*, 2 Dyer, 146 a.; *Vernon's case*, 4 Co. Rep. 3; *Craythorne* v. *Swinburne*, 14 Ves. 170.

bargain and sale of lands was stated to be a sum of money, but it was averred, and found by the jury, that the indenture was made 'as well in consideration of marriage (to make it a jointure in bar of dower) as of the said sum of money;' and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it. A fortiori, adds Lord Coke, the averment may be made, where no consideration is mentioned, but the deed is general for 'divers good considerations;' for, then the averment (that the bargainee gave money, &c.) is but an explanation and particularizing of the general words of the deed, which include every manner of consideration; and, in all these cases, the matter so averred is traversable and issuable. And Lord Hardwicke has held, that, where no consideration is expressed in the deed, a party claiming the benefit of a trust under the deed, may prove a valuable consideration" (*b*). [Wilde, C. J. The question is, whether you can aver, against the deed, that the 575l. was agreed to be paid and accepted in satisfaction of something not covered by the deed.] It is submitted that the deed does cover the whole compensation. [Wilde, C. J. It is expressly confined to injury done to the land sold.] As far as the considerations are expressed on the face of the deed, it certainly does not appear whether the compensation was intended to apply to anything more than the injury to the land sold. But there is clearly nothing inconsistent with the deed in holding **[220]** that the payment was to cover the whole damage stated in the declaration. It does not contradict the deed, or any recital in it. In *Bowman* v. *Rostron* (2 Ad. & E. 295 (*b*)), the declaration stated the execution of a deed by the plaintiff and defendant; the plea did not traverse the execution, but alleged new matter, upon which the replication took issue. The deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea: it was held, nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel: and, the judge at nisi prius having treated such deed as conclusive, and directed a verdict for the plaintiff, the court granted a new trial, without entering into the question whether the plea was or was not bad. [Wilde, C. J. The agreement provides for the sale of a portion of the land. The deed states the agreement, and then it goes on to recite that the plaintiff and the others have agreed to take, and the company have agreed to pay, 575l. for the said lands, &c., by way of full compensation for all damages, loss, or inconvenience which could or might be sustained, by severance, or otherwise by reason of the exercise of any of the powers of the said act, upon the said lands, &c., so agreed to be purchased as aforesaid. It was quite competent to the parties to agree for a sum to be paid as compensation for some only of the matters which had been the subject of the former agreement.] It is submitted that there is enough to shew the court, upon general demurrer, at least, that the money was paid in satisfaction of the entire damages, as well as for the land.

In *Smith* v. *Shaw* (10 B. & C. 277, 5 M. & R. 225), Bayley, J., says: "A thing is to be considered as done in pursuance of the act, when the person who does it is acting honestly and bonâ fide, **[221]** either under the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet if he acts bonâ fide in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons whilst so acting. This is established by *Gaby* v. *The Wilts and Berks Canal Company* (3 M. & S. 580), *Theobald* v. *Crichmore* (1 B. & Ald. 227), and *Parton* v. *Williams*" (3 B. & Ald. 330).

It is admitted here that the grievances complained of occurred in the course of carrying out the provisions of the act of parliament. That being so, the plaintiff can be entitled to no damages; or, if she is entitled to compensation, she must pursue the remedies pointed out by the act, in conjunction with the lands clauses consolidation act. In the case of *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (4 T. R. 794), it was held, that, where the acts of commissioners appointed by a paving-act, occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviours acting under them, are not liable to an action. "Some individuals," says Lord Kenyon, "suffer an inconvenience under all

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(*b*) Citing *Peacock* v. *Monk*, 1 Ves. sen. 128.

these acts of parliament; but the interest of individuals must give way to the accommodation of the public." In *Boulton* v. *Crowther* (2 B. & C. 703), by the general turnpike-act, 3 G. 4, c. 126, s. 85, the trustees of roads were authorised to divert, shorten, alter, or improve the course of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making any satisfaction for the same; and through or over any **[222]** private lands, tendering or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby: and it was held, that, under this clause, the trustees were authorised to lower hills and raise hollows; and that they were not liable to an action for a consequential injury resulting from an act which they were authorised to do. Referring to the case last cited, Abbott, C. J., there says: "It seems to me that that case is a distinct authority as to the second point now raised. The act of parliament, I think, authorised the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law, in my opinion, has provided a remedy. But the fact of their having so acted, is negatived by the finding of the jury. I am, therefore, of opinion that the defendant was not liable to this action." So, in *Thicknesse* v. *The Lancaster Canal Company* (4 M. & W. 472), where a canal act gave the commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained,—it was held that a party entitled to an easement over lands so purchased by him, could not maintain trespass for acts done upon those lands to the prejudice of his easement; but that, as soon as any damage was actually sustained, he ought to have claimed compensation under the act. [Cresswell, J., referred to *The King* v. *Pease* (4 B. & Ad. 30). There, by an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company, or persons authorised by them, were empowered to use locomotive engines upon the railway. **[223]** The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage-road. On indictment against the company for a nuisance, it was held that this interference with the rights of the public, must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorising the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) shewed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority.]

Greenwood, in reply. The plea professes to set up a justification under the contract: the statement as to the authority of the defendants to make the railway under the act of parliament, is mere inducement: if it had been pleaded as a substantive defence, it would have made the plea demurrable on the ground of duplicity; but, according to the rule laid down in Stephen on Pleading (5th edit. p. 296), "No matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation." Besides, the courts will not take notice of acts of parliament, unless they are properly described. Now, there is no such act of parliament as that stated in this plea. The royal assent was given to it on the 21st of July, 1845, which was in the 9th year of the reign of Her present Majesty: it should have been described, therefore, as an act passed in the 9th year, or at all events in the 8th and 9th years of the reign. [V. Williams, J. Is not the title **[224]** of the act given?] No: only what the pleader conceives to be the object of the act.

By the 53rd section of the lands clauses consolidation act, 1845 (8 & 9 Vict. c. 20), it is provided, that, before roads are interfered with, others are to be substituted: and by s. 55 it is enacted that, "if any party entitled to a right of way over any road so interfered with by the company, shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with costs, by action on the case in any of the superior courts, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." This bargain between the legislature and the promoters of the railway company, is to be construed like any other contract. [Cresswell, J. You do not allege any special damage from the stopping of the way.] No.

Wilde, C. J. It appears to me that the plea is bad, and that the plaintiff is entitled to judgment upon it. The first question is, whether the plea addresses itself to the grievances complained of in the declaration, and shews that the plaintiff has received compensation for them. The way in which it proposes to shew that, is this,—it sets out an agreement, by which it is alleged, that, before the committing the grievances in the declaration mentioned, the defendants agreed with the plaintiff to purchase a certain portion of land for such a sum of money as should be a sufficient compensation, not only for the value of the land, but also for all such inconvenience and collateral damage as might be incidental to the making of the railway. If the plea **[225]** were sufficient, the terms of the agreement are wide enough to include the damage complained of here. The plea then proceeds to state that the sum was ascertained and agreed at 575l., before the committing of the grievances complained of, and sets out the deed by which the transaction was carried into effect, and by which it was declared and agreed that the said sum of 575l. so paid as aforesaid, should be accepted and taken by the plaintiff and the other persons interested, and the plaintiff and the said other persons did thereby then accept and take the said sum of 575l., for the purchase of the said portion of land, and by way of full compensation for all damage, loss, or inconvenience whatsoever, which could or might be sustained, by them or any of them, by severance, or otherwise, by reason of the exercise of any of the powers of the said act upon the lands, hereditaments, and premises so agreed to be purchased, and so purchased, as therein mentioned,—the said sum of 575l. being the sum so theretofore agreed to be paid as aforesaid, to compensate the plaintiff, not only for the price and value of the said portion of land, but also for all such injury and inconvenience as should necessarily arise from, or be incidental to, the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid; and that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from, and incidental to, the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid, and were part of the damage, loss, and inconvenience sustained by the plaintiff, by reason of the exercise of the powers of the act before referred to, and intended to be compensated by, and to be included in, the said compensation money so paid to the plaintiff by the defendants as aforesaid. The object of **[226]** these allegations in the defendants' plea is, to extend the effect and operation of the deed. It appears to me to be an attempt to do that which by law cannot be done: and none of the authorities cited seem to me to have any bearing upon the case. Looking at the plea as one the validity of which depends upon whether it shews that the plaintiff has received compensation for the injury of which she complains, I think it fails in substance.

It is then insisted, that, by reason of the closing allegation in the plea, the defendants are entitled to avail themselves of another defence, viz. that the acts complained of were done by them under the authority of the act of parliament. It is said, that, where authority is given by the legislature to do an act, parties injured by the doing of it have no legal remedy, but should appeal to the legislature. That may be very good law. But the question is whether this plea properly advances that defence. The plea comes before us upon general demurrer. It must, therefore, receive a fair and reasonable construction, and is not to be read so as to give to its language a strained construction in favour of the party pleading. So reading the plea, it appears to me that it does not shew with sufficient certainty and precision that the acts which the defendants are charged with doing, were authorised to be done by the act of parliament. It does not set up the act in terms which make it a good plea in that sense. Its language is extremely loose, and evidently intends to rely, not upon the act of parliament, but upon the agreement.

Cresswell, J.(*a*). I am of the same opinion. I observe that this is the ninth plea; it has, therefore, in all probability, very little to do with the merits of the case. The defence that was evidently meant to be set **[227]** up by it, was, that whatever

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(*a*) Maule, J., had gone to chambers.

damage the plaintiff may have sustained by the acts of the railway company, was damage for which she has already been compensated under the agreement. That the defendants have failed in shewing. The plea states that the defendants agreed with the plaintiff to pay her a certain sum of money for the purchase of certain land, and as a compensation for certain damage. It then goes on to aver,—in order to supply the place of an averment that the sum mentioned was accepted in satisfaction of such damage,—that the money was agreed to be paid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from, or be incidental to the making of the railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid. It does not say that the things mentioned in the deed are the same as those mentioned in the declaration. The plea then goes on to aver that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same near to the said messuage and premises of the plaintiff, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid to the plaintiff by the defendants as aforesaid. That leaves the matter quite ambiguous; it does not say, intended to be compensated by the deed. The plea, therefore, is clearly bad as a plea relying upon compensation. Then, the plea not being pleaded over to, its language is open to fair criticism. I do not think it is sufficiently alleged that the acts done by the defendants were done by them **[228]** under the authority of the act. I therefore think the plaintiff is entitled to judgment.

V. WILLIAMS, J. I am of the same opinion. As a plea that the plaintiff has been compensated for the injury of which she complains, I agree, for the reasons already given, that this plea affords no defence. It is said that it amounts to a plea that the damage and injury complained of were a necessary consequence of acts which the defendants were authorised by the act of parliament to do, which, according to the cases of *The Governors and Company of the British Cast Plate Workers* v. *Meredith*, and *Boulton* v. *Crowther*,—which are the leading cases upon this subject,—affords a good defence. No doubt, if this plea had sufficiently alleged that the defendants did the acts complained of in the exercise of the powers and authorities conferred upon them by an act of parliament, and that the injury was the necessary and unavoidable consequence of those acts, it would have been an answer to the action. But I think the plea does not, in apt and proper language, allege that the injuries complained of were the necessary consequence of acts which were authorised to be done by the act of parliament. I therefore think the plea affords no defence.

Judgment for the plaintiff.

End of Hilary Term.

[229] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN HILARY VACATION, IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco during these sittings, were—Coltman, J., Maule, J., Cresswell, J., V. Williams, J.

MAYHEW AND ANOTHER, Assignees of Barnabas Mayhew, a Bankrupt, *v.* HERRICK. Feb. 8, 1849.

[S. C. 18 L. J. C. P. 179; 13 Jur. 1078. Explained, *Fraser* v. *Kershaw*, 1856, 2 K. & J. 499; *Jacobs* v. *Swan*, 1872, L. R. 2 H. L. 475.]

One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant, for the mere sale of the chattel; though he may be, for such a disposition as amounts to a destruction of it.—The defendant, an officer of the Palace Court, seized, under a fi. fa. against A., partnership effects of A. and B., and sold them to various purchasers, who carried them away. In trover at the suit of the assignees of B. (who had become bankrupt):—Held, that the seizure and sale, under the circumstances, did not amount to a conversion: but that, in the absence of any evidence to shew in what proportions the partners were interested in the partnership property, the assignees of B. were entitled to a moiety of the proceeds of the sale.

This was an action against an officer of the Palace Court, for seizing and selling partnership property under a writ of fi. fa. against one of the co-partners.

[230] The first count was in trover, for two hundred barrels, two hundred casks, &c., in the possession of Barnabas Mayhew, before his bankruptcy.

The second count stated, that Barnabas Mayhew, the bankrupt, and one Frederick Smee, before the bankruptcy of Mayhew, and at the time of the committing of the grievances thereinafter mentioned, were lawfully possessed, as of their own property, of divers other goods and chattels, to wit, two hundred barrels, two hundred casks, &c. &c., whereof a small share only, to wit, one hundredth undivided part, of the said goods and chattels of right belonged to the said Frederick Smee,—whereof the defendant, at the time of the committing of the grievances thereinafter mentioned, had notice; that, before the committing of the said grievances, to wit, on, &c. a writ of execution of our lady the Queen, to wit, a writ of fi. fa., directed to the bearers of the verges of the household of our said lady the Queen, and the officers and ministers of the court of her palace at Westminster, and every of them, was sued and prosecuted out of the said court of her said palace, by one Thomas Tiley, against the goods and chattels of the said Frederick Smee, for 100l. theretofore, by the judgment of the said court, recovered by the said Thomas Tiley against the said Frederick Smee; that the said writ was delivered to the defendant, one of the said bearers of the verges, and an officer of the said court of the palace, to be executed in due form of law; that the defendant, under colour of the said writ, and before the bankruptcy, seized the goods of the said Barnabas Mayhew and Frederick Smee; and that, although the defendant [231] then well knew that the said Barnabas Mayhew was so entitled to the said share of the said goods as aforesaid, yet the defendant, wrongfully, and under colour of the said writ of execution, wholly sold and disposed of the entirety of the said goods and chattels, for, &c. &c., to divers persons to the plaintiffs unknown, who then, by the procurement of the defendant, and by colour and force of the said sale, eloigned and carried them away, and disposed of them to their own use; whereby they became wholly lost to the said Barnabas Mayhew, and to the plaintiffs; to the damage of the plaintiffs, as assignees, &c.

The defendant pleaded,—first, to the whole declaration, not guilty,—secondly, to the first count, that Barnabas Mayhew was not, at the said time when, &c., possessed, as of his own property, of the said goods in the first count mentioned, or any of them, or any part thereof,—thirdly, to the second count, that Barnabas Mayhew and Frederick Smee were not, at the said time when, &c., possessed, as of their own property, of the said goods and chattels in the last count mentioned, or any part thereof, in manner and form as in the said last count mentioned: whereupon issue was joined.

The cause was tried before Lord Denman, at the last spring assizes at Kingston. The facts that appeared in evidence were as follows:—

The plaintiffs were the assignees of Barnabas Mayhew, who carried on the business of a brewer, in partnership with Frederick Smee, at the Phœnix Brewery, at Bow, in the county of Middlesex. The defendant was an officer of the palace court. In June, 1847, one Thomas Tiley sued Smee to judgment in the palace court for a private debt. Smee gave Tiley a cognovit, upon which (default having been made) judgment was entered up, and execution issued. A fi. fa., indorsed to levy of the goods of Smee 79l. 2s. 6d., having been delivered to the [232] defendant to execute, he proceeded to the brewery, and seized all the property he found there, notwithstanding that he was informed that certain of the goods so seized, were the sole property of Mayhew. The whole of the goods were carried away, and were sold on the 27th of July. The balance of the proceeds, about 30l. (36l. having been paid to the landlord for rent), was handed over to the execution-creditor. Mayhew became bankrupt in August, 1847.

The property said to belong exclusively to Mayhew, consisted of casks and brewing utensils, which had been used in the business before Smee became a partner therein. These were not mentioned in the partnership agreement, which was put in evidence. The partnership was for no specific term.

On the part of the defendant, it was objected, that, whatever might be the plaintiffs' rights as to the separate property of the bankrupt, no action would lie in respect of the undivided share of the partnership property.

Under the direction of his lordship, a verdict was entered for the plaintiffs upon the first count, for 15l. 15s., the value at which the jury estimated the separate property of Mayhew; with leave to the plaintiffs to move to increase the verdict by 75l., one half the estimated value of the joint property, upon the second count.

Leave was also reserved to the defendant to move to set aside the verdict found for the plaintiffs, and to enter a nonsuit.

Rules nisi were accordingly obtained in Easter term last.

Lush now shewed cause against the rule obtained, on the part of the plaintiffs, to increase the damages. The question is, whether a sheriff, who, under a fi. fa. **[233]** against one of two partners, seizes and sells partnership property, is liable to the solvent partner for the full value of his share. There is no trace of any such action having been brought, down to a very recent time. The point was raised, but not decided, in *Burnell* v. *Hunt* (5 Jurist, 650). In strictness, the sheriff's duty, in such circumstances, is, to seize the whole, and to sell the undivided moiety, and then the vendee becomes tenant in common with the solvent partner. In the case of *Eddie* v. *Davidson* (2 Dougl. 650), where the sheriff pursued the course that was adopted by this defendant, it was held, that, if, on an execution against one of two partners, the partnership goods are taken and sold, the sheriff is to pay over to the other a share of the produce, proportioned to his share in the partnership effects: and it was referred to the master to take the account. That, however, was disapproved of by Lord Eldon, who observes, in *Waters* v. *Taylor* (c): "If the courts of law have followed courts of equity in giving execution against partnership effects, I desire to have it understood that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it can be ascertained what is the subject of sale and purchase. Courts of law have repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How can a court of law ascertain what is the interest to be sold, and what the equities depending upon an account of all the concerns of the partners for years?" And in *Parker* v. *Pistor* (3 Bos. & Pull. 289), and **[234]** *Chapman* v. *Koops* (ibid.), this court refused to enter into the inquiry as to the respective interests of the partners. Lord Alvanley, in the latter case, says: "I hope this will be the last application that will be made to this court of a similar nature with the present. It appears to me to be most clear, that, without the consent of all parties, the court has no right to restrain the plaintiff from taking advantage of the execution which he has issued. When persons enter into partnership, they must be aware that the separate concerns of each partner may in some cases introduce a variety of claims very inconvenient to the general partnership concern. By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But, if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up to sale. It has been said that the court of King's Bench would suspend the plaintiff's execution until he consented to an account being taken by the master: but I do not think we are authorised to take such a step in this case. Indeed, I can hardly conceive a case in which we should be authorised so to do." And Chambre, J., says: "The law has determined what property the sheriff may take possession and dispose of under an execution; and we cannot erect ourselves into a court of equity for the purpose of taking accounts, without the consent of **[235]** the parties. The case of *Eddie* v. *Davidson* (which has been referred to in some of the cases) is essentially different: there, the application was made by the assignees of one partner to have a moiety of the produce of the goods taken in execution for a debt of the other partner, but no objection was made to the sale by the party applying, or to an account being taken by the master, by the party levying, though he denied the title of the insolvent partner to any of the goods. The short objection to this application is, that the court cannot direct a partnership account to be taken, without assuming a jurisdiction that does not belong to it." If, therefore, a court of common law is not competent to take the accounts, and ascertain what is due to each partner, one cannot maintain an action for his share; for, non constat, that there may be anything due to him. The case of *Garbett* v. *Veale* (5 Q. B. 408), seems to go the whole length of this argument. There, a fi. fa. was issued against one of two partners; and, whilst the sheriff was in possession, a fiat in bankruptcy issued against the firm. The sheriff, under an arrangement (the validity of which was afterwards questioned), allowed the messenger under the fiat to take possession of the goods; the messenger kept possession accordingly, and the goods were sold by the assignees, who received the proceeds. The execution-creditor sued them for money had and received: and it was held, that, even if the sheriff had sold the interest of the partner against whom execution issued, an account of the partnership liabilities must have been taken before such representative could have sued for money had and received; and therefore, that the execution-creditor had no right of action. "The son's interest," said Lord Denman, "could be only in the surplus which might remain after payment of the part-**[236]** nership debts; and that surplus must depend upon a settlement of accounts, which the court cannot take without the consent of the parties interested. If the sheriff had sold the son's interest the vendee could have been only tenant in common of the proceeds with the assignees of the firm, and could not have maintained an action without a settlement of accounts." In *Smith* v. *Stokes* (1 East, 363), after an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands; the solvent partner then died, leaving the defendant his executor; and afterwards a commission of bankruptcy was taken out against the surviving partner, and his estate assigned to the plaintiffs: it was held, that they were tenants in common with the solvent partner, and, after his decease, with his representatives, by relation of law from the act of bankruptcy; and therefore could not maintain trover against the defendant, claiming under such solvent partner. The practice now is, for the solvent partner to petition the court, to prevent the assignees from selling until the accounts are taken (*b*)[1]. [Maule, J. In the case of tenants or owners in common of a chattel, or of a joint bequest to two, may a creditor of one seize and sell the whole?] Yes. [Maule, J. That seems very odd.] In Co. Litt. § 323, it is said—"If two be possessed of chattels personals in common, by divers titles, as, of a horse, an ox, or a cow, &c., if one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time." [Maule, J. Then the vendee would not get a good title as against his co-tenant.] The sale passes no title.

(c) 2 Ves. & Bea. 301. And see *Barker* v. *Goodair*, 11 Ves. 78, *Young* v. *Keighley*, 15 Ves. 557, *Dutton* v. *Morison*, 17 Ves. 206, *Wait, In re*, 1 Jac. & W. 605.

[237] Trover is maintainable only where the plaintiff has the right of possession at the time. [V. Williams, J. In *Farrar* v. *Beswick* (1 M. & W. 682, Tyrwh. & Gr. 1053), Parke, B., says: "I have always understood,—until the doubt was raised in *Barton* v. *Williams* (*b*)[2],—that one joint-tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel, unless it were sold in such a manner as to deprive his partner of his interest in it. A sale in market overt would have that effect."] Here, all that is done is, a sale of the goods not in market overt; and therefore the property did not pass. One of the leading cases upon this subject is *Holliday* v. *Camsell* (1 T. R. 658), where it was held, that a member of an amicable society intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who take it from him. Ashhurst, J., there says: "The rule of law,—that one tenant in common cannot maintain an action of trover against another,—is undoubtedly true, and applies to this case. All the members of this society have a joint property in the box and its contents:

(*b*)[1] Archbold's Bpt. Laws, 9th edit., by Flather, 465.

(*b*)[2] 5 B. & Ald. 395. Affirmed on error, *Williams* v. *Barton*, 3 Bingh. 139, 10 J. B. Moore, 506, M'Clell. & Y. 406.

they are, therefore, tenants in common; and one tenant in common cannot maintain trover against another." *Barnardiston* v. *Chapman* (cited 4 East, 121), which will probably be relied on by the other side,—is plainly distinguishable. There, the plaintiff was tenant in common of one moiety of a ship called the "Triton," and the defendants tenants in common of the other moiety; and, the ship being in the possession of the plaintiff, the defendants forcibly took it, and secreted it from him, and changed its name; and the ship afterwards came into the possession of one Dean, who sent **[238]** it to Antigua, where the ship sunk, and was entirely lost. The jury found that this amounted to a wilful destruction of the ship by the defendants' means, and accordingly returned a verdict for the plaintiff, which the court afterwards refused to disturb.

Bramwell and Willes, in support of the rule. Beyond all doubt, the officer in this case was guilty of a conversion. The seizure and sale amount to a conversion, unless the sheriff justifies under the writ of execution. Not guilty and not possessed, do not put in issue more than was put in issue under the old plea of the general issue.

As to the second count, the proposition on the other side is, that the sheriff, under an execution against one having the smallest possible interest in the partnership property, may seize and sell the whole! [Maule J. The argument is, that the sheriff may sell, but he is guilty of no conversion, because the sale passes no title.] If the sale and delivery of property in which I have an interest, is a conversion, if done by a stranger, why is it the less so if done by one having an interest in a moiety of the thing sold? In the course of the argument in *Farrar* v. *Beswick*, Parke, B., observes: "I have never entertained any doubt, since the case of *Barton* v. *Williams*, that a sale by one of two tenants in common of the whole of their property, is a conversion as to the share of the other." [V. Williams, J. There must be some mistake in the report (*a*). That is not consistent with what he is afterwards made to say in the judgment. I think he must have meant,—"I should not have **[239]** entertained a doubt, but for the case of *Barton* v. *Williams*," &c.] In *Barton* v. *Williams*, A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same: these purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A.: immediately after the purchase, B. paid A. one half the value: after considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased: A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which the whole of the warrants were deposited with C. by the brokers: while they were so deposited, the brokers received instructions both from A. and B. to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by A. to get one half renewed, which C. agreed to do, and discounted fresh bills; and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them. It was held,—first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B.; secondly, that, after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and, that being so, the second pledge was the pledge of a specific chattel belonging to B., which the brokers had no authority to make, and that trover was maintainable. "It has been said," observes Abbott, C. J., "that trover cannot be maintained, because there was no conversion, on the **[240]** ground that, at the time of the original pledge, the plaintiffs were tenants in common with Moore, who was the owner of an undivided moiety. It is laid down by Lord Chief Baron Comyns (Com. Dig. Action upon the Case upon Trover, (E.); citing 2 Salk. 655), that, if a bailee sells the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain trover; and if that be so, it follows, that, if a bailee, in possession of undivided shares belonging to two persons, sells the whole, it

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(*a*) The following erratum was subsequently (in vol. ii.) published—"dele have, and for since read before;" and the original leaf was cancelled, and a corrected one substituted for it, when the volume was completed. And see the observation of Parke, B., as reported in Tyrwh. & Gr. 1056.

must be a conversion as to the undivided part belonging to one, over which he has no right or title whatever. I incline to think, therefore, upon that ground, that the pledge could not operate upon the property of the plaintiffs; and that, even if there had been no partition, the sale was a conversion of the undivided interest, and therefore that trover may be maintainable." And Bayley, J., said: "There may be cases in which the indivisible nature of the subject-matter of the tenancy in common may raise an implied authority in one to sell the whole. But, unless there be such authority, either express or implied, a sale of the whole by one tenant in common, is, with respect to the other, a wrongful conversion of his undivided part." Parke, B., evidently considers that case an authority that a sale out and out of the whole partnership property would be a conversion quoad the solvent partner. Two persons jointly interested in a chattel, may maintain separate actions of trover in respect of it against a person who unjustly detains it; *Bleaden* v. *Hancock* (4 C. & P. 152. (There was no plea in abatement).) In *Fennings* v. *Lord Grenville* (1 Taunt. 241), it was held that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to render it impossible that the plaintiff should ever take and use it. Here, the **[241]** goods are as entirely placed beyond the power and control of the plaintiff, as if they had been wholly destroyed, or as the ship was, in *Barnardiston* v. *Chapman*. In *Jacky* v. *Butler* (2 Lord Raym. 871), judgment was entered against one of two partners in trade; and, upon a fi. fa., all the goods, being undivided, were seized in execution: upon application to the King's Bench by him against whom the execution was not, the court held that the sheriff could not sell more than a moiety, for, the property of the other moiety was not affected by the judgment, nor by the execution. In *Smith* v. *Stokes* (1 East, 363), Lord Kenyon says: "I do not understand how the assignees of the bankrupt could take the whole legal interest in this case, without which it is admitted that the action is not maintainable against the defendant. If, indeed, property be left in the hands of a bankrupt partner at the time of the bankruptcy, the assignees are entitled to take possession of the whole and sell it; but they must account for a moiety to the other partner. As in the case of *Heydon* v. *Heydon* (1 Salk. 392), where it was holden, that, under an execution against one of two co-partners, the sheriff must seize all, and not merely a moiety of the goods sufficient to cover the debt; because the moieties are undivided; and he must sell a moiety thereof undivided, and the vendee will be tenant in common with the partner." [Cresswell, J. In *Farrar* v. *Beswick*, Parke, B., says: "As at present advised, though it is not necessary to give a conclusive opinion, I think, that, if the plea had stated that Joshua had a joint interest in these cattle, and that the sheriff seized and sold the whole goods to levy the execution, it would have been a good answer to this action." Do you contest that proposition?] I do. There **[242]** are numerous cases to shew that the sheriff has no right to sell more than the undivided moiety of the debtor. The authorities upon this subject are thus summed up in Archbold's Practice (8th edit., by Chitty, p. 583): "Under a fi. fa. against one of two partners, the sheriff may seize the goods of both (*b*), and sell the defendant's undivided moiety (*c*) in them; in which case, the vendee will, it is said, be tenant in common with the other partner (*d*). The seizure does not divest the other partner of his property or possession in the goods seized (*e*); therefore, when the sheriff enters and takes possession of partnership property, he seizes in execution only the interest of the defendant in the goods (*e*); and so, if, after he has seized under a writ of fi. fa. against one partner, a second writ of fi. fa. be delivered to him against both partners, he cannot be considered to have seized under it, until he has actually done so (*e*). And so, if the sheriff, after seizing the joint

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(*b*) Citing *Johnson* v. *Evans*, 7 M. & G. 240, 7 Scott, N. R. 1035, 1 D. & L. 935; *Farrar* v. *Beswick*, 1 M. & W. 682.

(*c*) Citing *Johnson* v. *Evans*, and *Jacky* v. *Butler*, 2 Ld. Raym. 871.

(*d*) Citing *Eddie* v. *Davidson*, 2 Dougl. 650; *Pope* v. *Hayman*, Comb. 217; *Heydon* v. *Heydon*, 1 Salk. 392. And see *Morley* v. *Strombom*, 3 B. & P. 254, 288; *Bachurst* v. *Clinkard*, 1 Show. 169; *Garbett* v. *Veale*, 5 Q. B. 408; *Johnson* v. *Evans*, 7 M. & G. 240; 7 Scott, N. R. 1035; 1 D. & L. 935, *Dutton* v. *Morrison*, 17 Ves. 193; *Taylor* v. *Fields*, 4 Ves. 396; Tidd's Practice, 9th edit., p. 1807.

(*e*) Citing *Johnson* v. *Evans*.

effects of two partners for the separate debt of one, should receive a fi. fa. requiring him to levy for the separate debt of the other, he cannot return nulla bona to the second writ, without rendering himself liable to an action for a false return (*e*). There appears to be much doubt as to what interest in the partnership property can be sold by the sheriff (*g*). In a recent case, Lord Denman, C. J., said, **[243]** that he must sell such legal interest or share as the defendant has, as partner (which, in the case of only two co-partners, would be an undivided share), not the degree of right which he may be found to have on a winding-up of the affairs; because, if the plaintiff waited till that could be ascertained, the goods might remain unsold for an indefinite time: he must, however inconvenient it may be, sell the share of the defendant partner, make the purchaser tenant in common with the other partner, and the purchaser must do the best he can to ascertain what interest there is (*a*)[1]. And, in another more recent case, the same learned judge said, 'The interest of one of several partners in the partnership property applicable to an execution against him, is only the surplus after payment of the partnership debts, and must depend upon a settlement of accounts, which a court of law is not competent to take, except by consent of all parties' (*b*). Where an execution issued against one of two partners for a separate debt, under which the goods of the partnership were seized; before the sale, a fiat in bankruptcy issued against the partnership; the partnership property was afterwards sold, and the produce received by the assignees; it was held that the execution-creditor could not maintain an action against the assignees for a moiety of the produce, as money had and received to his use, having acquired no legal interest in the goods (*c*). The proper course seems to be, to buy the defendant's share, and file a bill in equity for an account." [V. Williams, J., referred to *Graves* v. *Sawcer* (Sir T. Raym. 15), "in an action upon the case, the **[244]** plaintiff declares that he was owner of a sixteenth part of a ship, and the defendant was owner of another sixteenth part of the same ship, and that the defendant fraudulently and deceitfully carried the said ship ad loca transmarina, and disposed of her to his own use, by which the plaintiff hath lost his said sixteenth part: on not guilty pleaded, and verdict for the plaintiff, it was moved, in arrest of judgment, that this action doth not lie; for, although it was found to be deceptive, yet this does not help it, if the action doth not lie on the subject-matter; and here they are tenants in common of the ship; and Littleton saith, that between tenants in common, there is not any remedy; and there cannot be any fraud between tenants in common, because the law supposes a trust and confidence betwixt them; and upon these reasons, judgment was given quod querens nil capiat per billam" (*a*)[2]. Maule, J. All that appears there is, that the ship was made use of as a ship.] It may be conceded that the seizure and sale alone would not amount to a conversion. It is the delivery of the goods to the vendee, and thereby putting them out of the power and control of the solvent partner, that constitutes the conversion. This matter was very much considered in *Higgins* v. *Thomas* (8 Q. B. 908). The plaintiff is clearly entitled to a verdict on the second count, for a moiety of the value of the goods.

Bramwell and Willes then proceeded to shew cause against the rule obtained on the part of the defendant. Besides the partnership property, it appeared, that, at the time of the seizure, there were brewing utensils and casks upon the premises, which were the separate property of Mayhew. These,—which were valued by the **[245]** jury at 15l. 15s.,—it was contended, on the part of the defendant, having been used for the purpose of the business, were to be considered and treated as property belonging to the firm. But there was no evidence that they had ever been transferred to the firm: and the partnership agreement, which was put in, was altogether silent upon the subject. There is no pretence, therefore, for saying that they ever ceased to be the property of Mayhew. The partnership might have been put an end to at any

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(*e*) Citing *Johnson* v. *Evans*.

(*g*) See *Burton* v. *Green*, 3 C. & P. 306, and the note there.

(*a*)[1] Citing *Holmes* v. *Mentze*, 4 Ad. & E. 131.

(*b*) Citing *Garbett* v. *Veale*, 5 Q. B. 408; *Heydon* v. *Heydon*, 1 Salk. 392; *Chapman* v. *Koops*, 3 B. & P. 289. And see dictum per Patteson, J., in *Burnell* v. *Hunt*, 5 Jurist, 650.

(*c*) Citing *Garbett* v. *Veale*, ubi supra.

(*a*)[2] Vide M. 11 H. 4, fo. 13 a., pl. 29; *Crosse* v. *Abbot*, Noy, 14.

moment, at the option of either partner: there was, therefore, no reason why the plant should be made joint property.

Lush, in support of his rule. The question is, whether these casks and utensils, which had formerly belonged to Mayhew, did not, by the way in which they had been dealt with by the parties, become partnership property. If they did, upon the construction of the agreement, there must be a nonsuit: or, if the question should have been submitted to the jury, there must be a new trial. Besides these casks, there was a quantity of malt and hops upon the premises at the time Smee became a partner; and these were consumed in the business, and no claim is now made in that respect. In Collyer on Partnership (2nd edit. 105), it is said: "When the respective shares of the partners in the stock and capital are to be ascertained,—a necessity usually arising on a dissolution,—it will be essential, in the first place, to know in what manner the respective interests of the partners are distributed, either by virtue of their own agreement, or by operation of law. This will not be difficult, where one partner has brought to the joint concern real property, the other personal property; or, where both have provided stock of the same **[246]** nature in certain shares; or, where one has provided stock in specie, the other capital. And, in all these cases, where it does not appear what is the precise amount of the respective shares of the partners, the presumption is that they are entitled equally (*a*). But, suppose one partner to have contributed labour only, sharing the profits; would he, in default of partnership articles, be adjudged a partner in the original capital? In all doubtful cases, this question must be answered by a jury; and their verdict must depend upon whether they think with the civilians, operam pro pecuniâ valere." [Coltman, J. There was no evidence whatever upon which the jury could have come to the conclusion that the casks and plant ever became the property of the partnership; and, in the absence of any stipulation to that effect in the agreement, the evidence must be very strong indeed. There is a great difference between articles of this description, and goods, such as malt and hops, quæ ipso usu consumuntur.]

Coltman, J. It is quite clear that the plaintiffs in this case are entitled to a verdict for 15l. 15s. upon the first count.

As to whether the plaintiff can maintain trover against the officer for the sale of his share of the partnership effects,—it is conceded that the case of a sheriff is not distinguishable from that of any other joint owner of a chattel: and, that being so, the authorities are too strong to be got over, that the mere sale of a chattel by one of two joint owners, is not a conversion as against the other. It is not necessary, however, to decide that point here. There may be such a dealing with the chattel by one of the joint owners, **[247]** short of its absolute destruction, as would amount in law to a conversion. But there is nothing here to shew that the defendant has so conducted himself as to put it out of the power of the plaintiff to take his property, or to pursue his remedy against the parties who have got possession of it. The real question, however, is, whether that defence can be gone into upon not guilty. My opinion, notwithstanding the case of *Stancliffe* v. *Hardwick* (2 C. M. & R. 1),—which, it seems, is not now upheld (*b*),—is, that it was competent to the defendant, under not guilty, to shew that he had not been guilty of a wrongful conversion.

As to the second count, however, it seems to me that the facts as alleged are established, and that the plaintiffs are entitled to a verdict upon that count. And I do not see any other measure of damages than the half. We can only pay regard to the legal rights of the parties. Until the contrary is shewn, the presumption, in the case of partners, is, that each is interested in the partnership goods to the extent of one half. The plaintiffs, therefore, will have a verdict entered upon the second count for 75l.

Maule, J. I agree with my brother Coltman in thinking that the plaintiffs are entitled to a verdict upon the first count for 15l. 15s., and upon the second count for 75l. Nothwithstanding the section of Littleton that has been referred to, I am strongly inclined to think that trover may be maintained under circumstances like these. That doctrine, as it seems to me, is to be understood thus,—that there may be dispositions of the subject-matter which will amount to a con-**[248]**-version if done by a stranger,

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(*a*) *Farrar* v. *Beswick*, 1 M. & W. 682; *Peacock* v. *Peacock*, 2 Campb. 45, 16 Ves. 56.

(*b*) See the observations of Parke, B., upon that case, in *Whitmore* v. *Greene*, 13 M. & W. 107, and *Kynaston* v. *Crouch*, 14 M. & W. 272.

that are not so if done by a tenant in common. But I do not think it therefore follows, that no dealing with the thing by one of two tenants in common, that does not amount to a total annihilation of it (if that be possible), can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing, and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow, that, where one tenant in common has dealt with the subject to an extent exceeding his authority,—as, where he sells out and out to a number of purchasers, who carry away the articles,—it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion. It is not, however, necessary to decide that upon the present occasion.

The second count was distinctly proved, and the plaintiffs are clearly entitled to a verdict on it. The question is, to what amount of damages are they entitled. Until the contrary be shewn, partners are to be assumed to be entitled in equal shares The proper measure of damages is, the amount of interest which Mayhew lost by the sale. And, in the absence of any evidence to cut down his claim, we must assume that he was interested to the extent of a moiety.

Cresswell, J. I am of the same opinion. Upon the first point, the authorities seem to shew that one partner or joint-tenant of a chattel cannot maintain trover against his co-tenant in consequence of his having taken upon himself to sell the subject-matter of the joint-ownership. And there is no distinction in this respect between the case of the sheriff and any other tenant in common. If, however, the thing be destroyed, or sold so as to change the property, as, in market overt, the case [249] is different. So, here, if the plaintiffs could have shewn that the goods were so disposed of as to prevent him from following his legal rights, he might have been entitled to maintain trover. In the case of *Barnardiston* v. *Chapman*,—cited in 4 East, 121, from a MS. note of Lord Chief Justice King,—the court lay it down broadly, that, where one tenant in common does not destroy the thing in common, but only takes it out of the possession of the others, and carries it away, trover will not lie. But, upon the second trial, it appeared that the plaintiff was tenant in common of one moiety of the ship called the "Triton," and the defendants tenants in common of the other moiety; that, the ship being in the possession of the plaintiff, the defendants forcibly took it out of his possession, and secreted it from him, so that he knew not where it was carried, and changed the name of the ship, which afterwards came into the possession of one Dean, who sent her to Antigua, where she was entirely lost. The plaintiff's counsel insisted that the thing in common being thus destroyed, the defendants were to answer for it to the plaintiff. But the defendants' counsel insisted that one tenant in common is only answerable to the other tenant in common for an actual destruction; to which King, C. J., agreed; but left it to the jury, upon the whole circumstances of the case, "whether, by the defendants' force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve the ship? and, a destruction happening in those circumstances,—whether it should not be found to be a destruction by the defendants' means?" which the jury accordingly found, and gave the plaintiff 110l. damages. And the court unanimously agreed to the chief justice's direction, and refused to grant a new trial. It may be, as a sale in market overt is equivalent to a destruction of the thing so far as the rights of a co-tenant are [250] concerned, that that decision is sustainable on that ground: but I do not think the court meant to put it on any such footing. The property may be so entirely changed by other means than destruction or sale in market overt, as to give a right of action.

A denial of the conversion may be given in evidence under not guilty. As to the case of *Stancliffe* v. *Hardwick*, I should not have felt inclined to say that it was not law, unless the judges who decided it had themselves said so.

The second count, I think, was sustained by the evidence: and, in the absence of any thing to shew that the bankrupt was entitled to less than a moiety of the partnership effects, that must be the measure of damages the assignees are entitled to recover.

V. Williams, J. I also am of opinion that the damages should be increased on the second count, but not upon the first. Notwithstanding the doubt thrown upon the case of *Barton* v. *Williams* by Mr. Baron Parke, in *Farrar* v. *Beswick*, I think the true rule is, that the sale of a chattel by one of two joint-tenants is not a conversion, unless it operates altogether to deprive his companion of his property in it. It is not necessary for us to decide whether *Stancliffe* v. *Hardwick* is good law or not; though, after the observations made upon it by one of the judges who decided it, in *Whitmore* v. *Greene* and *Kynaston* v. *Crouch*, I think it cannot be sustained (*a*). The verdict upon the first count, therefore, will be limited to the 15l. 15s. the value of Mayhew's separate property.

The second count was proved. Whether it was good or not, is not the question now before us. In the absence of any thing to shew Mayhew entitled to less than **[251]** a moiety of the value of the partnership property, that must be the measure of damages.

Plaintiffs' rule to increase the damages, absolute, as to the second count.

Defendant's rule discharged.

Turner *v.* Meryweather. Feb. 9, 1849.

[S. C. 18 L. J. C. P. 155; 13 Jur. 683.]

A count in an action for a libel, stated that the defendant, intending to cause it to be believed that the plaintiff and one J. H. had transferred, or caused to be transferred, a certain amount of Bank-stock from the name of one W. T., by means of a power of attorney obtained by them from W. T. by undue influence, at a time when he was mentally incompetent to do any act requiring reason and understanding,—published the following, "There is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name, in the books of the Bank of England, by power of attorney obtained from him by undue influence after he became mentally incompetent to perform any act requiring reason and understanding (thereby meaning that the plaintiff and J. H. had transferred, or caused to be transferred, the said money from the said W. T.'s name in the said books of the said bank, by means of a power of attorney obtained by them from the said W. T. by undue influence exercised by them over the said W. T., and at a time when the said W. T. had become and was mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding"). —The jury having found a general verdict for the plaintiff:—Held, on motion in arrest of judgment, that the count was good, and that the innuendo did not improperly extend the meaning of the libel.—It is in the discretion of the judge at nisi prius to refuse or to allow a postponement of a trial, on the ground of the absence of a witness.

This was an action upon the case for a libel. The declaration consisted of eight counts.

The first count, after the common inducement, stated, that, theretofore, and long before the committing by the defendant of the said several grievances, one William Turner, late of Wodecote Lodge, in the county of Surrey, since deceased, had signed a draft will as and for instructions for the preparation by his attorney of the last will and testament of him the said William Turner; **[252]** that the said William Turner was, at the time he so signed such draft will, of perfectly sound and disposing mind, memory, and understanding, and knew and fully understood the nature and contents thereof: that one Mary Ann Meryweather was the only child and heiress-at-law of the said William Turner at the time of his death; yet that the defendant, well knowing the premises, but wickedly and maliciously contriving and intending to injure the plaintiff, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the plaintiff had fraudulently and corruptly caused and procured the said William Turner to sign the said draft will at a time when he the said William Turner was in an imbecile state of mind, and incapable of understanding the nature and effect thereof, and that the motive of the plaintiffs in procuring such signature was, to prevent the said heiress-at-law of the said William Turner from succeeding to his property, theretofore, to wit, on, &c., falsely, wickedly, and maliciously did compose, print, and publish, and caused to be composed, printed, and published, in one part of a certain pamphlet, intituled "Extraordinary case in the Ecclesiastical court, by a Barrister-at-law," the false, scandalous, malicious, defamatory, and libellous matters thereinafter next mentioned, of and concerning the said draft will, and of and concerning the said William Turner, and of and concerning the state of mind of the

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(*a*) And see *Higgins* v. *Thomas*, 8 Q. B. 908.

said William Turner, and his capacity to understand the nature and contents of the said draft will at the time when he so signed the same, and of and concerning the said heiress of the said William Turner, that is to say, &c. &c.

The seventh count stated, that also, before the time of the committing by the defendant of the grievances thereinafter next mentioned, and for a long time prior to, and at the time of, the death of the said William Tur-**[253]**-ner, a large sum of money, to wit, the sum of 10,000l., had been and was standing in the books of the governor and company of the Bank of England in the name of the said William Turner; that the defendant, further contriving and intending wickedly and maliciously to injure the plaintiff, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the plaintiff and the said John Hornblow Turner had transferred, or caused to be transferred, the said money from the said William Turner's name in the said books, by means of a power of attorney obtained by them from the said William Turner by undue influence, at a time when the said William Turner had become and was mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding, theretofore, to wit, on the 23rd of May, 1846, falsely, wickedly, and maliciously did compose, print, and publish, and cause to be composed, printed, and published, in another part of the said pamphlet in the said first count mentioned, the false, scandalous, malicious, defamatory, and libellous matters thereinafter next mentioned, of and concerning the plaintiff, and of and concerning the said money so standing in the books of the Bank of England in the name of the said William Turner as aforesaid, that is to say—"Yet, in defiance of all the watching, there is strong reason for believing that a very considerable sum of money was transferred from Mr. Turner's (meaning the said William Turner's) name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became wholly incompetent to perform any act requiring reason and understanding (thereby meaning that the said plaintiff and the said John Hornblow Turner had transferred, or caused to be transferred the said money from the said William Turner's name in the said books of the said **[254]** bank, by means of a power of attorney obtained by them from the said William Turner by undue influence exercised by them over the said William Turner, and at a time when the said William Turner had become and was mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding)," &c. &c.

The defendant pleaded not guilty, and several pleas of justification, which are not now material.

The cause was tried before Lord Denman, C. J., at the last spring assizes for the county of Surrey. The first seven counts of the declaration were for libellous matter published by the defendant in a pamphlet, reflecting very seriously upon the character of the plaintiff. It appeared that William Turner, mentioned in the declaration, was the brother of the plaintiff, and the father of the defendant's wife; that William Turner made a will on the 16th of May, 1829, and a codicil thereto on the 29th of August; and that he died on the 19th of September in that year.

At the time of making his will, William Turner was about eighty years of age, and in a very infirm state of health. Robinson, his attorney, it appeared, had got him to sign the draft before the will was formally executed. Shortly after William Turner's death, the defendant entered a caveat, and opposed the grant of probate, and afterwards commenced proceedings in equity, and brought two ejectments, for the purpose of trying the validity of the will; but none of these proceedings were followed up. The principal charges contained in the pamphlet, were, that the plaintiff and others in concert with him, had caused the will and codicil to be executed by the testator when in an unsound state of mind; and that, whilst he was in such state of mental incapacity, they had induced him to sign a power of attorney, under which there was rea-**[255]**-son to believe that a large amount of stock had been sold out.

The cause having been specially appointed to be tried on Monday, the 3rd of April, the defendant, on Saturday, the 1st of April, applied to Parke, B., at chambers, for leave to examine one Dr. Harris, a medical man who had attended William Turner down to the time of his death, before a commission at Reading (he being unable to attend at the trial, by reason of illness), and that such examination might be read as evidence for the defendant on the trial; or why the trial should not be postponed. Upon the hearing of the summons, at 1 o'clock on that day, the learned baron made an order that the defendant might be at liberty to examine Dr. Harris vivâ voce as to any matters to which he had not been interrogated on his examination in a suit in chancery, in 1835, touching the will in question,—on condition, that if the defendant should read the examination, he should also read the deposition of the witness in chancery, and should also admit the deposition of Robinson (deceased), the attorney of the testator, taken at the same time, to be read for the plaintiff.

On the morning of Monday, the 3rd of April, application was made to Lord Denman to postpone the trial, on the ground of the absence of Dr. Harris. The order of Parke, B., had not been acted upon. Lord Denman declined to postpone the trial; and, in the result, a general verdict was found for the plaintiff, damages 1000l.

Channell, Serjt., in Easter term last, moved for a rule to shew cause why there should not be a new trial, on the ground of the trial having been improperly allowed to take place in the absence of Dr. Harris, and also on the ground that the damages were excessive; or why the judgment should not be arrested on the **[256]** seventh count, and a venire de novo awarded, to try the issues joined upon the other counts, on the ground that the seventh count was bad, the innuendo therein unduly extending the meaning of the libel.

Wilde, C. J. Looking at the nature of the imputations cast upon the plaintiff by the publication in question, and having no certain test for ascertaining the precise measure of damages in such a case, I cannot say that the sum awarded is excessive. As to the refusal of Lord Denman to postpone the trial, that is a matter that is attended with some difficulty: the affidavits do not shew that the defendant has sustained any prejudice from the course that was adopted. Upon this point, however, as well as upon the motion in arrest of judgment, we will take time to consider. There certainly seems to be a little ambiguity in the seventh count.

On the following day, the court intimated that the rule might go upon the two points which had been reserved for consideration.

Shee, Serjt., R. Gurney, and Fish, now shewed cause. It was entirely in the discretion of the learned judge to postpone the trial: and, if it were necessary to consider it, that discretion was well exercised upon the facts of the case. The defendant had ample time to act upon the order of Parke, B., if he had been minded so to do.

It is said that the seventh count is bad, for that the innuendo unduly extends the meaning of the words of the libel. There can be no doubt that the publication is in itself libellous. [Maule, J. The objection is, that the innuendo asserts, as a fact, that the plaintiff and John Hornblow Turner had improperly procured the **[257]** money to be transferred; whereas, the libel itself merely states that "there was strong reason for believing" that they had done so.] It was for the jury to say what was the meaning of the party using the words,—whether he did not intend to impute fraud to the plaintiff, under the mask of caution. In Comyns's Digest (title Action upon the Case for Defamation (E. 1)), it is laid down, that "if words are slanderous, it is not material though they are spoken indirectly and obliquely: as, I will make thee an example, for a perjured knave." In *Peake* v. *Oldham, in Error* (Cowp. 275), in slander, in which the plaintiff below (Oldham) declared, that, upon a colloquium of and concerning the death of one Daniel Dolly, Peake (the defendant below) said to Oldham,—"You are a bad man, and I am thoroughly convinced that you are guilty (meaning, guilty of the murder of the said Dolly), and, rather than you should want a hangman, I would be your executioner:" and these words were held actionable. Lord Mansfield there says: "Where it is clear that the words are defectively laid, a verdict will not cure them. But, where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them." So, in *Roberts* v. *Camden* (9 East, 93), it is laid down, that the rule of construction as to slanderous words is, to construe them in their plain and popular sense, that in which an ordinary hearer would have understood them at the time they were spoken: and, therefore, the defendant saying of the plaintiff that "he was under a charge of prosecution for perjury; and that G. W. (an attorney of that name) had the Attorney-General's directions to prosecute the plaintiff for perjury," is actionable: for, after verdict **[258]**—by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had not committed,—the words, not having been justified, must be taken to be false; and, being unqualified by any context, and unexplained by any occasion to warrant them, the law infers malice from the falsehood of an accusation which, in the common acceptation of the words, imputes perjury to the plaintiff. In *The Earl of Northampton's case* (12 Co. Rep. 132), it was resolved, "that, if A. say to B. did you not hear that C. is guilty of treason? &c., this is tantamount to a scandalous publication." So, in Bac. Abr. Slander (G.), pl. 2, it is said: "An action lies for publishing these words of J. S., I think, or I dreamed, he committed a certain felony; for, although the words are not directly affirmative, J. S. may by reason of the words be arrested, upon suspicion of having committed that felony." [V. Williams, J., referred to *Boydell* v. *Jones* (4 M. & W. 446), where the words were spoken ironically.] It is enough, after verdict, if the words can have the meaning imputed to them. In *Gardiner* v. *Williams* (*c*), one of the counts set forth the following libel, addressed in a letter to one C. A. P.—"I (meaning the defendant) have reason to suppose that many of the flowers of which I (meaning the defendant) have been robbed, are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to C. A. P., and unlawfully placed them in the garden of the last-mentioned person):" and the count was held good, on motion in arrest of judgment, on the ground that **[259]** "flowers" could be the subject of larceny, and that the innuendo was not too large; Lord Abinger, C. B., observing, that "any assignable case which will support the verdict, must be presumed" (vide 1 M. & R. 281).

The first seven counts are, in substance and legal effect, one. In *Alfred* v. *Farlow* (8 Q. B. 854), a declaration for slander recited that the plaintiff carried on the trade of buying and selling, and was a dealer in an article of fishing-tackle, called a winch; and that the defendant used the trade of making and selling winches; and it charged that the defendant, intending to injure the plaintiff in his said trade, and to cause his customers to believe that he was guilty of unlawfully buying goods, well knowing them to have been stolen and dishonestly come by, in a discourse which he had with the plaintiff, of and concerning him, with reference to his said trade, and of and concerning the premises, in the presence and hearing of J. F., &c., falsely and maliciously spoke to and of and concerning the plaintiff, and of and concerning him with reference to his said trade and the premises, the words, &c., "I (meaning the defendant) have been robbed of about three dozen winches (meaning such articles, &c.): a person has been buying things at my shop, and has taken them: you (meaning the plaintiff) have bought two, one at 3s., and one at 2s.: you (meaning the plaintiff) knew well, when you bought them (meaning the said winches), that they cost me (meaning the defendant) three times as much making, as you (meaning the plaintiff) gave for them, and that they could not have been come honestly by." The declaration then proceeded—"whereupon the plaintiff then, in the presence and hearing of the aforesaid persons, said to the defendant," &c., setting forth further words of the plain-**[260]**-tiff respecting winches, and alleging that the defendant, further contriving, &c., thereupon, in the presence and hearing of the said persons, replied, &c. (setting out other words); "thereby meaning," &c., "that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by, and to have been feloniously stolen, by the person of and from whom the said plaintiff had so bought them." After verdict for the plaintiff, with general damages,—it was held, on motion in arrest of judgment, first, that the words first set out, imputed that the plaintiff had received stolen goods, knowing them to have been stolen; secondly, that the words following appeared to have been spoken at the same time with the others, and formed with them a continued discourse; that the declaration, therefore, contained only a single count; and, consequently, that the plaintiff was entitled to judgment, even on the assumption that the words last set out gave no cause of action. The same doctrine is laid down in *Griffiths* v. *Lewis* (8 Q. B. 841). And both these cases are founded upon *Hambleton* v. *Veere* (2 Saund. 169). *Hughes* v. *Rees* (4 M. & W. 204) puts libel and slander upon the same footing in this respect.

Pearson and Henniker, in support of the rule. This is, of all others, a case in which the evidence of the medical attendant would be important; and therefore justice

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(*c*) 2 C. M. & R. 78, 5 Tyrwh. 757. Affirmed, on error: *Williams* v. *Gardiner*, 1 M. & W. 245, Tyrwh. & Gr. 158.

required that the defendant should not have been forced to trial in the absence of Dr. Harris.

Reading the seventh count by itself, there is nothing libellous in it, nor anything to apply it in an offensive sense to the plaintiff. When some counts in a declaration for libel or slander are good and some bad in law, and general damages are given, the court will **[261]** arrest the judgment in toto, and will not award a venire de novo: *Holt* v. *Scholefield* (6 T. R. 691). In Comyns's Digest (title Action upon the Case for Defamation (F. 14)) it is said, that, "if words charge no person certain; as, one of my brothers is, &c., where he had several brothers," no action lies. So, if he say to three witnesses, one of you is perjured, none of them shall have an action. So, "if he say my enemy is, &c., no one shall have an action. The Boxes are traitors, none of that name shall have an action. She had a child, and she, or somebody else, made it away." In *Hall* v. *Blandy* (1 Y. & J. 480), it is laid down, that, where that which is complained of in the declaration as a libel, does not, upon the face of it, apply to the plaintiff, and import a libel, it is necessary by inducement to state such facts as will support an innuendo, and shew the libellous application of the statement to the plaintiff. In *Forbes* v. *King* (1 Dowl. P. C. 672), a count in an action for a libel charging that the defendant wrote of the plaintiff that he was a "man Friday" to another, was held bad, for want of an averment to shew that, by the term Friday, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him: so, to write of a man, that he has been engaged in a gambling fracas, arising out of a dispute at play, is not libellous, without an averment that illegal gambling and play were intended by the libel. In *Solomon* v. *Lawson* (8 Q. B. 823), it was held, that, in an action for libel or slander, where the words written or spoken are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give them such an application. In *Empson* v. *Griffin* (11 Ad. & E. 186, 3 P. & D. 160), where one of several counts in a declaration for slander was bad, and some of the de-**[262]**-famatory words in it were proved at the trial, and the jury found a general verdict with damages for the plaintiff, the court set aside an order of the judge who tried the cause, to confine the verdict and damages to the good counts. The office of the innuendo is thus explained in Williams's Saunders (*a*): "An innuendo is only explanatory of some matter already expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add to, or enlarge, or change the sense of previous words." Again (vol. i. p. 243 a. n. (2)): "The principle that an innuendo which introduces a meaning broader than that which the words naturally bear, is bad, as being too large, unless connected with proper introductory averments, has been supported by numerous modern decisions" (*c*). Ambiguous words are not helped by a verdict: *Hughes* v. *Rees* (4 M. & W. 204). This is not like the case of *Griffiths* v. *Lewis*, where the whole was one continuous statement. In *Solomon* v. *Lawson* (8 Q. B. 823), it was held, that, in an action for libel or slander, when the words, written or spoken, are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give such an application. Therefore, where the declaration, in the first count,—after reciting that the plaintiff was employed in supplying fresh water to ships at St. Helena, and had, for that purpose, fitted up a schooner with wooden tanks, and that, the ship "Moffat" being at St. Helena, the plaintiff conveyed fresh **[263]** water to her in the wooden tanks of his schooner,—complained that the defendant published, of and concerning the plaintiff in his said employment, and concerning the water so supplied to the "Moffat," a statement (set forth in the count) that persons on board the "Moffat" had become ill soon after leaving St. Helena, where they had taken in fresh water; which illness was occasioned by the water; that the water was run into a copper tank, whence the casks were filled alongside; that the poison was imbibed from the tank;

(*a*) Vol. i. p. 243, n. (4); citing *Rex* v. *Greepe*, 2 Salk. 513, 1 Ld. Raym. 256, 12 Mod. 139.

(*c*) The following cases are cited—*Goldstein* v. *Foss*, 6 B. & C. 154, 9 D. & R. 197, (in error, 4 Bingh. 489, 1 M. & P. 402, 2 Y. & J. 146); *Alexander* v. *Angle*, 1 C. & J. 143, 7 Bingh. 119, 4 M. & P. 870; *Day* v. *Robinson*, 1 Ad. & E. 554, 4 N. & M. 884; *Harvey* v. *French*, 1 C. & M. 11; *Gompertz* v. *Levy*, 9 Ad. & E. 282, 1 P. & D. 214; *Wheeler* v. *Haynes*, 9 Ad. & E. 286 (*a*), 1 P. & D. 55.

and that it behoved the authorities to order its removal, and replace it with an iron one,—thereby meaning that the plaintiff had been guilty of supplying bad and unwholesome water to the "Moffat,"—the court arrested the judgment. In giving judgment, Lord Denman says: "If there be contained in the alleged libel, matter which is capable of receiving the interpretation put upon it by the innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But, generally, if the words written or spoken cannot apply to the individual plaintiff, no previous averments or subsequent innuendos can help to give the words an application which they have not. And that is the reason why the words must be set out, as was observed by Lord Abinger, in giving the judgment of the court in the case of *Gutsole* v. *Mathers*" (1 M. & W. 495, Tyrwh. & Gr. 694).

COLTMAN, J. We must consider in this case what is due in justice, not only to the defendant, but also to the plaintiff. The defendant did not avail himself of the order of my brother Parke. If there was not time for the purpose, that might have been shewn by affidavit. When at the assizes, the defendant sought to have the trial postponed, not for a short time, but until the **[264]** next assizes. It is quite clear, therefore, that he intentionally chose not to make use of the power of examining Dr. Harris, which that order gave him. If we saw reason to think that there had been any failure of justice in consequence of Lord Denman's refusal to postpone the trial, we should undoubtedly have felt disposed to listen to this application. But, considering that the matter had already undergone full discussion in the court of Chancery, there is little reason to doubt that justice has been done. The evidence given by Dr. Harris in the court of Chancery in 1835, would be much more satisfactory to my mind, than his vivâ voce evidence given after this lapse of time, when his recollection of what occurred so long ago, must necessarily be very imperfect. I therefore think there should be no new trial.

The only ground upon which a venire de novo could be awarded is, that the judgment ought to be arrested. The question, then, in this case is, whether there is any ground for arresting the judgment. The argument on the part of the defendant has rested mainly upon some old cases in which it was held that a mere innuendo will not supply the want of certainty in the charge contained in a libel. But those cases cannot apply, where the application of the libellous matter is ascertained by proper introductory averments. In *Solomon* v. *Lawson*, the innuendo does not impute any misconduct to the plaintiff: the innuendo is, thereby meaning that the water which the plaintiff supplied to the shipping at St. Helena, was bad and unwholesome. It was imputing no offence or misconduct to the plaintiff to say that he supplied bad water, unless it appeared that he had the means of supplying good and wholesome water. It is not stated that the plaintiff knew the water to be bad. Even the innuendo, therefore, imputes no offence to the plaintiff. That case, therefore, is very distinguishable from the **[265]** present: and, as this matter is upon the record, I think we are quite justified in leaving the defendant to such remedy as he may have that way.

MAULE, J. I am of the same opinion. The postponement of the trial was a matter that was entirely in the discretion of the presiding judge. The judge is not in any case bound to put off the trial of a cause, at the instance of the defendant, on the ground of the absence of a witness. And I think in this case the application was very properly refused: the learned judge might well infer that the application was made for the mere purpose of delay.

Taking that part of the declaration to which the motion in arrest of judgment applies, to be a separate and distinct count, it seems to me that it charges something that is actionable. It states, in effect, that the defendant and John Hornblow Turner procured a transfer of stock by means of fraud, by inducing a person of weak and incompetent understanding to execute a power of attorney for that purpose. That is clearly a statement of a wrong done to the plaintiff. I agree that some of the older cases held that defamatory matter was to be construed in mitiori sensu, and that a plaintiff could not by averment impute to them a graver construction. That, however, is not the case now; and the later cases, which decide that slanderous words are to be taken in their ordinary and appropriate sense, are certainly more consistent with reason. If *Solomon* v. *Lawson* is to be taken to have decided, that, where a libel, speaking of a class of persons, and without mentioning the plaintiff, cannot by proper averments and due proof be shewn to have been intended to apply to the plaintiff, I should not feel satisfied with the decision. But I am far from thinking that that case proceeded upon any such ground.

[266] CRESSWELL, J., not having heard the whole of the argument, pronounced no opinion.

V. WILLIAMS, J. I am of the same opinion. It may well be that the libel charged in the seventh count, was intended to impute gross misconduct to the plaintiff. The declaration alleges it, and the jury have found it. It would be a reproach to the law, if the plaintiff could not recover damages in such a case. And I find no authority that at all militates against his right so to do.

Rule discharged (*a*).

MORRISON *v.* CHADWICK. Feb. 14, 1849.

[S. C. 6 D. & L. 567; 18 L. J. C. P. 189; 13 Jur. 638.]

An eviction by a landlord of his tenant, from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction; but the tenancy is not thereby put an end to; nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent.—Where, therefore, in assumpsit by a landlord against his tenant for breach of a promise to use the premises in a tenant-like manner during the continuance of the tenancy, the latter pleaded, that, during the continuance of the tenancy, and before any breach, the former entered upon part of the premises and evicted him therefrom, and that he thereupon relinquished and gave up, and the landlord had and thence hitherto retained the possession of, the residue of the premises:—Held, that the plea was bad, inasmuch as it did not shew a dissolution of the tenancy, by mutual consent.—A further plea stated, that, during the tenancy, and before any breach, the premises, and the defendant's estate and interest therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant's then quitting the same premises, and every part thereof, with the licence and consent of the plaintiff, and relinquishing the possession thereof to the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's then accepting such possession, with the intention of putting an end to the same tenancy:—Held, that, if the tenancy continued up to the time of the arrangement stated in the plea, such arrangement would not enure as a surrender by act and operation of law: and also that it was a valid objection to the plea, on special demurrer, that it amounted only to an argumentative denial that there had been any breach during the tenancy.—The defendant also pleaded a set off, alleging that the plaintiff, before and at the commencement of the suit, was, and still is, indebted to the defendant, &c.; to which the plaintiff replied that he "was not indebted to the defendant, in manner and form," &c.:—Held, that this was a sufficiently direct traverse of the continued existence of the supposed debt alleged in the plea.

Assumpsit. The first count of the declaration stated, that, before the commencement of the suit, to wit, on the 1st of March, 1830, in considera-[267]tion that the defendant had become and was tenant to the plaintiff of divers messuages, lands, and premises, with the appurtenances, the defendant then promised the plaintiff to use the said messuages, lands, and premises, with the appurtenances, in a tenant-like and proper manner, for and during the continuance of the said tenancy; and that, although the said tenancy did continue and endure for a long space of time, to wit, from the day and year last aforesaid to the time of the commencement of this suit, yet that the defendant did not nor would, during the continuance of the said tenancy, use the said messuages, lands, and premises, with the appurtenances, in a tenant-like and proper manner, but, on the contrary thereof, the defendant during the continuance of the said tenancy, to wit, on the 2nd of March, 1830, and on divers and very many days between that day and the commencement of the suit, so improperly behaved and conducted himself in that behalf, and used the said messuages, lands, and premises, with the appurtenances and chattels therein, in so untenant-like and improper a manner, that, by reason thereof, the said messuages, lands, and premises, with the appurtenances,

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(*a*) See *Wakley* v. *Healey* (*in Error*), post.

to wit, on the said 2nd of March, 1830, then became and were, and thence hitherto continued, and still remained, ruinous, broken down, destroyed, prostrated, foul, miry, and greatly dilapidated.

The declaration also contained counts for use and occupation, for money paid, and for money found due upon an account stated.

Second plea,—to the first count,—that the plaintiff, [268] during the continuance of the said tenancy, and before any breach of the defendant's alleged promise, to wit, on the 31st of August, 1840, with force and arms, and without the consent, and against the will of the defendant, entered into and upon a certain part of the said demised premises, to wit, a part thereof called, to wit, the shed, and then ejected, expelled, put out, and amoved the defendant from the possession thereof; and that, thereupon, the defendant, before any breach of the said promise, and whilst he was so expelled, ejected, put out, and amoved, from the said part of the said demised premises by the plaintiff as aforesaid, to wit, on the day and year aforesaid, wholly quitted, abandoned, relinquished, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff had from thence forward had the same, and the possession thereof,—verification.

Special demurrer to the second plea, assigning for causes,—that the said second plea affords no answer in law to the first count; that it states, at most, only an eviction from a part of the premises in the first count mentioned, and does not in any manner shew a determination of the tenancy in the said first count alleged, before the breach of promise by the defendant in that count mentioned, or at any other time;—that the said second plea only states and shews a trespass on the part of the plaintiff, in ejecting the defendant from a part of the premises in the first count mentioned, and that thereupon the defendant gave up possession of the residue of the said premises, which the plaintiff has since hitherto had; but that the said second plea does not in any manner shew an eviction in point of law, by the plaintiff of the defendant, from any part of the said premises; and that the said second plea does not state or shew that the plaintiff kept the defendant ejected from any part of the said premises for any [269] length of time, nor that the defendant did not, immediately after the supposed eviction of him the defendant, return to the said part of the said premises from which he had been so ejected by the plaintiff, and to the possession thereof;—that the said second plea is ambiguous, in this, that it is uncertain whether the defendant means, in his said plea, to allege and rely upon a supposed eviction of him by the plaintiff from a part of the premises therein mentioned, authorising the defendant in law to give up the residue of the said premises, and his possession and tenancy thereof, to the plaintiff, and a consequent giving up of such residue by the defendant, and a ceasing of all use and occupation and tenancy thereof by him, or whether the defendant, in and by his said second plea, means to make, and rely upon, an allegation of an eviction of him, the defendant, from a part of the said premises, by the plaintiff, and of a surrender in law by the defendant to the plaintiff of the residue of the said premises, or an executed agreement between the plaintiff and the defendant for the giving up of the said residue by the defendant to the plaintiff, and the ceasing of the defendant's tenancy thereof;—that the said second plea does not state or shew, either substantially, or in accordance with the rules or forms of pleading, any facts amounting to a surrender in law of the said residue of the premises in the said second plea mentioned, or of the whole or any part of the premises in the first count mentioned, nor any executed agreement between the plaintiff and the defendant for the determination of the defendant's said tenancy thereof; that the facts in the said second plea alleged are not pleaded as, or as amounting to, a surrender in point of law, and that the said second plea does not shew that the defendant gave up possession of the said residue of the premises therein mentioned, by the licence or consent of the plaintiff, or [270] with the intention of putting an end to the defendant's said tenancy as to any part of the said premises, or that the plaintiff in any way accepted the possession thereof, or accepted the same with a like intention;—that the said second plea is an argumentative denial of the allegation in the first count, which is to the effect that the defendant, during the continuance of the said tenancy in the first count mentioned, used the said messuages, lands, and premises therein mentioned in the untenant-like and improper manner in the said first count mentioned;—and that the said second plea improperly concludes with a verification.

Third plea,—to the first count,—that, during the said tenancy, and before any breach of the defendant's said promise, to wit, on the 31st of August, 1840, the said messuages, lands, and premises, and the said estate, term, and interest therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant's then quitting the said messuages, lands, and premises, and every part thereof, with the licence and consent of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff, with the intention of putting an end to the same tenancy, and by the plaintiff's then accepting such possession and enjoyment thereof, with the intention of putting an end to the same tenancy,—verification.

Demurrer to the third plea, assigning for causes,—that the said third plea is an argumentative denial of the allegation in the said first count, which is to the effect that the defendant, during the continuance of the said tenancy in the first count mentioned, used the said messuages, lands, and premises therein mentioned in the untenant-like and improper manner therein mentioned;—that the said third plea alleges a surrender by act and operation of law, and yet does not shew, with sufficient certainty, any such surrender;—that the sur-[271]-render alleged in the said third plea is not shewn to have been in writing;—that it is uncertain whether, in the said third plea, the defendant means to rely on a surrender by operation of law, or on a surrender in fact;—and that the said third plea alleges two repugnant and incompatible modes of surrender, and is calculated to embarrass and perplex the plaintiff.

Fifth plea,—to the second and subsequent counts,—that the plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the defendant in a large sum of money, to wit, &c., for work then done, and materials for the same provided, by the defendant for the plaintiff, at his request, and for goods, chattels, fixtures, and effects bargained and sold, and sold and delivered, and relinquished, surrendered, and given up by the defendant to the plaintiff, at his request, and for money by the plaintiff before that time had and received for the use of the defendant, and for money due and owing from the plaintiff to the defendant for interest for the forbearance by the defendant to the plaintiff, at his request, for divers long spaces of time, of moneys due from the plaintiff to the defendant, and for money due and owing from the plaintiff to the defendant upon an account stated between them; which said sum of money so due to the defendant as aforesaid, equals the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said promise in the second and subsequent counts of the declaration mentioned, and out of which said sum of money so due and owing to the defendant as aforesaid the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided, —verification.

Replication to the fifth plea,—And the plaintiff, as to the defendant's last plea, says that he was not in-[272]-debted to the defendant, in manner and form as in the defendant's said last plea is alleged; concluding to the country.

Demurrer to the replication to the fifth plea, assigning for causes,—that it neither properly traverses nor confesses and avoids the plea,—that, if it is intended to be in confession and avoidance, it is bad, for not confessing any primâ facie or colourable right in the defendant, and for concluding to the country instead of with a verification;—that, if it is intended as a traverse, it is bad, for tending to raise an immaterial issue, to wit, whether or not the plaintiff was indebted to the defendant in manner and form in the said last plea alleged;—that the said replication takes too narrow a traverse, to wit, by traversing only that the plaintiff was indebted as alleged, instead of traversing that he was and is indebted as alleged;—that the said replication departs and varies from the usual course of precedents, and tends to embarrass and perplex the defendant, in this, to wit, that it leaves him in doubt as to how much of his said plea is admitted or denied, what evidence he should be prepared to adduce in support of his plea, what evidence by the plaintiff will entitle him to a verdict, what will be the effect of a verdict either in his or the defendant's favour;—and that the said replication is ambiguous and uncertain, because it does not in terms admit or deny that the plaintiff was indebted to the defendant at the time of his pleading his said last plea, &c.

Joinders in demurrer.

T. Jones, in support of the demurrer. The first count charges the defendant with a breach of the agreement, in suffering the premises to be out of repair during the term. The plea is a mere argumentative denial of the existence of the tenancy at the time of the alleged breach. [Maule, J. The plea is evidently **[273]** drawn to meet the view, that a partial eviction is no answer to an action for suffering the premises to be out of repair, the tenant retaining the rest.] No doubt it is: but for that there is no authority. [V. Williams, J. *Newton* v. *Allin* (1 Q. B. 518) shews that an eviction from part of the premises, is no answer to a breach of the covenant to repair.] In that case, the landlord declared against the tenant for breaches of covenants—to repair, not to plough up meadow land without consent, or depasture orchards, except, &c., not to cut wood, and not to assign or underlet without consent,—with an averment that the plaintiff entered, and that the breaches were committed during the continuance of the demise. The defendant pleaded, that, after he had taken possession, and before breach, one B. entered upon a parcel of the demised premises, and ejected the defendant, and kept him out from thence hitherto, and committed certain specific grievances upon the premises, whereby the defendant lost all the benefit he would otherwise have made by his occupation; and that B. had full power and authority from the plaintiff so to act. The plea did not state that the defendant had quitted possession, except as above: it was held bad, on demurrer to the replication; Lord Denman saying—"The objection to the plea is insurmountable: the defendant could not at the same time exercise the rights of a tenant, and yet contend that he was not a tenant."

A similar objection arises upon the third plea. It alleges, that, during the tenancy, and before any breach the premises, and the defendant's interest therein, were duly surrendered to the plaintiff by act and operation of law. That is clearly bad, as an argumentative denial of the continuance of the tenancy. [Maule, J. In both pleas, the allegation that the tenancy was put an **[274]** end to, is an affirmative allegation, not a negation.] If the defendant means to deny an allegation in the declaration, he must do it in the negative of the words the plaintiff has used in his declaration. [Maule, J. The defendant says, that, before the alleged breach, he surrendered the premises to the plaintiff, and the plaintiff accepted possession of them. If he proves that, the allegation as to the committing of waste, is immaterial.] No plea can be good, unless it be an absolute denial, in negative terms, of the words in the declaration, or be pleaded in confession and avoidance. This plea is not a direct traverse of anything in the declaration; nor is it consistent with the fact of the defendant's having been guilty of waste during the tenancy.

The replication to the fifth plea states that the plaintiff was not indebted to the defendant, in manner and form as in the plea alleged. The ground of demurrer, in substance, is, that the replication should have traversed that the defendant was and is indebted, &c. The allegation in the plea, that the plaintiff was and still is indebted, has reference to the time of the plea. In *Dendy* v. *Powell* (3 M. & W. 442, 6 Dowl. P. C. 577), it was held that a plea of set-off which stated that, "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," &c., without adding "and still is indebted," is bad, on demurrer. [Maule, J. To say that the plaintiff is not indebted at the time of the replication, would be denying something which is not alleged in the plea.]

Peacock, contrà. The second and third pleas are not argumentative. The only promise in the declaration is one which the law will imply,—a promise arising out of the existence of the tenancy. It is an affirmative promise that the defendant will use the premises in a **[275]** tenant-like manner. The plea, in substance, is, that the defendant was unable to perform this promise, because, as to part of the premises, the plaintiff evicted him, and, as to the rest, he surrendered them, and the plaintiff received possession of them. [Coltman, J. Have you any authority for saying that an eviction from part entitles the tenant to give up the entire premises?] In *Smith* v. *Raleigh* (3 Campb. 513), it was held, that, where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation. And, in a note, the reporter adds: "This case was recognised by Dallas, C. J., in *Stokes* v. *Cooper*, Worcester Lent assizes, 1814, in which the rule was laid down, that, after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up the possession of the residue, is entirely discharged; but that, if the tenant, after eviction, continues in possession of the residue, he may be liable upon a quantum meruit. Vide *Dalston* v. *Reeve*, 1 Ld. Raym. 77, *Clun's case*, 10 Rep. 128." [V. Williams, J. Does an eviction from part of the premises do any thing more than operate a suspension of the rent? Maule, J. It is difficult to see why it should not discharge the tenant from the performance of all the other duties also. V. Williams, J. What becomes of the estate?] It may remain where it was. [Maule, J. The material part of the plea is, not the landlord's taking possession of part, but the tenant's giving up the rest. *Newton* v. *Allin* (1 Q. B. 518, 1 G. & D. 44) seems to assume, that, if the tenant had chosen to avail himself of the right to relinquish the rest of the premises, he would have been released from all the duties of tenant. Coltman, J. Is there any case where the tenant has been held to be discharged from his covenant [276] by reason of the act of the evictor making it impossible for him to perform it? Maule, J. He may be evicted from a portion that is essential to the performance of the covenant.] *Newton* v. *Allin* was the case of a covenant under seal. Here, the defendant is charged upon a mere contract implied by law: and his contention is, that, by reason of what has taken place, the contract implied by law is gone. [V. Williams, J. Does the plea amount to an averment that the plaintiff accepted the possession? Maule, J. The material part of the plea is, the abandonment. The argument requires that the term should be still subsisting.] It undoubtedly does so.

The substance of the declaration is, that the defendant became tenant, and that the tenancy continued at the time of the breach. The plea states, that, during the tenancy, and before breach, that took place between the parties which amounts to a surrender by act and operation of law. In *Grimman* v. *Legge* (8 B. & C. 324, 2 M. & R. 438), A. demised to B. the first and second floors of a house, for a year, at a rent payable quarterly; during a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately; the latter answered, she might go when she pleased: B. accordingly quitted, and A. accepted possession of the apartments: and it was held that A. could neither recover the rent, which, by virtue of the original contract, would have been due at the expiration of the quarter, nor rent pro ratâ, for the actual occupation of the premises for any period short of the quarter. Holroyd, J., there says (8 B. & C. 325): "Where, by express contract, rent is reserved payable quarterly, the landlord cannot recover a proportionable part of the rent for the occupation of [277] his premises for any period less than a quarter." And Bayley, J., says: "A parol licence to quit will not of itself operate as a surrender of the tenant's interest. But, where the tenant gives up possession, in pursuance of such a licence, and the landlord accepts it, the licence, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession." So, in *Dodd* v. *Acklom* (6 M. & G. 672, 7 Scott, N. R. 415), A. and B. demised a house by lease in writing to C., at a rent payable quarterly: the key was delivered to C.'s wife: C. entered into possession; but, before the first quarter's rent became due,—there having been some dispute as to arrears of rent and taxes,—C.'s wife delivered back the key to A., who accepted it: B., after signing the lease, had never interfered:—it was held that the delivering back the key by the tenant, animo sursumreddendi, and the acceptance thereof by the landlords, amounted to a surrender of the term by act and operation of law, within the statute of frauds. [T. Jones. The surrender, to be valid, should be in writing. V. Williams, J. At common law, no writing was necessary; and surrenders by act and operation of law are expressly excepted out of the statute of frauds. T. Jones. The surrender here set up, is a surrender by act of the parties; and therefore must be in writing. Maule, J. If Mr. Jones's argument is well founded, it brings it back to the same question as that which arises upon the second plea.]

The replication to the fifth plea is entirely out of the usual form, and is clearly bad. The allegation in the plea is, that the plaintiff, at the time of pleading, "was and still is indebted, &c." [Maule, J. That is, at the time of the commencement of the suit, and from thence [278] to the time of pleading.] The plaintiff was bound by his replication to traverse the allegation in the plea. [Maule, J. He does so. At the time of which the replication speaks, the plaintiff denies that he was indebted at the time and in the manner mentioned in the plea. It seems to me, I confess, the appropriate way of doing it.] In *Atkinson* v. *Davies* (11 M. & W. 236), to a declaration by the payees against the acceptor of a promissory note, the defendant pleaded that one T. D., the brother of the defendant, then deceased, was, in his life-time, indebted to the plaintiffs in a large sum of money, to wit, to the amount in the promissory note specified; and that, after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant, who then made and delivered the same upon such threat, and for no other cause whatever: the plea also averred that there never was any consideration for the making of the note, and that the plaintiffs always held the same without value: replication, that one of the plaintiffs did not, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of the defendant's brother from taking place, procure from the defendant the note, in manner and form alleged: it was held,—first, that the replication was a good answer to the whole plea,—secondly, that, where a replication traverses part of the plea, but leaves unanswered so much of it as forms a defence to the action, at the same time not expressly admitting it, the court cannot give judgment non obstante veredicto, or arrest the judgment, but the proper course is to award a repleader. [Maule, J. You have raised a **[279]** ghost, which I think you will find some difficulty in laying.] It may be that the replication would be a good answer if found for the plaintiff, but not otherwise. [Maule, J. One who traverses a fact in his adversary's plea, does not admit any other facts therein, except the traverse is found against him.] In *Faithful* v. *Ashley* (1 Q. B. 183), to a count in debt, alleging that the defendant was indebted to the plaintiffs in 10l. for work, &c., the defendant pleaded, that he never was indebted to the plaintiffs in a greater amount than 4l. in respect of the causes of action in the declaration mentioned, and, as to 4l., payment into court: the plaintiffs replied, that the defendant was indebted to them in a greater amount than the said sum, &c., in respect of the causes, &c.: and the replication was held bad, for not alleging that the defendant was and is indebted, &c. (vide post, 285 (*a*)).

T. Jones, in reply. To shew the replication to the fifth plea good, all that is necessary is, to make out that the words "was not indebted" have reference to the time of plea pleaded. [V. Williams, J. Unambiguously.] There is nothing doubtful or ambiguous in this replication. If the plaintiff had said that he is not indebted, it could only be good by holding, by a liberal construction, that it meant that he was not indebted at the time in the plea mentioned. [V. Williams, J. Suppose, to a plea of plene administravit, the plaintiff were to reply that the defendant had assets,—what would that mean? Maule, J. The question is whether the "modo et formâ" does not make the replication sufficient. The object of it is, to save the repetition of all the circumstances that constitute the manner and form.] Including time.

[280] It is said that the second plea shews that the plaintiff has estopped himself from complaining of the defendant's breach of contract. That, in substance, amounts to this, that an eviction from part of the premises, is an answer to the action. [Maule, J. That the defendant's breach of contract is excused.] Assuming that it does substantially amount to an excuse, is it well pleaded? It is clearly bad, as shewing a suspension of the relation of landlord and tenant. Why is it, that an eviction of the tenant from part of the premises, followed up by a relinquishment of the rest, discharges the tenant from the performance of his contract? The landlord says —"You owe me a duty." "True," says the tenant, "I did owe you a duty; but you have discharged me, by an act which operates a suspension of the relation of landlord and tenant between us." [Maule, J. I think you will find it difficult to shew that the eviction puts an end to the term.] It operates a suspension of the tenancy,—of the right of the landlord to demand the rent and the performance of the covenants, and of the right of the tenant to have possession of the premises on payment of the rent. An allegation of a tenancy, can only mean a holding in fact, or that the party has a right to the possession of the premises as tenant. [Maule, J. Fealty is essential to a tenancy, but not rent. There is a great deal, in Littleton on Tenures, about tenures, where nothing is said about contract.] The plea is clearly bad in form: it does not confess that the defendant was guilty of a breach during the tenancy; and it is an argumentative denial only. Assuming it to be a good defence in substance, it is informally pleaded,—like the case put in Doctrina Placitandi (page 41), where, in trespass for taking away the plaintiff's goods, a plea that the plaintiff **[281]** never had any goods, was said to be an infallible argument, and yet no plea.

The third plea does not shew a surrender by operation of law; which is altogether irrespective of the intention of the parties. In *Lyon* v. *Reed* (13 M. & W. 285), it was held that the term "surrender by operation of law," is properly applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Thus, where a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease; and, as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease was of itself a surrender of the former one. "All the old cases," says Parke, B., "will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case, it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite, of intention." If the court of Exchequer be right in that case, there can be no surrender by act and operation of law, unless the law can infer the intention; and that is not the case here. Then, if this be a surrender by act of the parties, the 29 Car. 2, c. 3, s. 3, avoids it. In 1 Williams's Saunders, 277 a. b. (2), it is laid down, that "where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with [282] the circumstances required by the act; as, in the case of a will of lands, it must be alleged to have been made in writing; but, where an act makes writing necessary to a matter where it was not so at the common law,—as in the case in the preceding note, where a lease for a longer term than three years is required to be in writing, by the statute of frauds,—it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence (*Anonymous*, 2 Salk. 519). A distinction, however, is taken between a declaration and a plea: in the former, the plaintiff need not shew the thing to be in writing; but, in the latter, it must be so pleaded. As, where the defendant pleads that another person, for a good consideration, promised to be answerable to the plaintiff for the debt,—it was held that it must be shewn to be in writing, so that it may appear to be a contract which the plaintiff can enforce:" *Case* v. *Barber* (Sir T. Raym. 450).

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

This was an action by a landlord against his tenant, founded on a promise to use the demised premises, during the continuance of the tenancy, in a tenant-like manner. The breach alleged is, that, during the continuance of the tenancy, he used them in so untenant-like a manner that they became ruinous, &c. There was also a count for use and occupation, and there were the money counts.

To the first count of the declaration, the defendant pleaded,—secondly, that the plaintiff, during the continuance of the tenancy, and before any breach, entered into a certain part of the demised premises, to wit, the shed, and ejected, expelled, and put out the defendant [283] from the possession thereof, whereupon the defendant, before any breach, and whilst he was so expelled, &c., wholly quitted, abandoned, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff has from thenceforward had the same, and the possession thereof.

To this plea the plaintiff demurred, insisting that it amounted only to an argumentative denial of the allegation that a breach was committed during the tenancy.

For the defendant, it was said, that the plea was a good plea in confession and avoidance: for, it was insisted, that, when the plaintiff entered on his tenant, and evicted him from a part of the premises, the tenant was justified in relinquishing the possession of the remainder, and was no longer bound to perform the agreement he had entered into on becoming tenant. But we are of opinion that this proposition cannot be supported.

An eviction by a landlord of his tenant from a part of the premises, creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession: see the authorities cited in 1 Wms. Saund. 204, n. (2). But there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent.

It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain satis-**[284]**-faction for any inconvenience or loss which he may suffer.

If the eviction of a part by the landlord will not discharge the tenant from the performance of the covenants of his lease, other than the covenant to pay rent, will the relinquishing the possession of the land, and the landlord's taking possession, have that effect? We think it will not; for, the allegations do not shew a dissolution of the tenancy by mutual consent. The tenancy, therefore, continues; and, whilst the tenancy continues, the obligation to perform the covenants continues (*a*)[1]. We think, therefore, the plea is bad.

The third plea alleges a surrender of the tenancy before any breach, by operation of law,—by the defendant's quitting possession of the lands demised, with the consent of the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's accepting such possession, with the intention of putting an end to the tenancy.

It was contended, on the part of the plaintiff, that this plea was bad, on the ground that the agreement stated in the plea, would not constitute a surrender by act and operation of law; and that the plea, unless it shewed a surrender, furnished no answer to the declaration. And we agree that this is so; for, the breach is admitted; and, if the tenancy continued, no answer is given to it.

If, however, it ought to be held,—agreeably to what is said in *Grimman* v. *Legge* (8 B. & C. 324, 2 M. & R. 438),—that the plea shews a **[285]** surrender by act and operation of law, we think the plea is bad, on special demurrer, as amounting only to an argumentative denial that any breach had been committed during the continuance of the tenancy.

The fifth plea is a plea of set-off, alleging, in the usual form, that the plaintiff, before and at the time of the commencement of the suit was, and still is, indebted to the defendant in a large sum of money, &c. To this plea the plaintiff, in his replication, says that he was not indebted to the defendant in manner and form as in the defendant's last plea is alleged. To this replication the defendant demurred, on the ground that it ought to have alleged that the plaintiff was not nor is indebted to the defendant.

The replication in this case deviates from the usual form of pleading: but it appears to us to be grammatically correct (*a*)[2], and that the allegation that the plaintiff was not indebted in manner and form, amounts to a direct traverse of the matter alleged in the plea, and that it sufficiently answers what is alleged.

The plaintiff, therefore, is, we think, entitled to judgment.

Judgment for the plaintiff (*b*).

[286] CROSSFIELD *v.* MORRISON. Feb. 12, 1849.

[S. C. 6 D. & L. 608; 18 L. J. C. P. 135; 13 Jur. 565.]

A., the lessee of certain coal-mines, for a term of years, by indenture assigned the same to B. for the unexpired residue of his term, B. covenanting that he, his executors, &c., would, at all times during so long as he or they should be in possession

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(*a*)[1] It would appear, therefore, that, where the lessor has evicted the lessee or assignee, or has taken possession with his assent, the lessee or assignee would, under a covenant to repair, be bound to re-enter upon the lessor for the purpose of doing the repairs. It would, of course, be a good answer to an action of covenant for not repairing, to say that the defendant was prevented by the plaintiff from entering.

(*a*)[2] Notwithstanding what is said in *Faithful* v. *Ashley*, 1 Q. B. 183, ante, 279 (in which, however, the connecting clause "modo et formâ" is not mentioned in the statement of the pleadings, and is not noticed in the argument or in the judgment), the usual form is obviously incorrect. It seems to be impossible to attach any meaning to the words, "nor is indebted," in the replication, without involving in the traverse a matter neither expressly nor impliedly contained in the plea, viz. the continued existence of the debt down to the time of the delivery of the replication.

(*b*) And see *Burn* v. *Phelps*, 1 Stark. N. P. C. 94; *The King* v. *The Inhabitants of Banbury*, 1 Ad. & E. 136, 3 N. & M. 292; 6 M. & G. 683 (*a*).

or receipt of the rents, produce, and profits of the premises, pay to the lessors the rents, galeages, and wayleaves reserved and made payable by the original lease, and observe and perform all other the covenants therein contained, and would at all times thereafter keep harmless and indemnified A., his heirs, &c., from and against the rents, covenants, &c., in the said lease, and from and against all actions, &c., for and in respect of the same covenants, or otherwise in relation thereto.—In covenant by A. against B. upon this indenture, the declaration assigned two breaches, —first, non-payment of the rents and galeages, &c., accruing whilst B. was in possession or receipt of the rents, produce, and profits of the premises,—secondly, that B. had neglected to keep A. indemnified. Plea,—to the whole declaration,—that, at the times when the said rents and galeages became due, B. was not in possession or receipt of the rents, produce, or profits by the indenture assigned, &c. :—Held, that the issue raised by this plea was an immaterial issue, inasmuch as the restrictive words, "so long as B., his executors, &c., should be in possession or receipt of the rents, produce, and profits of the premises," did not extend to the covenant to indemnify; and, consequently, that, the jury having found for the defendant on the issue joined on that plea, A. was entitled to judgment non obstante veredicto.—If one of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters which are disposed of on proper issues raised upon them, the court will not award a repleader.

This was an action of covenant.

The declaration stated, that theretofore, and before and at the time of the making of the indenture of lease thereinafter mentioned, Margaret Thomas and William Trew were seised in their demesne as of fee, of and in the premises thereinafter mentioned to have been demised; and that, being so seised, afterwards, to wit, on the 29th of July, 1835, by a certain indenture of lease then made between the said Margaret Thomas and William Trew of the one part, and the plaintiff of the other part,—profert,—for and in consideration of the galeage, rents, payments, duties, covenants, conditions, and **[287]** agreements thereinafter reserved, mentioned, and contained, on the part and behalf of the plaintiff, his executors, administrators, and assigns, to be paid, rendered, kept, done, and performed, they the said Margaret Thomas and William Trew did demise, lease, and to farm let unto the plaintiff, his executors, administrators, and assigns, all and singular the mine, vein, pit, grove, bed, and hole of coal called the Large Vein, being the vein of coal commonly worked in the parish of Monythusloyne, lying in and underneath all those two several messuages or dwelling-houses, out-houses, barns, stables, buildings, gardens, and the several closes of lands, arable, meadow, and pasture, which were more particularly delineated, together with the quantities, mears, metes, and bounds thereof, in or by the map or plan indorsed on the first skin of the said indenture, and which lands were called or known by the several names of the Tyn-y-gelly and Leyn-Celyn farms, then in the several and respective tenures and occupations of John Jones and Richard Lewis, and were situate in the said parish of Monythusloyne, in the county of Monmouth, containing by admeasurement forty-six acres or thereabouts, excepting always so much and such parts of the said veins of coal as might be necessary to remain unworked for the purpose of supporting and keeping effective the main level or tramroad thereinafter mentioned, leading or extending from the Pentwyn lands under and through the lands of the said Margaret Thomas and William Trew, to the Pen-y-van-Issa coal lands; and also full and free liberty, licence, and authority to and for the plaintiff, his executors, administrators, and assigns, and their respective miners, workmen, colliers, servants, labourers, and others, to open, dig, search for, work, gain, raise, and get all the coal thereby demised (except as aforesaid), and to dig, sink, drive, run, and make, any pits, **[288]** shafts, levels, tram and other roads, trenches, drains, and watercourses, in, under, upon, and about the said lands, colliery, and mines or works, as well for the working of the coal thereby demised, as for the purpose of hauling, carrying, and conveying any other coal or minerals, the produce of any other collieries or estates, and particularly to continue the main level or carriage road then in progress through the Pentwyn lands, under and through the said lands of the said Margaret Thomas and William Trew, till it reaches the Pen-y-van-Issa coal lands; and also to erect, build, and set up in and upon the said lands and premises, or any part thereof, storehouses, smithies, forges, mills, engines, hovels, sheds, and other buildings and machines, for the better and more effectually working of the said colliery or coalmines, and the accommodation of the colliers, miners, and others who should be, from time to time, employed in and about the said colliery and mines; but no such building or machine should be erected within one hundred yards of any dwelling-house then being upon the said lands, without the consent of the said Margaret Thomas and William Trew, their heirs and assigns, had and obtained; and also to construct and make yard spoil banks and deposits of coal or rubbish upon the said lands; and, for the purpose of using and exercising the several powers and authorities thereby granted, to take, use, and occupy so much of the surface of the said lands as might be reasonably necessary, he the said plaintiff, his executors, administrators, and assigns paying, for so much and such parts of the surface of the said lands as might be used for any of the purposes aforesaid, the fair and just value thereof; and also to raise and quarry from and out of the said lands, and to use in the erection of the buildings and works to be set up under the powers therein contained, all such stone, clay, and sand, as might be reasonably required for [289] such purpose; and likewise full and free licence and authority to bring out, up, convey through, and work, raise, and get up, by means of the said lands thereinbefore described, or any part thereof, from or out of any other lands, any other coals or minerals whatsoever than those thereby demised; and likewise full and free liberty of ingress, egress, and regress, to and for the plaintiff, his executors, administrators, and assigns, agents, workmen, labourers, servants, customers, and dealers, in and upon the said farm and lands, with horses, carts, and other carriages, to and for the working, hauling, and carrying away the said coal, and the using and exercising the several powers thereby granted, at all times at his and their will and pleasure, without any interruption, molestation, hindrance, obstruction, denial, or impediment of or by the said Margaret Thomas and William Trew, or either of them, their heirs or assigns, or the heirs and assigns of either of them,—subject, nevertheless, to the covenants and restrictions on the part of the lessee thereinafter contained, to have, hold, use, exercise, and enjoy the said mines, vein, pit, grove, bed, and hole of coal (except as aforesaid), and all and singular other the privileges, liberties, powers, and premises thereby granted, demised, and leased as aforesaid, or intended so to be, with their and every of their appurtenances, unto the plaintiff, his executors, administrators, and assigns, from the 1st of May, 1834, for and during and unto the full end and term of twenty years thence ensuing, and fully to be complete and ended; and to have and to hold all and every the coal thereby demised that should or might be found or raised during the said term thereby granted, or intended so to be, unto him the plaintiff, his executors, administrators, and assigns, and as his and their own proper goods and chattels,—Yielding and paying therefore, for every ton of large marketable coals, of the [290] weight of 20 cwt., of 112 lbs. to the cwt., that should be raised, gotten, and brought out from and underneath the said lands, and being the produce thereof, the royalty, galeage, or sum of 9¾d.; and also, in case such royalty, galeage, or sum of money should not amount to the yearly sum of 426l. 5s., then yielding and paying, during so many years of the said term thereby granted as the said coals thereby demised (except as aforesaid) should continue unworked and unexhausted, and until all such large marketable coal (except as aforesaid) as, according to the usual mode of working by level, ought to be worked out, should be exhausted, but no longer, such further amount, rent, or royalty as, with the said galeage, in case any should become due, should amount in the whole to the yearly rent or sum of 426l. 5s.; but, in case no such galeage should become due, then yielding and paying the rent or sum of 426l. 5s., such yearly rent to be computed from the commencement of the said demise; and also yielding or rendering, on demand, so long as any of the coals thereby demised should be worked and raised, one ton and five hundred weight of coals weekly for the use of the said Margaret Thomas and William Trew, free of charge, such coal to be delivered on the tram-road of the Monmouthshire Canal Company, at the point where the coals worked from the said lands should be first placed upon such tram-road; and also yielding and paying for such quantity of coal as should remain unworked, for the purpose of supporting the said road leading from the Pentyn lands to the Pen-y-van-Issa coal lands, the said galeage of 9¾d. per ton, of the weight aforesaid: and also yielding and paying for every 5½ tons of coal, of the weight thereinbefore mentioned, not being the produce of the lands thereinbefore described, which should be conveyed by the plaintiff, his executors, administrators, or assigns, or any other [291] person or persons by his or their authority, through the said lands, and should have been raised and gotten from and out of the Pen-y-van-Issa estate, the property of Robert Phillips, Esq., the way-leave or sum of 9¾d., for every 11 tons of coals, of the weight aforesaid, not being the produce of the lands thereinbefore described, which should be conveyed by the plaintiff, his executors, administrators, or assigns, through the said lands, and should have been raised and gotten from and out of any other lands than the Pen-y-van-Issa estate, the way-leave or sum of 9¾d.; and it was thereby declared and agreed that the rents, royalties, and sums of money thereby reserved, should be paid free from taxes, without any reduction or abatement on account of any claim made or to be made by Benjamin Hall, Esq., lord of the manor of Abercarne, of, for, or in respect of the said coals, or any of them, or the working, raising, or carrying away of the same, or otherwise howsoever; and that, whilst the said rent of 426l. 5s. should continue due and payable, the same should be paid by quarterly payments on the 1st of August, the 1st of November, the 1st of February, and the 1st of May,—the first of such payments to be calculated as having become due and payable on the 1st of August, 1834; and that, in case the said royalty or galeage of 9¾d. per ton should exceed in any one year of the said term, the said rent of 426l. 5s., such excess should be paid at the expiration of such year; and that, at the same time, all such sums as during the preceding year might have become due for way-leave, should be paid,—all and every the payments thereby reserved, being made by the promissory notes or acceptances of the plaintiff, his executors, administrators, or assigns, payable in two months from the time when the said rents, galeages, or sums of money should have become due and payable: And the plaintiff did thereby, for himself, his heirs, executors, and adminis-**[292]**-trators, covenant, promise, and agree to and with the said Margaret Thomas and William Trew, their heirs and assigns, that he, the plaintiff, his executors, administrators, or assigns, or some or one of them, should and would well and truly pay or cause to be paid unto the said Margaret Thomas and William Trew, or to one of them, their or one of their heirs or assigns, or other the person or persons who, under the reservations thereinbefore contained, should be entitled to receive the same, the said rent, galeage, and wayleave, and yield and render the coal thereinbefore reserved, at the respective times, and in the manner and proportion thereinbefore mentioned: That afterwards, and during the continuance of the said demise, to wit, on the 1st of January, 1845, by a certain indenture of assignment then made between the plaintiff of the first part, the defendant of the second part, and one John Reid of the third part,—profert,—the plaintiff, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto the said John Reid, his executors, administrators, and assigns, all and singular the mine, vein, pit, grove, bed, and hole of coal, liberties, privileges, licences, powers, and authorities, rights, members, and appurtenances demised by and then held under and by virtue of the said indenture of lease (except as is there mentioned to be excepted) and also the said indenture of lease, to hold the same (except as aforesaid) unto the said John Reid, his executors, administrators, and assigns, from thenceforth for and during all the residue then to come and unexpired of the said term of twenty years granted by the said indenture of lease, and to hold, possess and enjoy the coals that should and might during the said term be found, gotten, or raised in or under the hereditaments mentioned in the said indenture of lease, unto the said John Reid, his executors, administrators and assigns, to and for his and their own absolute **[293]** use and benefit, as his and their own proper goods and chattels,—subject, nevertheless, to the payment of the several rents, galeages, wayleaves, and sums of money in and by the said indenture of lease reserved and made payable, save only the arrears thereof, if any, to the day of the date of the said indenture of assignment, and to the performance and observance of the covenants, conditions, provisoes, declarations, and agreements therein contained on the part of the tenant, lessee, or assignee, his executors, administrators, and assigns, to be paid, observed, and performed; and it was thereby declared by and between the said parties to those presents, that the said John Reid, his executors, administrators, and assigns, should stand possessed of all and singular the premises thereinbefore assigned, or otherwise assured, or intended so to be, upon the trusts, and for the intents and purposes thereinafter expressed and contained, that is to say, in trust for the said defendant, his executors, administrators, and assigns, until default should be made by him in payment of the sum of 1575l. and interest, or any part thereof respectively, in the shares, or at all the times, and in the manner, thereinbefore appointed for the payment thereof respectively, or until default should be made by the defendant, his heirs, executors, or administrators, in the performance of the covenants thereinafter contained on the part of the defendant; and upon this further trust, that, if the defendant, his heirs, executors, administrators, or assigns, should pay or cause to be paid the said sum of 1575l., and the interest thereon, to the plaintiff, his executors, administrators, or assigns, in the shares, or at the times, and in the manner thereinbefore appointed for payment thereof respectively, and should duly and faithfully perform the covenants of him the defendant thereinafter contained, then, and in that case, he, the said John Reid, his executors, administra-**[294]**-tors, and assigns, should, immediately after such payment should be so made as aforesaid, upon the request, and at the costs and charges of the defendant, his executors, administrators, or assigns, assign the said mine, vein, pit, grove, bed, and hole of coal, and other the said premises thereby assigned, or intended so to be, with their appurtenances, unto the defendant, his executors, administrators, or assigns, for and during all the residue which should be then unexpired of the said term thereby assigned, or intended so to be, for his and their own use and benefit; but, if default should be made by the defendant, his executors, administrators, or assigns, in the payment of the said sum of 1575l. and interest, or any part thereof respectively, for the space of fourteen days next after any one of the several days or times thereinbefore appointed for payment of the same respectively,—the same having been demanded in writing; or, if default should be made in performance of the covenants of the defendant thereinafter contained, or any or either of them; then, and in either of the said cases, and immediately thereupon, upon trust that he the said John Reid, his executors, administrators, or assigns, did and should absolutely sell and dispose of the said mine, vein, pit, grove, bed, and hole of coal, and premises thereby assigned, or intended so to be, in manner therein mentioned; and the defendant did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he, the defendant, his executors, administrators, or assigns, or some or one of them, should and would, at all times during so long as he or they should be in possession or receipt of the rents, produce, and profits of the said premises thereby assigned, under the trusts thereinbefore contained, well and truly pay, or cause to be paid, unto the lessors of the said premises, or other the person or persons who, **[295]** under the reservations contained in the said lease, should be entitled to receive the same, the rents, galeages, and wayleaves therein reserved and made payable, and should and would yield and render the coals therein reserved, at the respective times, and in the manner and proportions therein mentioned, and should observe, perform, and fulfil all other the covenants, conditions, provisions, and agreements therein contained, which, on the part of the lessee or assignee of the said premises, ought to be paid, observed, and performed, or such of them as then remained subsisting, unperformed, or capable of taking effect; and should and would, at all times thereafter, effectually keep harmless and indemnified the said plaintiff, his heirs, executors, and administrators, and also the said John Reid, his executors, administrators, or assigns, of, from, and against the rents, covenants, conditions, provisions, stipulations, and agreements, reserved and contained by and in the said indenture of lease, and of and from and against all actions, suits, costs, charges, damages, and expenses, claims, and demands whatsoever, for or in respect of the same covenants, conditions, provisions, stipulations, and agreements, or otherwise, in relation thereto: That, after the making of the said indenture of lease, and during the continuance of the said demise, to wit, on the 28th of September, 1836, the said William Trew departed this life, leaving the said Margaret Thomas him surviving, who thereupon, to wit, on the day and year last aforesaid, became and was seised of the reversion of and in the said demised premises, and entitled to the rents, galeage, and wayleave reserved and made payable by the said indenture of lease as aforesaid; and, being so seised and entitled, she, the said Margaret Thomas, theretofore, and after the 1st of January, 1838, to wit, on the 18th of July, 1838, duly made and published her last will and testament in writing, bearing date the **[296]** day and year last aforesaid,—and which said will was then duly signed at the foot thereof by the said Margaret Thomas, in the presence of two credible witnesses, present at the same time, and was then attested and subscribed by such witnesses, in the presence of the said Margaret Thomas, according to the form of the statute in such case made and provided,—and thereby, amongst other things, gave and devised the said demised premises unto Dacey Miles, Elizabeth Watkins, and Moses Watkins, their heirs and assigns, and then appointed the said Dacey Miles, Elizabeth Watkins, and Moses Watkins, executrix and executors of her said, will; that the said Margaret Thomas afterwards, to wit, on the day and year last aforesaid, died so seised of the said reversion of and in the said demised premises, with the appurtenances, as aforesaid, without altering her said will as to the said devise of the said demised premises; whereupon and whereby the said Dacey Miles, Elizabeth Watkins, and Moses Watkins, became and were seised of the said reversion, in their demesne as of fee; and, being so seised, afterwards, to wit, on the day and year last aforesaid, the said Dacey Miles and Moses Watkins departed this life, leaving the said Elizabeth Watkins them surviving, who then became, and, at the time of the making of the payments by the plaintiff as thereinafter mentioned, was, seised of the said reversion, in her demesne as of fee, and was the person who, under the reservations contained in the said lease, was entitled to the rents, galeages, and wayleaves therein reserved and made payable: That, afterwards, and whilst the defendant remained and was in possession or receipt of the said rents, produce, and profits of the said premises by the said last-mentioned indenture of assignment, under the trusts of the said indenture of assignment contained, to wit, on the 10th of August, 1846, a large sum of money, to wit, the sum of **[297]** 106l. 11s. 3d., of the rent or sum of 426l. 5s., of the yearly rent aforesaid, reserved by the said indenture of lease, became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, for one quarter's rent, due on the day and year last aforesaid; and that, afterwards, and whilst the defendant remained and was in possession or receipt of the rents, produce, and profits as aforesaid, to wit, on the 1st of November, in the year last aforesaid, a certain other large sum of money, to wit, the further sum of 106l. 11s. 3d., of the rent or sum of 426l. 5s. of the yearly rent aforesaid, reserved by the said indenture of lease, also became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, for another quarter's rent due on the day and year last aforesaid; and that afterwards, and whilst the defendant remained and was in possession or receipt of the said rents, produce, and profits as aforesaid, to wit, on the day and year last aforesaid, a certain other large sum of money, to wit, the sum of 111l. 18s. 4d., for a galeage rent of 9¾d. per ton, of the weight aforesaid, for 2755 tons of coal which remained unworked, for the purpose of supporting the said road leading from the Pentwyn lands of the Pen-y-van-Issa coal lands, became and was also due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease,—of all which the defendant then had notice: Yet the defendant and the said John Reid, although often requested so to do, did not nor would, nor did nor would either of them, pay the said rents or sums of 106l. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d., or any or either of them, or any part thereof, or give their or either of their promissory notes or acceptances for the same, or any part thereof, but wholly neglected and refused so to do; and thereupon, afterwards, and before the commencement of this suit, to wit on the 2nd of December, 1846, the now plaintiff **[298]** was called upon to pay, and was forced and obliged to pay, to the said Elizabeth Watkins, a large sum of money, to wit, the sum of 250l., for, on account, and in satisfaction and discharge of the said last-mentioned rents, and which were then due and payable to her as aforesaid, under and by virtue of the said indenture of lease; and the plaintiff was also put to great costs, charges, and expenses, in consequence of the non-payment of the said rents, and non-performance of the said covenants in the said lease contained as aforesaid, in the whole amounting to a large sum of money, to wit, to the sum of 350l.,—of all which the defendant, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, also had notice; yet the defendant, disregarding his said covenant in that behalf made as aforesaid, had not (although often requested so to do) kept harmless and indemnified the plaintiff, of, from, and against the said rents, covenants, conditions, provisions, stipulations, and agreements reserved and contained by and in the said indenture of lease, and of, from, and against all actions, suits, costs and charges, damages and expenses, claims and demands whatsoever, for or in respect of the covenants, conditions, provisions, stipulations, and agreements, or otherwise in relation thereto, but, on the contrary thereof, had wholly neglected and refused, and still did neglect and refuse, to keep harmless and indemnified the plaintiff against the said sums of 106l. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d., so by him paid to the said Elizabeth Watkins, for the rents aforesaid, or any or either of them, or any part thereof, or of, from, or against the costs, charges, damages, and expenses by him sustained as aforesaid, in consequence of the non-payment of the said rents and non-performance of the said covenants in the said lease contained, and which on the lessee's part ought to have been performed; and so the plaintiff **[299]** in fact said that the defendant had not kept his said covenant, &c.

The defendant pleaded,—first, that the said Margaret Thomas and William Trew did not, by the said indenture in the declaration first mentioned, demise, &c., unto the plaintiff, his executors, &c. the said mines, vein, pit, grove, bed, and hole of coal, and other the premises, except as aforesaid, in manner and form, &c.

Secondly, that the said supposed indenture of assignment was not the deed of the defendant.

Thirdly, that, at the times respectively when the said rents or sums of 106l. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d., or any or either of them, or any part thereof, became due, the defendant was not in possession or receipt of the said rents, produce, or profits of the said premises by the said indenture of assignment assigned, under the said trusts therein contained, in manner and form as in the declaration alleged.

Fourthly, as to so much and such part of the declaration as related to the non-payment of the said rents or sums of 106l. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d.,—that, after the accruing of the causes of action in the declaration mentioned in respect thereof, and before the commencement of this suit, to wit, on the 1st of January, 1847, and on divers other days and times afterwards, he (the defendant) paid to the plaintiff, and the plaintiff then accepted and received of the defendant, divers sums of money amounting, to wit, to all the moneys in the declaration mentioned, in full satisfaction and discharge of the said damages and causes of action in the declaration mentioned, so far as they relate to the said non-payment of the said rents or sums in the introductory part of this plea mentioned.

Fifthly, as to so much and such part of the said declaration as related to the defendant's not having kept harmless and indemnified the plaintiff in manner **[300]** and form as therein alleged,—that he, the defendant, did keep harmless and indemnify the plaintiff against the said rents or sums of 106l. 11s. 3d., 106l. 11s. 3d., and 111l. 18s. 4d., and of, from, and against the said costs, charges, damages, and expenses by the plaintiff sustained as aforesaid, according to the defendant's covenant, &c.

Sixthly, as to the causes of action in the introductory part of the third plea mentioned,—that the plaintiff did not pay the said moneys, or any of them, or any part thereof, nor was the plaintiff put to, nor did he sustain, the said costs, charges, and expenses, or any of them, or any part thereof, in manner and form as in the declaration alleged.

These pleas all concluded to the country, and the plaintiff joined issue upon them.

At the trial, before Erle, J., at the summer assizes at Monmouth in 1847, a verdict was taken for the defendant on the third issue, and for the plaintiff on all the others; leave being reserved to the plaintiff to move that the judgment might be entered for him for 266l. 10s., if the court should be of opinion that the plaintiff was entitled to judgment, notwithstanding the verdict, on the third issue.

Talfourd, Serjt., in Michaelmas term, 1847, obtained a rule nisi accordingly.

Whateley and Sir T. Phillips shewed cause at the sittings in banco after last Trinity term. It is clear from the terms of the covenant, that the liability of the defendant under the covenant to indemnify was, like the covenant for payment of the rent and galeages, to be limited to the time during which he should be "in possession or receipt of the rents, produce, and profit of the premises thereby assigned:" Sugden's Vendors and Pur-**[301]**-chasers (11th edit. vol. ii. ch. 13, § 3; ch. 14, § 2). In *Browning* v. *Wright* (2 Bos. & Pull. 13), A., after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted, that, notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had full power, &c., to convey the same; he then covenanted, for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and, lastly, that he, his heirs and assigns, and all persons claiming under him, should make further assurance: it was held, that the intervening general words, "full power, &c., to convey," were either part of the preceding special covenant, or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. So, in *Foord* v. *Wilson* (8 Taunt. 543), the assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be incumbered; and that, notwithstanding any such act, the lease was a good and subsisting lease, and that the defendant, at the time of executing the assignment, had in himself good right to assign the premises in manner aforesaid: it was held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only. In *Nind* v. *Marshall* (1 Brod. & Bingh. 319, 3 J. B. Moore, 703), the assignor of a lease covenanted for quiet enjoyment during the term, "without the lawful let, suit, interruption, &c., of J. M., his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged, or otherwise by J. M., his heirs, [302] executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents and arrears of rents, statutes, judgments, recognisances, made or suffered by J. M., or by their or either of their acts, means, default, procurement, consent, or privity," preceded by a covenant that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them: it was held, by Dallas, C. J., Burrough, J., and Richardson, J.,—Park, J., dissentiente,—that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world. "In this," says Dallas, C. J. (3 J. B. Moore, 735, 1 Brod. & Bingh. 345), "as in every similar case, it is a question of intention, to be collected, not merely from the words of any one covenant, but by comparing all the covenants, each with the other, so that the construction be made on the entire deed; and this, without reference to the order in which the covenants are found." And, after reviewing the authorities that were cited, and referring to the particular language of the covenants, he concludes (1 Brod. & Bingh. 348, 349, J. B. Moore, 739)—"On the whole, therefore, when I find the deed begin and end with a restrictive covenant, when I find intermediate restrictive covenants, when I find in the very clause in which the supposed general covenant occurs, that it is immediately preceded by a restrictive covenant; when I further find, that, to suppose the general words were added to enlarge the restrictive words, would be inconsistent with special restraining words which imme-[303]-diately follow, and would give them a sense different from what they bear in a subsequent covenant: putting all these circumstances together, and having to assign a meaning to the general words, not merely by themselves, nor even as they follow special words, but as they themselves are, in every subsequent covenant, followed by restrictive words; if there were more of difficulty in this case than appears to me to belong to it, still, on the whole, I should be of opinion that the general intention is clear; and, in favour of a clear intention, that is, such intention to be collected from the whole deed, I should consider that these words might even be rejected, if necessary. But this I do not see any necessity to do, because I think 'all persons whatsoever' must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them; and that they are in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words, reference being had to their special nature, and, as such, ranging under known rules of construction, and to be explained and applied as I have already stated." Putting, therefore, a reasonable construction upon this covenant, it is clear, that, if not limited in express terms to the defendant's possession, the covenant, in its nature, is one that could only enure during the continuance of the estate.

At all events, the plaintiff is not entitled to judgment non obstante veredicto. In *Pitts* v. *Polehampton* (1 Ld. Raym. 390), Lord Holt lays it down, that, "where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial, and found for the plaintiff, he shall have judgment; but, if the defendant's plea goes in discharge of the action, and issue is taken immaterially, and verdict for [304] the plaintiff, a repleader shall be granted." And in *Lambert* v. *Taylor* (4 B. & C. 138, 6 D. & R. 188), Abbott, C. J., says: "The question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action: if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict: if the plea does not confess a cause of action, there must be a repleader." In *Goodburne* v. *Bowman* (2 M. & Scott, 706), Tindal, C. J., suggests that the cases establish, that, "if the plea does not confess a cause of action, and does contain a sufficient avoidance, it is bad, and a repleader must be awarded." It is true that was not essential to the decision of that case. In *Plummer* v. *Lee* (2 M. & W. 495, 5 Dowl. P. C. 755), which was an action of debt on an award, by an administratrix, the declaration stated, that, on the 12th of July, 1833, a settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration, by the plaintiff, as administratrix, and the defendant, and an award: the first plea traversed the making of the award; the second traversed that the settlement took place on the day mentioned in the declaration; the third traversed the making of such settlement at any time: on the trial, the plaintiff had a verdict on the first and third issues, and the defendant on the second: and, after argument, and time taken to consider, the court held that the second plea did not contain any confession, and that judgment non obstante veredicto could not be given, but awarded a repleader. In *Gwynne* v. *Burnell* (*d*), the House of Lords would **[305]** have awarded a repleader, upon the authority of the cases above cited, if it had been competent to a court of error so to do (see 2 Wms. Saund. 319 b. n. (*e*). In *Negelen* v. *Mitchell* (7 M. & W. 612), the plea confessed but did not avoid. In 2 Wms. Saunders, 319 d. n. (*h*), it is said, that, "where a plea is good in form, though not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own shewing, that, in any way of putting it, he can have no merits, and the issue joined thereon be found for him, then, as the awarding of a repleader would not mend the case, the court, for the sake of the plaintiff, will at once give judgment non obstante veredicto; but, where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader." [Maule, J. As the plaintiff was wrong in alleging an immaterial fact, and the defendant was wrong in traversing it, the latter ought not to be permitted to stand in the same beneficial position as he would have been in if he had demurred, as he ought to have done.] The reason is well given in *Staples* v. *Heydon* (2 Ld. Raym. 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121), where Lord Holt says: "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue. But, where the matter of the justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not **[306]** be taken to be a confession of the plaintiff's action. And the books do all of them, if they be narrowly looked into, turn upon this difference,—where the confession is full, and the matter of the plea is ill in substance."

Talfourd, Serjt., and Dowdeswell, in support of the rule. If this had been the case of a mortgage, with a power to enter for non-payment of the mortgage money or interest, it might have been reasonable that the covenant to indemnify should be limited to the period of the covenantor's enjoyment of the property. This, however, is the case of an absolute sale: and, what is there unreasonable in a covenant to indemnify during the continuance of the lease? The construction contended for on the other side, would expunge the words "at all times thereafter," which certainly are not idle. [Maule, J. If those words had not been there, the covenant to indemnify would only have been during the defendant's possession, which would not have been sufficient.] The plaintiff is clearly entitled to judgment non obstante veredicto. The case falls precisely within the rule laid down in *Negelen* v. *Mitchell*, that, where there are several pleas upon the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters, which have been disposed of on proper issues, the court will not grant a repleader. That case overrules *Plummer* v. *Lee*. Here, the defendant has traversed every material

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(*d*) 6 N. C. 453, 1 Scott, N. R. 711; cited 1 M. & G. 939, 5 M. & G. 674, ante, vol. ii. 444, vol. iii. 492, vol. vi. 289.

allegation in the declaration, and all the issues thereon are found against him. The reason for a repleader, therefore, ceases to exist. Besides, a repleader is never awarded in favour of the party who makes the first default. [Coltman, J. That is confined to the case on the issue being found for the party.] The court may, it seems, mould the rule, and, although judgment non [307] obstante veredicto only is asked for, they may award a repleader, if they see fit: *Fillieul* v. *Armstrong* (7 Ad. & E. 557; 2 Nev. & P. 406).

Cur. adv. vult.

Coltman, J., now delivered the judgment of the court.

After stating the pleadings, the learned judge proceeded as follows:—

At the trial, the verdict was entered for the defendant, on the issue joined on the third plea, and for the plaintiff, on the other issues; and leave was reserved for judgment to be entered for the plaintiff for the sum of 266l. 10s., if the court should be of opinion that the plaintiff is entitled to judgment notwithstanding the verdict on the third plea.

On the argument before us, it was insisted, on the part of the defendant, that the defendant was only bound to pay the rents and galeages, and to perform the covenants, during such time as he should be in possession; and that the covenant to indemnify must be construed with a similar restriction; for, that it could not be supposed that the defendant would agree to indemnify the plaintiff against the breach of any other covenants than those which he had undertaken to perform; and, as he only undertook to perform the covenants during such time as he should be in possession, it could not be the intention that he should be bound to indemnify against the breach of any other covenants than such as were to be performed during the time he was in possession.

But we think the covenant to indemnify is not to be so restricted. At the time the deed was executed, it was probably in contemplation of the parties that the defendant would pay the stipulated price of 1575l., and [308] remain in possession of the colliery: and, under that expectation, it was of course that the defendant should enter into a covenant to pay the rents and perform the covenants during the time that he should be in possession: but the parties must also be taken to have had in their contemplation the possibility of the defendant's making default in paying the stipulated sum, and of the colliery's being sold by Reid under the trusts of the deed. On such a sale taking place, it was to be expected that covenants would be entered into by the purchaser, to perform the covenants of the original lease. But, the purchaser might make default in performing them: and it was, therefore, reasonable that the plaintiff should require from the defendant a covenant to indemnify him against any breach of the covenants of the original lease after the sale: nor could the defendant reasonably object, as it would be only in consequence of his own default that a sale would take place. And, if we look at the terms of the covenants entered into by the defendant, they are quite consistent with this view of the case; the first covenant being that the defendant would at all times, so long as she should be in possession, pay the rents, &c.; the latter covenant being without restriction, that he would at all times indemnify, that is to say, whether in possesion or not.

Such being, in our opinion, the true construction of the covenants, the question arises, whether the third plea furnishes any defence to the action.

It appears by the declaration, that the assignment to Reid, as trustee, was made on the 1st of January, 1840, and that the sums on which the question arises became payable after the assignment. It is also alleged in the declaration, that those sums became payable during the time the defendant was in possession. The payment of the sums in question is alleged to have been afterwards (that is, after they had become due and payable) made [309] by the plaintiff; but it is not alleged to have been made whilst the defendant was in possession.

The plea does not deny that the sums in question became due to Elizabeth Watkins after the assignment to Reid, but denies only that the defendant was in possession or receipt of the rents, when those sums became payable. Now, as far as the covenant to pay the rents is concerned, such a plea appears to be a sufficient answer: for, the defendant is only bound to pay the rents whilst in possession. But it is no answer to the covenant, to indemnify; it being immaterial, with reference to that covenant, whether the defendant was in possession or not. The plea, therefore, which professes to answer the whole declaration, does, in fact, leave a material part of the declaration unanswered; and the issue raised by it is, with reference to the decision of this cause on the whole record, an immaterial issue.

The next question is, whether the plaintiff is entitled to judgment non obstante veredicto, or whether there should be a repleader: and it appears to us that there is no occasion for a repleader. The case falls within the reason of the rule laid down by the court of Exchequer in *Negelen* v. *Mitchell* (7 M. & W. 612), that, if one of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reason for a repleader ceases.

We therefore think, that, in this case, there should be judgment for the plaintiff non obstante veredicto.

Judgment accordingly.

[310] YOUNG AND ANOTHER *v.* RAINCOCK. Feb. 14, 1849.

[S. C. 18 L. J. C. P. 73; 13 Jur. 539.]

On the sale of a messuage, &c., the vendor,—by a deed, reciting that his wife was the heir of A. H., deceased, that A. H. had died intestate, and that the vendor and his wife, or one of them, were or was seised in fee, and after further reciting a settlement made on the marriage of the vendor and his wife, giving them a power of appointment, the power was executed in favour of H. S. Y. in fee,—covenanted "that, for and notwithstanding any act, matter, or thing by them the vendor and his wife, or either of them, or the said A. H., made, done, &c., to the contrary," they, the vendor and his wife, or one of them, were or was lawfully and rightfully seised of the messuage, &c., and had lawful and absolute authority to appoint, &c., and that it should be lawful for H. S. Y., his heirs, &c., peaceably and quietly to hold the messuage, &c., without any lawful let, suit, &c., by them the vendor and his wife, or either of them, their or either of their heirs, &c., or from or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, or the said A. H.; and that, free and clear, &c., of, from, and against all gifts, grants, incumbrances, &c., already or thereafter to be had and made, &c., by the vendor and his wife, or either of them, or the said A. H. deceased, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them or any or either of them, or by their or any or either of their acts, deeds, means, defaults, or procurement.—The declaration, in an action by the executors of the covenantee, after setting out the covenant for quiet enjoyment, assigned a breach of that covenant as follows:—"that the said H. S. Y., during his life-time, was not permitted, nor was he able, peaceably and quietly to hold the said messuage, &c., without the lawful let, &c., of the defendant and his wife, and of, from, and by all other persons whomsoever, lawfully and equitably claiming and to claim by, from, and under, and in trust for him and them and the said A. H. deceased; but, on the contrary thereof, after the making of the indenture, and during the life-time of the said H. S. Y., one P. H., who then claimed, and from thence hitherto hath claimed, and still doth claim from, under, and as heir-at-law to the said A. H. deceased, lawful right and title to the said messuage, &c., caused a declaration in ejectment to be served on the said H. S. Y." The declaration then set out a recovery in ejectment by P. H., claiming as above, and an eviction of the said H. S. Y. by due process of law.—To this declaration, the defendant pleaded, inter alia, that A. H. died intestate, leaving the defendant's wife her only child and heir-at-law, and that the said H. S. Y., intending, &c., instigated P. H. to claim right and title to the messuage, and to bring ejectment; and so the defendant said that the said H. S. Y., of his own wrong, and by and through his own act and procurement, was evicted, &c.—The plaintiffs replied de injuriâ:—Held,—first, that, assuming that the recital in the deed—that the vendor's wife was heir of A. H.—would have operated as an estoppel against the plaintiff's testator, after eviction by title paramount, if properly pleaded and relied upon, such estoppel was waived by joining issue upon a replication which put in issue the fact of the wife's heirship alleged in the plea, instead of rejoining the estoppel:—Secondly, that, excluding such allegation of the heirship of the defendant's wife, the plea afforded no answer to the action:—Thirdly, that the allegation in the declaration that P. H. claimed, as heir to A. H., lawful title to the premises, though possibly objectionable on special demurrer, on the ground of uncertainty, must, after being pleaded over to, be understood to mean, not merely that he claimed, but that he had lawful title:—Fourthly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words,—for and notwithstanding, &c.,—of the covenant for title.

This was an action for the breach of a covenant for quiet enjoyment.

The cause was tried before Patteson, J., at the Suf-[311]-folk summer assizes, 1847. The plaintiffs were the executors of one Henry Shadow Young, who died in 1846. The defendant, in 1832, married Martha Ann, the only child of Ann Hopley, who purchased a small estate, consisting of the house and premises which were the subject of the present action, and died intestate (as to this estate) in 1827. Martha Ann Hopley, her only child, then entered into possession.

In 1841, the defendant and Martha Ann his wife sold and conveyed the estate to Henry Shadow Young, who entered into possession thereof.

In 1845, one Peter Hopley, who claimed to be the heir of the said Ann Hopley, brought an action of ejectment against Henry Shadow Young, and obtained possession of the premises. Henry Shadow Young was evicted, and the present action was brought for a breach of the covenant for quiet enjoyment in the deed of conveyance on the sale in 1841.

The deed on which the action was brought was set out on oyer. By that deed,—after reciting a grant to Ann Hopley, in fee, and that the defendant's wife was the heir of Ann Hopley, deceased, and that Ann Hopley had died intestate, and that M. A. Raincock was seised in fee; and after further reciting a settlement made [312] on the marriage of the defendant and his wife, giving them a power of appointment,—the power was executed in favour of H. S. Young, in fee; and the defendant covenanted as follows:—That, for and notwithstanding any act, matter, or thing by them, the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, they the said G. D. Raincock and Martha Ann, his wife, or one of them, are or is at the time of the sealing and delivery hereof, lawfully, rightfully, or absolutely seised of and in, or well and sufficiently entitled to, the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder, or limitation of any use or uses, or restraint, cause, matter, or thing whatsoever, to alter, change, defeat, incumber, revoke, or make void the same; and that, for and notwithstanding any such act, deed, matter, or thing as aforesaid, they, the said G. D. Raincock and Martha Ann, his wife, some or one of them, now have or hath good right, full power, and lawful and absolute authority to appoint, grant, bargain, sell, release, and convey the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed and declared, and in manner aforesaid, and according to the true intent and meaning of these presents; and that it shall and may be lawful to and for the said Henry Shadow Young, [313] his heirs, appointees, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into, hold, occupy, possess, and enjoy the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, denial, claim, demand, interruption, or eviction whatsoever of or by them the said G. D. Raincock and Martha Ann his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, or of, from, or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, or the said Ann Hopley, deceased; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said G. D. Raincock and Martha Ann, his wife, their heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, dowers, and all rights and titles to dower, uses, trusts, entails, wills, mortgages, leases, statutes-merchant, or of the staple, recognisances, judgments, executions, extents, rents, arrears of rents, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, debts of record, debts due to the Queen's Majesty, and of, from, and against all other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already or hereafter to be had and made, executed, occasioned, and suffered by the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, or by any other person or persons lawfully **[314]** or equitably claiming or to claim by, from, or under, or in trust for them or any or either of them, or by their or any or either of their acts, deeds, means, defaults, or procurements: and, further, that they, the said G. D. Raincock and Martha Ann, his wife, and their heirs, executors, and administrators, and all and every other person or persons having or claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, or any of them, or any part thereof, by, from, or under, or in trust for them the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Henry Shadow Young, his heirs, appointees, or assigns, make, do, acknowledge, execute, and perfect, or cause or procure to be made, done, acknowledged, executed, or perfected, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely appointing, granting, conveying and assuring of the said messuage or tenement, land, hereditaments and premises hereby appointed, granted, and released, or intended so to be, and every part thereof, with their appurtenances, unto the said Henry Shadow Young and his heirs, to the uses, upon the trusts, and for the intents and purposes hereinbefore declared or expressed concerning the same, or to the use of such other person or persons, and in such other manner and form as he the said Henry Shadow Young, his heirs, appointees, or **[315]** assigns, or his or their counsel in the law shall advise and require, and prepare and tender to be made, done, and executed.

The declaration, after setting out the covenant for quiet enjoyment, alleged for a breach, that Henry Shadow Young, during his lifetime, was not permitted, nor was he able, from time to time, and at all times thereafter, peaceably and quietly to hold, occupy, possess, or enjoy the said hereditaments and premises, nor was he permitted, nor was he able, to have and receive the rents, &c., without the lawful let, suit, trouble, &c., of the defendant and Martha Ann, his wife, and off, from, and by all other persons whomsoever lawfully and equitably claiming and to claim by, from, and under and in trust for him and them and the said Ann Hopley, deceased; but, on the contrary thereof, after the making of the said indenture, and during the lifetime of the said Henry Shadow Young, one Peter Hopley, who then claimed, and from thence hitherto hath claimed, and still doth claim, from, under, and as heir-at-law to the said Ann Hopley, deceased, lawful right and title to the said messuage or tenement, caused a declaration in ejectment to be served on Henry Shadow Young, &c. The declaration then set out a recovery in ejectment by Peter Hopley, claiming as above mentioned, and an eviction by due process of law of Henry Shadow Young.

To this declaration, the defendant pleaded, that Ann Hopley died on the 5th of December, 1827, intestate as to her real estate, leaving Martha Ann Raincock, her only child and heir-at-law; that Henry Shadow Young, intending to harass and injure the plaintiff, procured, instigated, and stirred up Peter Hopley to claim right and title to the said messuage, &c., and to commence and prosecute the action of ejectment; and that Peter Hopley did, in consequence of such procurement, make the said claim, and commence and prosecute the said **[316]** action of ejectment; and so the defendant said that the said Henry Shadow Young, of his own wrong, and by and through his own act and procurement, was interrupted and evicted from the peaceable and quiet possession of the said messuage, &c.

To this plea the plaintiff replied de injuriâ.

There were other pleas, to which, however, it is unnecessary to advert in detail, as they did not substantially differ from the above.

The cause was tried before Patteson, J., at the Suffolk summer assises, 1847, when it was contended, on the part of the defendant, that the recital in the deed of 1841, that Martha Ann Raincock was the heir of Ann Hopley, deceased, was conclusive evidence of the fact.

The learned judge was of opinion, that, if evidence at all, the recital was not conclusive evidence of that fact; and, the other evidence that was given in the cause having established, to the satisfaction of the jury, that Martha Ann Raincock was illegitimate, a verdict was, by his direction, found for the plaintiff.

Prendergast, in Michaelmas term, 1847, obtained a rule nisi for a new trial, on the ground of misdirection, or to arrest the judgment. He referred to *Rees d. Chamberlain* v. *Lloyd* (Wightwick, 121), *Bowman* v. *Taylor* (2 Ad. & E. 278), *Lampon* v. *Corke* (5 B. & Ald. 606), Co. Litt. 47 b., Stephen on Pleading (5th edit. p. 227), *Browning* v. *Wright* (2 B. & P. 13), *Hosier* v. *Searle* (2 B. & P. 299), and *Payler* v. *Homersham* (4 M. & Selw. 423). [Wilde, C. J. referred to *Hayne* v. *Maltby* (3 T. R. 438) and *Lainson* v. *Tremere* (1 Ad. & E. 792, 3 N. & M. 603).]

[317] Biggs Andrews, O'Malley, and Worllege, in Trinity term last, shewed cause. The facts are simple. The covenant upon which the question arises, is the usual covenant for quiet enjoyment in a case where the vendor comes in as heir-at-law of a deceased person. The third plea states that Ann Hopley died intestate (as to her real estate) on the 5th of December, 1827, leaving Martha Ann Raincock her only child and heir-at-law, that Henry Shadow Young procured one Peter Hopley to claim title to the messuage, that Peter Hopley did make claim, and that so the said Henry Shadow Young was evicted by his own act and procurement. It was proved that Peter Hopley, claiming as heir-at-law of the deceased Ann Hopley, brought ejectment, and recovered possession of the premises from Henry Shadow Young, the vendee. The principal question is, whether the recital in the purchase deed,—that Martha Ann Raincock was the heir of Ann Hopley, operated to estop the plaintiffs from saying that any one else was her heir-at-law. It is submitted that it did not. The deed contains an express covenant for quiet enjoyment, and for freedom from eviction by Raincock and his wife, their or either of their executors and administrators, or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, "or the said Ann Hopley, deceased." In Co. Litt. 352 a., it is said "Estoppe cometh of the French word estoupe, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." In Viner's Abridgment (tit. Estoppel (M.), No. II. pl. 8), the following case is put:—If A. S., reciting by her deed that she is feme covert (and in truth she is a feme sole), grants an annuity, **[318]** &c., it is a good grant, for that is but a void recital, and the grantee need not put that in his writ, and that cannot be a conclusion to him when he shews the deed (*a*). But, if feme covert, reciting by her deed that the is a feme sole, grants an annuity, this is a void grant, for, she shall not be concluded by this recital, &c." (Perk. § 41). Again (tit. Recital (A.), pl. 2), "Indenture between lord and tenant, reciting that the tenant held of the lord by homage, fealty, and 10s. rent, the lord confirms his estate, salvo antiquo dominico et servitio; and it was held, that, though it was indented, and both sealed, yet, because it is a recital, and all the words of the lord only, therefore it shall not estop the tenant to plead hors de son fee" (*d*). In *Doe d. Pritchard* v. *Dodd* (2 N. & M. 838), it was held, that, where a party to a conveyance is therein described as heir-at-law of J. P., a surviving devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J. P., even against another party who executed the conveyance. Taunton, J., there said: "I think the mere description of Oldham as heir of the surviving trustee, is insufficient, without extrinsic evidence that the description is true. The rule is, that a recital shall not be evidence for the party making the recital, though it may be so against him." If that be correct, there would be no misdirection here, even if the learned judge had told the jury that the recital in the deed of 1481 was no evidence at all, against the

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(*a*) Perk. § 40; citing 3 E. 3, Itin. Not. Esto. 132 (Fitz. Abr. tit. Estoppel, pl. 132).

(*d*) Citing Brooke's Abridgement, title Faits, pl. 4, which cites 35 H. 6, fo. 34 (M. 35 H. 6, fo. 34 A. pl. 41).

plaintiffs, of the truth of the matter therein stated. In *Bowman* v. *Taylor* (2 Ad. & E. 278), the matter recited was the very foundation of the obligation entered into. Lord Denman there **[319]** says: "The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for, it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel may exclude the truth. However, it is right that the construction of that which is to create an estoppel, should be very strict." [Cresswell, J. The recital there was, that the plaintiff was entitled to that which he professed to grant. That is very like a recital that the vendor has title to that which he professes to convey.] In Jarman's Conveyancing (3rd edit., by Sweet, p. 366), it is said: "The doctrine of estoppel, if carried strictly out, would seem to require, that the grantee should not, in an action on the indenture, be permitted to allege that it did not operate according to its purport. But, if this were so, an action could scarcely be brought in any case upon the covenants for title in a conveyance; for, if the deed purported to confer a good title, and therefore did not disclose any defect, the grantee would be estopped from alleging a defect, and, though evicted, must necessarily admit that the eviction was unlawful, and therefore not within the covenants; and the case of *Noke* v. *Awder* (*b*) seems to have been founded too much on this notion. The proper way of regarding the matter appears to be, that statements by deed are estoppels only quoad the purpose for which they are made, and so may estop for one purpose, and not for another: *Gaunt* v. *Wainman* (3 N. C. 69, 3 Scott, 413): therefore, the recital of the grantor's title shall not estop him and his assigns from denying that he then could convey, because it is made with a view to conveyance; and, for **[320]** the same reason, it shall estop the grantee, so long as he is not ousted, from asserting a want of title in his grantor as an excuse for not performing his part of the compact. But, quoad the covenants for title, the recital of title is obviously immaterial, or, rather, may be said to be contingently inconsistent with them, and, so far only as may be necessary for their operating, to be set loose by them."

To operate as a bar, the estoppel must be pleaded. In *Trevivan* v. *Lawrence* (*a*), the court took this difference, "that, where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for, here is a title in the plaintiff, that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel; for, then they are to find the truth of the fact which is against him. Thus, in debt, for rent on an indenture of lease, if the defendant plead nil debet, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but, if the defendant plead nil habuit, &c., and the plaintiff will not rely on the estoppel, but reply habuit, &c., he waives the estoppel, and leaves it at large, and the jury shall find the truth notwithstanding his indenture." In *Bowman* v. *Rostrow* (4 Nev. & M. 557, 2 Ad. & E. 295 (*b*)), the declaration stated the execution of a deed by the plaintiff and defendant; the plea did not traverse the execution, but alleged new matter, upon which the replica-**[321]**-tion took issue; the deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea: it was held, nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel. So, in *Magrath* v. *Hardy* (4 N. C. 782, 6 Scott, 627), to an action for money had and received, the defendant pleaded a recovery by foreign attachment at the suit of a creditor of plaintiff's, and that the creditor had execution of the sum recovered, according to the custom of London; and the plaintiff replied that no execution was executed; upon which the defendant joined issue: it was held, that, having joined issue on the fact of the execution, the jury were not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact. In *Hill* v. *The Manchester and Salford Waterworks Company* (2 B. & Ad. 544), an obligor sued on a bond reciting a certain con-

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(*b*) Cro. Eliz. 373, 436, *Awder* v. *Nokes*, F. Moore, 419.

(*a*) 1 Salk. 276, 2 Ld. Raym. 1036, 6 Mod. 256; cited in 10 Vin. Abr. title Estoppel (L. 2), pl. 4, in marg., Com. Dig. title Estoppel (C.).

sideration, was held to be estopped from pleading that the consideration was different, unless he could make it appear by his plea that the real transaction was fraudulent or unlawful. The principle upon which this doctrine rests, is well laid down by Parke, B., in *Carpenter* v. *Buller* (8 M. & W. 209). "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound, to deny the recital (*d*), notwithstanding what Lord Coke says on the matter of recital, in Co. Litt. 352 b.: and a recital in instruments not under seal, may be such as to be conclusive to the **[322]** same extent. A strong instance as to recitals in a deed, is found in the case of *Lainson* v. *Tremere*, where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170l.; and the defendant was estopped from pleading that it was 140l. only, and that such amount had been paid. So, where other particular facts are mentioned in a condition to a bond, as, that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond (*a*)[1]. All the instances given in Comyns's Digest (title Estoppel (A. 2)), under the head of 'Estoppel by matter of writing' (except one, which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to shew that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170l., in the one case, or was married, in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other **[323]** proceeding between them." In 1 Wms. Saund. 325 a, n. (*d*), it is said that "the rule appears to be general, with respect to estoppels by deed, that the estoppel must be pleaded if there be an opportunity; otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth"(*a*)[2]. In *Bensley* v. *Burdon* (2 Sim. & Stu. 519), Sir John Leach, V. C., says: "Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and when nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped, in respect of the solemnity of the instrument, from saying, as against the other party to the indenture, contrary to his averment in that indenture, that he had not such interest at the time of its execution." In *Edwards* v. *Brown* (3 Y. & J. 423), A., with B. & C. his sureties, entered into a bond to D., the condition of which, after reciting that A. was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of D. in fee, was, that the bond should be void, if the recovery should be suffered "so and in such manner as that, under and by virtue thereof, the estate should be vested in D. for ever:" the recovery was duly suffered, but, A. being seised for life only, D. brought an action upon the bond, to which one of the sureties pleaded, that, if A. had been seised in tail, the recovery was suffered so as to vest the estate in D. in fee: it was held that this plea was bad, because the recital in the condition did not estop D. from disputing that A. was seised in tail, or release the surety from his obligation, it being the intention of the parties that **[324]** D. should have an estate in fee. In *Lady Cavan* v. *Pulteney* (2 Ves. jun. 544), where the lessor, reciting that he was seised of an estate of freehold and inheritance in the estate, covenanted for quiet enjoyment against himself, his heirs, &c., or any other person or persons lawfully claiming by, from, or

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(*d*) See *Rainsford* v. *Smith*, Dyer, 196 a., and cases in notes.

(*a*)[1] 1 Roll. Abr. 873, l. 25; *Payne* v. *Skeltrom* (translated, 10 Vin. Abr. 467, pl. 13), Style, 17, Aleyn, 13.

(*a*)[2] See 2 Smith's Leading Cases, 457; *Wilson* v. *Butler*, 4 N. C. 748, 6 Scott, 540.

under him, &c., or by or through his, their, or any of their acts, means, default, or procurement: the lessees were evicted by the remainderman under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that, upon eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. Sir E. Sugden observes upon that case (Vendors and Purchasers, vol. ii. p. 518)—The ground of this opinion must have been, that the eviction was owing to the default of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; where the default arose from fraud or negligence was, to the lessees, immaterial. In *Howell* v. *Richards* (11 East, 633), relessors covenanted, that, for and notwithstanding any act, &c. by them or any or either of them done to the contrary, they had good title to convey certain lands in fee, and also that they, or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the relessee should peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the relessors, or their heirs or assigns, or for or by any other person or persons whatsoever, and that the relessee should be kept harmless and indemnified by the relessors and their heirs against all other title, charges, **[325]** &c., save and except the chief-rent issuable and payable out of the premises to the lord of the fee: it was held that the generality of the covenant for quiet enjoyment against the relessors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the relessors to the contrary. To avail himself of the estoppel, the defendant should have prayed oyer of the deed, and demurred.

The fact that Peter Hopley was heir-at-law of Ann Hopley, is sufficiently alleged in the declaration. The allegation is, that "one Peter Hopley, who then claimed, and from thence hitherto hath claimed, and still doth claim, from, under, and as heir-at-law to, the said Ann Hopley, deceased, lawful right and title to the said messuage," &c., brought ejectment, &c. That is a distinct averment of the fact; and it is clearly sufficient, at all events on general demurrer. In 1 Wms. Saund. 235 b. c. (notes to *Thursby* v. *Plant*), it is said: "But, though a person who derives title under tenant for life, or pur auter vie, must aver the life of tenant for life, or cestui que vie, yet it seems not to be necessary to make an express averment thereof, as is done in this declaration. It is held, that, if it appear by implication that the life continues, it is sufficient, at least after verdict, or on general demurrer: as, where one who claims under a rector says that the rector was, and yet is, seised, it is a sufficient averment of his life: *Scamler* v. *Johnson* (Dyer, 304 a., Sir T. Jones, 227). So, where the plaintiff, lessee for years from a tenant for life, states in his declaration that he was and still is possessed, this is held to be a sufficient averment of the life of the tenant for life: *Thompson* v. *Withers* (2 Bulstr. 263), 1 Brownl. 4 (*Anonymous*). So, **[326]** in a cognisance as bailiff to husband and wife, he being seised in right of his wife, who was tenant for life, for rent being in arrear; the plaintiff demurred specially, because it was not averred that the wife was alive; and, by Hale, C. J., the words 'being in arrear' are quasi an averment of the wife's life; and, after verdict, or upon a general demurrer, had questionless been good; but, being upon special demurrer, he doubted. But Twisden and Wild, justices, held it good enough upon a special demurrer; and judgment was given for the avowant: *Harlow* v. *Bradnox*" (2 Lev. 88, 3 Keble, 151, 166). So, the words "as assignees," have been held to amount to an averment that the parties so described were in fact assignees. Thus, in *Fletcher* v. *Pogson* (3 B. & C. 192, 5 D. & R. 1), a declaration in sci. fa. stated that R. S. (the plaintiff in the original action) became bankrupt, whereupon a commission was duly awarded against him, and E. F., R. B., and J. T. (the plaintiffs in the sci. fa.) were duly chosen assignees of the estate and effects of the said R. S. under the commission, "and now, on behalf of the said E. F., R. B., and J. T., as assignees as aforesaid, we have been informed," &c.: and it was held that this was good (the defendant not having demurred to it), without an express averment that an assignment of the bankrupt's effects had been made; for, that the expression "assignees as aforesaid" might mean "persons to whom an assignment has been made," and the 5 G. 2, c. 30, s. 26, having directed the choice of assignees to be followed up by an assignment of the effects to the person chosen, the court might presume that such an assignment was made. "The expression 'as assignees as aforesaid,'" says Bayley, J., "may apply not only to persons chosen assignees, but to persons being assignees of the estate and effects; that is, to persons to whom an assignment has been made. It is **[327]** unnecessary to decide whether this would have sufficed, had the defendants demurred; but I think, that, having pleaded over, they are not in a situation to avail themselves of the objection, as the words are capable of receiving a construction which will support the proceeding." The same doctrine is laid down in *Eaton* v. *Southby* (Willes, 131) and *Mead* v. *Robinson* (Willes, 422). If the allegation that Peter Hopley claimed as heir-at-law of Ann Hopley, had been traversed, the plaintiff would have been bound to prove that he was her heir-at-law.

In all cases, it is sufficient, if the breach be assigned in the words of the covenant, or in words equivalent to the sense and intent of the covenant: Com. Dig. Pleader (2 V. 2). In *Foster* v. *Pierson* (4 T. R. 617. And see 2 Wms. Saund. 181 a., n. (10)), it was held, that, in assigning a breach of covenant, which was for quiet enjoyment, it is sufficient to allege, that, at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and, having such lawful right and title, entered, &c., and evicted him, &c.; without shewing what title A. B. had, or that he evicted the plaintiff by legal process, &c.(*d*). Ashhurst, J., there says: "The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant; for, in substance, it is this—that the person who entered had a better title than the defendant, and having such title, entered upon the plaintiff." In none of the cases has the breach been in the negative breach, unless where the covenant has been against all acts. Affirmative words limit the proof. Thus, in *Harris* v. *Mantle* (3 T. R. 307), it was held, that, if the breach of a covenant be assigned thus—"that the defendant has not used a farm in a husbandlike **[328]** manner, but, on the contrary, has committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it do not amount to waste." So, on a declaration alleging that the defendant, being tenant to the plaintiff, cut down and destroyed trees on the premises, and otherwise used the premises in so untenantlike and improper a manner, that they became and were, and are, dilapidated, and in bad and untenantable condition, the plaintiff cannot recover for permissive waste. *Martin* v. *Gilham* (7 Ad. & E. 540). Patteson, J., in the course of the argument, says: "A particular act of waste is alleged here, in destroying trees; what general allegation is there under which permissive waste could be proved?" And, in giving judgment, he says: "There are no words of suffering and permitting in this declaration; but it charges that the defendant 'used the premises' in so untenantlike a manner that they became dilapidated." In *Edge* v. *Pemberton* (12 M. & W. 187),—which was an action on a covenant to keep demised premises in tenantable order and repair, and, at the end of the term, to deliver them up in such tenantable repair,—the breach assigned was, that the defendant did not nor would sufficiently repair and keep the said premises, &c., in tenantable order and repair, nor deliver them up in such tenantable repair at the end of the term, but, on the contrary thereof, suffered and permitted the premises to be and continue, and the same were, ruinous and in decay for want of needful and necessary reparations, &c., and the defendant, at the end of the term, left them so out of repair: and it was held, that, under this breach, the lessor could not recover for voluntary waste. Lord Abinger there says; "If nothing had been stated, except merely to negative performance of the covenant in its terms, and the issue **[329]** had been taken on that, it would have been taken to be a breach to the full extent of the covenant; but, when the plaintiff goes on to add the words—'but, on the contrary, suffered and permitted' the premises to be out of repair, he makes that allegation specific which before is general and uncertain, and is bound by it." Here, there is on the face of the declaration a general allegation of breach of the covenant. The covenant is against the acts of the parties, their heirs, executors, &c., or any other person or persons whomsoever lawfully or equitably claiming or to claim, by, from, or under, or in trust for him, them, or either of them, or the said Ann Hopley deceased. What difference is there between "claiming lawful title," and "lawfully claiming title?" *Evans* v. *Vaughan* (4 B. & C. 261, 6 D. & R. 349), is an instance of the form of

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(*d*) If A. B.'s title were precisely alleged and the title, so alleged, were traversed, the plaintiff would not have the means of proving it.

traverse here adopted. In *Hobson* v. *Middleton* (6 B. & C. 295), Bayley, J., says: "Although, in general, in pleading, an equivocal expression is to be construed against the party using it, yet, where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the previous pleading." [Cresswell, J. The declaration does not allege a recovery in the ejectment by Peter Hopley.] It alleges that Peter Hopley recovered possession of the premises by due process of law. A statement of a recovery in ejectment amounts to an allegation of lawful title: 2 Wms. Saund. 181 a., n. 10. It is there said, that, "if a recovery in ejectment be stated in the declaration to have been had by the person evicting, the defendant may, nevertheless, plead that the lessor of the plaintiff, that is, the person evicting, was not lawfully entitled, and, on issue being joined thereon, may prove that he had no lawful title; and this will be a bar to the action." So, here, it would be a good answer **[330]** to this declaration, to allege that Peter Hopley had not good title as heir-at-law.

Channell, Serjt., Prendergast, and Dasent, in support of the rule. The jury were clearly misdirected. In the first place, the recital in the deed, that Mrs. Raincock was the heir of Ann Hopley, was conclusive evidence of that fact. And, in the next place, it was unnecessary to prove Mrs. Raincock's heirship, the plea affording a sufficient answer without that allegation: and, the rest of the plea having been proved, the learned judge ought to have directed the jury to find for the defendant.

This is the case of a covenant not for title, but merely for quiet enjoyment, and against eviction of a particular description only, viz., by George Dawson Raincock and Martha Ann his wife, their heirs, executors, and administrators, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under them, or either of them, or the said Ann Hopley, deceased: so that, in case of eviction by any person other than Raincock or his wife, or their heirs, &c., to bring it within this covenant, the eviction must be by one lawfully or equitably claiming by, from, or under him, them, or either of them, or from Ann Hopley. That being so, it was necessary to shew that the party claiming not only had title, but that he insisted on his title, and that the party evicted was evicted in consequence thereof. The defendant contends that that which forms an essential element in the plaintiff's case is a matter that was brought about by the act of Henry Shadow Young himself. It was quite unnecessary to allege in the plea that Martha Ann Raincock was the only child and heir-at-law of Ann Hopley. Suppose, instead of replying de injuriâ, the plaintiffs had traversed the heirship as alleged, the replication would have been bad, as tendering **[331]** an immaterial issue. [Cresswell, J. You say,—admitting that the title was bad, Henry Shadow Young might still have enjoyed the land, but for his own act?] Precisely so. It is not enough to shew that Peter Hopley had lawful right; the plaintiffs were bound to shew that he lawfully claimed: *Fowle* v. *Welsh* (1 B. & C. 29); *Eeles* v. *Lambert* (Aleyn, 38); *Foster* v. *Pierson* (4 T. R. 617); *Proctor* v. *Newton* (2 Levinz, 37); *Hodgson* v. *The East India Company* (8 T. R. 278). The cases of *Lainson* v. *Tremere* (1 Ad. & E. 792, 3 N. & M. 603); *Bowman* v. *Taylor* (2 Ad. & E. 278); and *Carpenter* v. *Buller* (8 M. & W. 209), are distinct authorities to shew that the recital here was conclusive.

It is undoubtedly true, that, if the estoppel appears upon the record, and the defendant, instead of relying upon it, chooses to go to issue upon the fact, he thereby sets the matters at large, and the jury are at liberty to disregard the estoppel, and find the truth: Com. Dig. Estoppel (C.); *Goddard's case* (2 Co. Rep. 4 b.); *Treviran* v. *Lawrence* (1 Salk. 276, 2 Ld. Raym. 1036); *Vooght* v. *Winch* (2 B. & Ald. 662); *Magrath* v. *Hardy* (4 N. C. 782, 6 Scott, 627); *Wilson* v. *Butler* (*o*); *Bowman* v. *Rostron* (2 Ad. & E. 295 (*b*)). But here it is to be considered as part of the declaration, which, if bad on general demurrer, is also bad on motion in arrest of judgment. [Cresswell, J. That appears to be inconsistent with the rule, that, if you give your adversary an opportunity of going to the jury upon it, you lose the benefit of the estoppel.]

The generality of the terms of the covenant for quiet enjoyment, is restricted by the introductory words of the covenants for title and for power to convey. The **[332]** covenant for title is preceded by these words,—"that, for and notwithstanding any act, matter, or thing by them the said George Dawson Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, made, done,

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(*o*) 4 N. C. 748, S. C. per nom. *Wilson* v. *Wilson*, 6 Scott, 540, Arnold, 333.

omitted, committed or knowingly or willingly suffered to the contrary," &c. And the covenant for title is in like manner introduced by the words—"and that, for and notwithstanding any such act, deed, matter, or thing as aforesaid," they, the said George Dawson Raincock and Martha Ann, his wife, &c., have power, &c., to appoint, &c. And this restrictive clause must be considered as drawn down to, and embodied in, the covenant for quiet enjoyment. In Sugden's Vendors and Purchasers (10th edit. vol. ii. p. 526, 11th edit. p. 756), it is said: "Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct. Thus, in *Nerrin* v. *Munns* (3 Levinz, 46), the vendor covenanted,—first, that, notwithstanding any act by him to the contrary, he was seised in fee,—secondly, that he had good right to convey,—thirdly, that the lands were clear of all incumbrances made by him, his father, or grandfather,—and, fourthly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather: and it was holden, by three justices, against North, C. J., that the second covenant, although general, was restrained by the first covenant to acts done by the vendor." That case of *Nerrin* v. *Munns* is followed by *Browning* v. *Wright* (2 B. & P. 13), where the vendor, who claimed an estate in fee by purchase, sold the estate, and covenanted, that, notwithstanding any thing done by him to the contrary, he was seised in fee, "and that he had **[333]** good right, &c., to convey, in manner aforesaid," and it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. "For," says Sir E. Sugden, "in the first place, the purchaser was, according to the general practice, entitled to limited covenants only; and, in the next place, special covenants would be of no use, if the other were general. Besides, the defendant having covenanted, that, 'for and notwithstanding any thing by him done to the contrary,' he was seised in fee, and that he had good right to convey; the latter part of the covenant, coupled as it was with the former part by the words 'and that,' must necessarily be over-ridden by the introductory words 'for and notwithstanding any thing by him done to the contrary.'" The judgment of Lord Eldon in that case, is most clear and satisfactory. [V. Williams, J. In *Smith* v. *Compton* (3 B. & Ad. 189), Lord Tenterden, commenting on *Browning* v. *Wright*, says: "The covenant there, if taken by itself, was general, and it was held to be qualified by the preceding and subsequent ones; but there the first and second covenants were connected together by the words 'for and notwithstanding any thing by him done to the contrary,' which extended to both" (*b*).] The connecting words here are the same as those in *Browning* v. *Wright*. Speaking of the very remarkable case of *Howell* v. *Richards* (11 East, 633), Sir E. Sugden says (10th edit. vol. ii. p. 529, 11th edit. p. 758): "Lord Ellenborough, in delivering the opinion of the court, justly laid great stress on the covenant being a distinct covenant from the covenant for title. He said that it was perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he pur-**[334]**-ports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, is strictness of law, in some degree imperfect, but he may at the same time know that it has not become so by any act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it: he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found, at any period, to have been liable to some exception at the time of his conveyance. He did not find any case in which it was held that the covenant for quiet enjoyment was all one with a covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed is to be construed—according to the intention of the parties." These two cases of *Howell* v. *Richards* and *Browning* v. *Wright* are commented upon in *Nind* v. *Marshall* (1 Brod. & B. 319, 3 J. B. Moore, 703), which is thus stated by Sir E. Sugden (vol. ii. 10th edit. p. 529, 11th edit. p. 758): "In a later case, where the subject was elaborately discussed, the covenants in an assignment of a leashold estate, were, 1, that, notwithstanding any act by the seller, the lease was a good lease,—

(*b*) Reading "and that he had." &c., as "and had," &c.

2, 'and further that' the purchaser might peaceably enjoy without any interruption from 'the seller, his executors, administrators, or assigns, or any other person or person whatsoever, having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate,' &c., in the premises; and that, free from incumbrances by the sel-**[335]**-ler; and moreover for further assurance by the seller, his executors, and administrators, and all persons claiming by, from, under, or in trust for him or them. All the covenants, therefore, were restricted to acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. It was held, by three judges against one, that, by construction, the covenant for quiet enjoyment was restrained to persons claiming under the seller; and this case was distinguished from *Howell* v. *Richards*, on the ground that there, the covenant respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief rent, which was not an act or default of the party, or of any claiming under him: this exception, therefore, confined the generality of all the other words." [V. Williams, J. The words "notwithstanding anything done by him (the grantor) to the contrary," governed both branches of the sentence in *Browning* v. *Wright* (vide supra, 333 (*b*)). Is that so here?] It is submitted that it is. In *Gainsford* v. *Griffith* (1 Wms. Saund. 60 a.), this difference was taken, that, "if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense may be applied to the one and the other, there it shall extend to both sentences: but otherwise it is, if such sentence be placed in the middle of one of two sentences, as in *Crayford* v. *Crayford* (Cro. Car. 106) and *Hughes* v. *Bennett*" (ibid. 495). In *Stannard* v. *Forbes* (6 Ad. & E. 572, 1 N. & P. 633), where the seller of a leasehold estate depending upon a life, covenanted that, notwithstanding any act by him done, the lease was valid, and that the same, and the term therein expressed, was in full force, and **[336]** in no wise determined, &c., otherwise than by effluxion of time,—the second covenant was held to be restrained by the first, and was therefore not broken, although the life upon which the lease depended had dropped before the assignment: and it was considered to be no objection to this construction, that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor. [Maule, J. Do you say that an eviction by a grantee or devisee of Ann Hopley would be within this covenant?] Possibly it would not apply to an eviction by a devisee: but it would to the case of a vendee; for, that would be an act done by her which the covenant expressly provides against. In 2 Wms. Saund. 181 b., n., it is said (*a*): "In an action of covenant that the grantor has good right, full power, and lawful authority to grant, it is held that the breach may be as general as the covenant, namely, that he had not good right, full power, and lawful authority to grant, without stating any eviction or interruption: as, where the declaration stated 'that the defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the said indenture;' and, after verdict, and judgment for the plaintiff, it was assigned for error, that the plaintiff in his declaration, had not shewn what person had right, title, estate or interest in the demised premises at the time of making the indenture, by which it might appear to the court that the defendant had not full power and lawful authority to demise the premises: but it was resolved that the assignment of the breach of covenant was good, for he has followed the words of the covenant negative, and it lies more properly in the knowledge of the lessor what estate he had in the land **[337]** which he demised, than of the lessee, who was a stranger to it; and therefore the defendant ought to shew what estate he had in the land at the time of the demise made, by which it might appear to the court that he had full power and lawful authority to demise it."

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

After setting out the facts and pleadings ut ante, 310-316, the learned judge proceeded as follows:—

Upon the trial, it was contended, on behalf of the defendant, that the recital in the deed,—that Mrs. Raincock was the heir of Mrs. Hopley,—was conclusive evidence of that fact.

(*a*) Citing *Bradshaw's case*, 9 Co. Rep. 60 b., Cro. Jac. 304.

The learned judge was of opinion that the recital, if evidence at all, was not conclusive; and the other evidence having established, to the satisfaction of the jury, that she was illegitimate, a verdict was, by his direction, found for the plaintiff.

A rule nisi was afterwards obtained for a new trial, or to arrest the judgment.

On the argument before us, it was insisted that the direction of the judge was wrong on two grounds,—first, because the recital in the deed was conclusive,—secondly, because the allegation of Mrs. Raincock's heirship did not require to be proved, the plea being a sufficient answer without that allegation; and that, the rest of the plea having been proved, he ought to have directed the jury to find for the defendant.

To shew that the recital was conclusive, the counsel for the defendant referred to the cases of *Lainson* v. *Tremere* (1 Ad. & E. 792, 3 N. & M. 603), *Bowman* v. *Taylor* (2 Ad. & E. 278, 4 N. & M. 264), and *Carpenter* v. [338] *Buller* (8 M. & W. 209): and it seems clear, that, where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary. Whether the recital in the present case is one which, after the plaintiff had been evicted from the estate by title paramount, would have estopped him, if advantage had been duly taken of it by the defendant's pleading the estoppel, and relying upon it, is not necessary to be determined; for, the defendant has not adopted the course of referring the consideration of the estoppel to the court, but has pleaded the fact of Mrs. Raincock's heirship; and, by joining issue on the replication, has referred it as matter of fact to the jury, who are not bound by the estoppel, but may (*b*) find the truth of the fact according to the evidence. This doctrine was much discussed in the case of *Magrath* v. *Hardy* (4 N. C. 782, 797, 6 Scott, 627), in which it was held, that, if the estoppel appears on the record, and the party who is entitled to take advantage of it, instead of relying on it, goes to issue on the fact, he puts the matter at large, and the jury may[b] disregard the estoppel. *Vooght* v. *Winch* (2 B. & Ald. 662), and *Bowman* v. *Rostrow* (*c*) are to the same effect.

It remains to be considered whether the rest of the plea, excluding the allegation of Mrs. Raincock's heirship, is an answer to the action,—that answer being, in substance, that Henry Shadow Young instigated and procured Peter Hopley to bring the ejectment, and to evict him.

It was urged, that, to constitute a breach of covenant for quiet enjoyment, there must not only be an adverse [339] title, but an insisting on the title adversely; and therefore, if the party disturbed has brought about the act of disturbance by his own act, he cannot complain of the disturbance. As, in Dyer, 30 a. "The condition of an obligation was such, that the obligor should surrender a certain copyhold, and would suffer the obligee and his heirs peaceably to enjoy the land without interruption of any person. The defendant pleads performance, and that the plaintiff peaceably continued his possession according to the condition for a certain time, and then the lord, for rent in arrear, entered, agreeably to the custom, for a forfeiture; and the plea was held good: and the law is the same, if he were a tenant at the common law, and the obligee ceased (*a*), the obligation is saved, for, it was the act of the plaintiff himself."

But these cases are distinguishable; for, in them, the party disturbing had title of entry by the act of the plaintiff himself. In the present case, Peter Hopley had title of entry quite independent of any act done by Henry Shadow Young; and, when he entered under lawful title not derived from the plaintiff, the covenant was broken, whatever might be the motive that induced him to enter. We think, therefore, the plea is insufficient, if the allegation of the heirship of Mrs. Raincock be struck out from it; and, consequently, that the verdict was properly found for the plaintiff.

The first ground on which the motion to arrest the judgment rested, was, that it was only alleged in the declaration that Peter Hopley claimed, as heir-at-law to Ann Hopley, lawful title to the premises; whereas, it ought to have alleged that he was heir-at-law to Ann Hopley, or that he lawfully claimed lawful title.

The allegation in question might have been open to objection on special demurrer,

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(*b*) And must.

(*c*) 4 N. & M. 551, S. C. per nom. *Bowman* v. *Rostron*, 2 Ad. & E. 295, n.

(*a*) I.e. Cessavit per biennium; as to which see F. N. B. 208.

on the ground of uncertainty; but, after it has been pleaded over to, we think [340] it must be understood to mean, not only that he claimed to have, but that he had, lawful title. The objection on this ground, therefore, fails.

It was further objected, that the generality of the terms of the covenant for quiet enjoyment, was restricted by the introductory words of the covenant for title and for power to convey. The covenant for title is introduced by a restrictive clause, that, notwithstanding any act done or omitted by Raincock and his wife, or either of them, or Ann Hopley, they or one of them are or is seised in fee. The covenant that they have right to convey, is preceded by a similar restrictive clause. But, when we come to the covenant for quiet enjoyment, the restrictive clause is not repeated: and, after the covenant for quiet enjoyment, there follows a covenant for further assurance, to which a restrictive clause of this nature would be inapplicable, and in which it is consequently not found.

On the part of the defendant, it was contended that the restrictive clause in question is to be drawn down from the first two covenants, and to be considered embodied in the third covenant: and the opinion of the majority of the court in the case of *Nind* v. *Marshall* (1 B. & B. 319), and the case of *Browning* v. *Wright* (2 B. & P. 13), were relied on in support of the position contended for.

It cannot be disputed, that the general introductory words of one of the usual covenants for title, may be drawn down in this way, and applied to others, in which they are not to be found, where, from what is found in other parts of the deed, it appears that such must have been the intention of the parties. But, admitting this principle, the question will remain, what reason there is for introducing into the present covenant, by implication, a restrictive clause which is not found in it. The covenant, read without the restrictive clause, seems to be a reasonable and usual one. The [341] estate in question is recited to have been purchased by Mrs. Hopley, and is sold by one purporting to represent her as heir. On such a conveyance, it would be reasonable to expect that the estate should be cleared from any charges from Mrs. Hopley (*a*) downwards to the present purchaser: and, accordingly, the covenant, as it stands, is a covenant for quiet enjoyment against any lawful let, &c., by Raincock and wife, or by any other person lawfully or equitably claiming from or under Raincock and wife, or either of them, or the said Ann Hopley. The covenant, as it stands, without the restrictive words, is quite consistent with the covenant for further assurance, by which it is covenanted that Raincock and wife, and every other person claiming under them or either of them, or under Ann Hopley, shall make further assurance, on every reasonable request. But, if the restrictive words which it is sought to introduce into the covenant for quiet enjoyment, are to be considered as introduced into it, and have the effect contended for,—that the entry by Peter Hopley, not being occasioned by any act or default of Mrs. Hopley, is not a breach of the covenant for quiet enjoyment,—this inconsistency will result from it, that the covenant for quiet enjoyment will not extend to protect the purchaser from a disturbance by Peter Hopley; but the covenant for further assurance will entitle the purchaser to a conveyance from Peter Hopley of his right to the estate, or, in case of refusal, entitle him to maintain an action against the present defendant for such refusal.

We are, therefore, of opinion that there is no reason for introducing into the covenant for quiet enjoyment, the restriction contended for. The rule, therefore, will be discharged.

Rule discharged.

[342] THE RIGHT HON. SPENCER BULKELEY, LORD NEWBOROUGH, J. E. SHEARMAN, AND THOMAS DYKE *v.* LUDOLF BALTHAZAR SCHRODER. Feb. 14, 1849.

[S. C. 18 L. J. C. P. 200; 13 Jur. 611. Referred to, *Taylor* v. *Chichester and Midhurst Railway Company*, 1867-70, L. R. 2 Ex. 390; L. R. 4 H. L. 628.]

It is unnecessary to make profert of deeds or other instruments which are set out by way of inducement only.—In pleading,—except in deducing title,—a deed may, at the option of the party pleading it, be set out, either in its terms, leaving the court to construe it, or according to its legal effect.—In an action for the breach

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(*a*) Inclusively, ut videtur.

of a covenant of indemnity contained in an indenture of November, 1842, the declaration set forth an indenture of January, 1809, being a settlement made on the marriage of A. with B., by which provision was made for effecting a policy of assurance on the life of B., the proceeds of which were to be subject to the appointment of A. and B., or of the survivor, in favour of a child or children of the marriage; it then set out a settlement of March, 1840, made upon the marriage of C., a daughter of A. and B., with D., reciting the death of A. without having exercised the power of appointment, by which deed C., with the consent of D., her then intended husband, assigned all her interest in any fortune to which she might become entitled under the will of her mother, to trustees, for the separate use of C., with a power of appointment by C. in favour of children of that marriage. Of these deeds no profert was made. The declaration then set out, with profert, the indenture of November, 1842,—reciting the death of B., that she had made a will, dated in July, 1840, whereby she appointed the sum of 2000l. to be settled "upon the trusts declared in the indenture of settlement of March, 1840, so far as the rules of law and equity would permit, and she had power so to direct and appoint, but if she had not such power, then she willed and appointed that the 2000l. should be paid to C., or as C. should by writing direct and appoint, for her separate use,"—and further reciting that by another indenture the plaintiffs became trustees under the indenture of March, 1840, that they had received the 2000l., which was property of a personal nature to which C. was beneficially entitled under the will of B., and that the same was in their hands subject to, and charged in equity with, the trusts of the indenture of March, 1840, that D. was desirous to obtain from the plaintiff a loan of the 2000l., and that it was considered that B. had not power to appoint the 2000l. to be settled upon the trusts of the indenture of March, 1840, and therefore that, under the alternative appointment made by her, C. had become entitled thereto absolutely for her separate use, but that a question had been made whether it was not subject to the assignment made by the indenture of March, 1840, wherefore the said C., with the approbation of D., her husband, had proposed and consented that the 2000l. should be paid to the plaintiffs as trustees, to be held by them upon the trusts therein declared, they being indemnified by C. and D.—The declaration then averred that the 2000l. had been accordingly lent by the plaintiffs to D.; that that sum remained unpaid; that, by an indenture of September, 1845, T. S. and others were appointed trustees of the indenture of March, 1840, in place of the plaintiffs; that T. S., as such trustee, had commenced a suit in Chancery against the plaintiffs and others to compel them to invest the 2000l. so lent to D.; that D. had notice of the proceedings, and was required to take upon himself the defence thereto, and to indemnify the plaintiffs; that D. declining to take upon himself the defence, the plaintiffs consented to an order whereby they became liable to transfer to the accountant-general a certain amount of stock, and were put to expense:—Held,—first, that profert of the indentures of January, 1809, and March, 1840, was not necessary, those indentures being stated by way of inducement only:—Secondly, that the indenture of March, 1840, not deducing title, it was sufficient to set it out in its terms:—Thirdly, that it was not necessary to the maintenance of the action, that the indenture of March, 1840, should be valid as an assignment at law; but that, it was enough if it bound the fund in equity in the hands of the trustees:—Fourthly, that the plaintiffs were not precluded from recovering upon the defendant's contract of indemnity, by their having consented to a decree before hearing,—it not being shewn that the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence, or have diminished the damage consequent upon an adverse decision.

This was an action of covenant. The declaration stated, that, on the 3rd of January, 1809, by a certain indenture then made between the Rev. John [343] Werninck, D.D., of the first part, the Hon. Lena, otherwise Magdalena Wynn, afterwards the wife of the said John Werninck, of the second part, and the Right Hon. T. J. Bulkeley, Lord Viscount Bulkeley, Henry Hope, and John Pownall, of the third part,—being a settlement made in contemplation of the then intended marriage between the said John Werninck and the said Lena Wynn, and being the indenture described in the indenture the tenor whereof is hereinafter set forth as made on or about the 3rd of January, 1809,—all the interest of her the said Lena Wynn of and in certain annual rents or yearly sums of money in the said deed mentioned, were by her assigned unto, and vested in, the said Viscount Bulkeley, Henry Hope, and John Pownall, their heirs and assigns, upon the trusts and for the intents and purposes, and subject to the provisoes, **[344]** declarations, and agreements thereinafter expressed and declared concerning the same respectively, that is to say, in trust for the said Lena Wynn and her assigns, until the said intended marriage should be had and solemnized; and, from and after such marriage, upon trust, by or out of the moneys to be received on account of the same annual rents or yearly sums, or either of them, or any part thereof, to procure from the Equitable Assurance Office, or some other public office or offices for the assurance of lives in London or Westminster, a policy or policies of assurance to them the said trustees, their executors, administrators, or assigns, or to the survivor or survivors of them, their or his executors, administrators, or assigns, for securing the payment of the sum of 5000l., or any separate sums of money amounting to 5000l., upon the death of the said Lena Wynn, and, from time to time after such insurance should be effected, and during the life of the said Lena Wynn, to keep and continue the same in full force, and to pay such annual premiums or sum or sums of money as should be necessary and sufficient for that purpose, and all other costs, charges, and expenses attending the effecting and continuing such insurance; and also upon trust, from time to time during the life of the said Lena Wynn, as and when the said annual rents or yearly sums expressed and intended to be thereby granted and conveyed, or any part thereof, should be received, to stand possessed of the same, or so much thereof as should remain after effecting and keeping on foot such insurance, for the sole and separate use of the said Lena Wynn, independent of the said John Werninck, her then intended husband, and so as not to be in any wise subject to his interference, dominion, or control, debts, or engagements, and to pay the same into her proper hands from time to time for that purpose, or to such person or persons, and for such **[345]** intents and purposes, as she, by writing under her hand, should at any time during such her coverture, or from time to time, order or direct; and it was thereby further declared and agreed by and between the parties to those presents, that, from and after the death of the said Lena Wynn, the said Viscount Bulkeley, Henry Hope, and John Pownall, and the survivor and survivors of them, and the executors and administrators of such survivor, should stand possessed of or interested in the principal moneys which should become due and be received upon such policy or policies of insurance as aforesaid, upon trust for an only child, or for all and every, or for any one or more, exclusive of the rest, of the children of the said intended marriage, if there should be more than one, in such parts, shares, or proportions, for such interest or interests, to vest and be payable at such time or times, and under and subject to such charges or limitations over, powers, conditions, or restrictions, or in such other form as the said John Werninck and Lena Wynn, his intended wife, or the survivor of them, should, by any deed or deeds, writing or writings, with or without power of revocation, to be made, sealed, and delivered by both of them, or by the survivor of them, as the case might happen, and to be attested by one or more credible witness or witnesses, or by the last will and testament of such survivor, or any codicil or writing in the nature of, or purporting to be, his or her will, to be signed and published by him or her, and attested in like manner, should at any time thereafter, and from time to time, direct or appoint; but not so as to enable the said John Werninck, if he should survive, to divest any portion which should have become payable according to the trusts thereafter declared; and, for want of such direction or appointment, or so far as such direction or appointment, if incomplete, should not extend, **[346]** in trust for an only child, or for all and every the children of the said intended marriage, if there should be more than one, equally to be divided amongst them, and to be deemed a vested interest or vested interests in a son or sons respectively on his or their attaining the age of twenty-one years, and in a daughter or daughters on her or their attaining such age or marrying, which should first happen, notwithstanding such time or times of vesting might arrive in the lifetime of the said Lena Wynn, and to be payable at such time or respective times of vesting, if the same should happen after her death, and otherwise as soon after her death as might be, &c.: That afterwards, to wit, on the 4th of February, 1809, the said intended marriage was had and solemnized between the said John Werninck and the said Lena Wynn; and afterwards, to wit, on the 23rd of January, 1809, the trustees in the first-mentioned indenture mentioned, in pursuance thereof, by and out of moneys received by them on account of the said annual rents or yearly sums, procured and effected from and in the said Equitable Assurance Office a policy of assurance to them the said trustees, their executors, administrators, and assigns, for securing the payment of 5000l. upon the death of the said Lena Wynn, together with such bonuses upon the same as should, from time to time, by the rules of the said assurance office, become payable in respect of the said policy, and the said policy of assurance was, from time to time during the life of the said Lena Wynn, kept and continued in full force by the payment of premiums in respect thereof from and out of the annual rents and moneys, by the trustees for the time being charged with the execution of the said trusts in respect thereof, and at the time of the death of the said Lena Wynn hereinafter mentioned, a large sum of money, to wit, 14,000l., was due and payable by the said Equitable Assurance Office upon and in respect of the said policy [347] of assurance for the said sum of 5000l. and divers bonuses payable by the said assurance office by virtue thereof, which said sum so due was charged with the trusts, and applicable to the purposes, in the said first-mentioned indenture mentioned of and concerning the same: That, after the said marriage, to wit, on the 1st of January, 1820, the said John Werninck died, leaving his said wife, and divers, to wit, four children of the said marriage,—whereof one afterwards became the wife of the defendant, as hereinafter mentioned, him surviving, and without having made any appointment or direction, either alone or jointly with his said wife, pursuant to the said first-mentioned indenture: That afterwards, and before the commencement of this suit, to wit, on the 4th of March, 1840, by a certain indenture then made between the defendant of the first part, Maria Lena Werninck (who was one of the children of the said marriage between the said John Werninck and the said Lena, his said wife), of the second part, the said Right Honourable Spencer Bulkeley, Lord Newborough, one Henry Hope Werninck, and the said James Edward Shearman, of the third part,—being a settlement made in contemplation of the then intended marriage of the defendant and the said Maria Lena Werninck, and which is described in the indenture the tenor whereof is hereinafter set forth, as an indenture made on or about the 4th of March, 1840,—it was, amongst other things, witnessed that the said Maria Lena Werninck did, with the consent and approbation of the defendant, thereby assign all her right, title, interest, benefit, power, claim, and demand whatsoever in or to a certain principal sum of 50,000 florins, Dutch stock, &c., and also in, to, or out of any fortune or property of a personal nature of or to which the said Maria Lena Werninck might become possessed, or beneficially entitled, under or by virtue of the last will and testament of her said mother, [348] Lena Werninck unto the said Spencer Bulkeley, Lord Newborough, Henry Hope Werninck, and James Edward Shearman, their executors, administrators, and assigns, upon and for certain trusts, intents, and purposes therein expressed, declared, and contained of and concerning the same, that is to say, in trust for the said Maria Lena Werninck, her executors and administrators, in the meantime and until the said intended marriage should be had and solemnized, and, from and immediately after the solemnization thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, declarations, and agreements thereinafter expressed, declared, and contained of and concerning the same, that is to say, in trust that they the said Spencer Bulkeley, Lord Newborough, Henry Hope Werninck, and James Edward Shearman, and the survivor or survivors of them, their or his executors, administrators, or assigns, should, as soon as circumstances would permit, procure, the said 50,000 florins stock, stocks or funds and securities, respectively, to be assigned and transferred into their or his names or name, and should lay out and invest the aforesaid trust sum and sums of money forthwith after the same should be received in or upon public or parliamentary stocks, funds, or securities in England or Holland in the names or name of the said trustees or trustee for the time being, and should pay the dividends, interest, and annual proceeds to accrue due from time to time during the joint natural lives of the said Maria Lena Werninck and Ludolf Balthazar Schröder for and in respect of the said trust florins and stock, stocks, funds, and securities respectively, unto such person or persons, for such ends, intents, and purposes, and in such manner and form, as the said Maria Lena Werninck, notwithstanding her being under coverture, should, by any note or writing under her hand, to be by her signed in the presence of and at-[349]-tested by one or more credible witness or witnesses, order or direct; and, failing such order or direction, then to pay the same dividends, interest, and annual proceeds, from time to time, into the proper hands of the said Maria Lena Werninck, for her separate use and benefit, exclusive of the said Ludolf B. Schröder, and the same not to be in any wise subject to his control, debts, or engagements, but the receipt and receipts of the said Maria Lena Werninck, or of the person or persons to whom she should so order or direct the said dividends, interest, and annual proceeds to be paid as aforesaid, should alone be a good and sufficient discharge, and good and sufficient discharges for the same; and upon further trust, after the decease of the said Ludolf B. Schröder, and in case the said Maria Lena Werninck, his intended wife, should survive him, to pay the dividends, interest, and annual proceeds of the said trust florins, stock, stocks, or funds and securities respectively to accrue due after the death of the said Ludolf B. Schröder, unto the said Maria Lena Werninck and her assigns, from time to time, during the remainder of her natural life, for her and their proper use or benefit; but, in case the said Ludolf B. Schröder should survive the said Maria Lena Werninck, his intended wife, then in trust, from and after the decease of the said Maria Lena Werninck, to pay the dividends, interest, and annual proceeds of the said florins, stock, stocks, or funds and securities respectively, unto the said Ludolf B. Schröder and his assigns during his life, for his and their proper use and benefit, but so, nevertheless, that, in case he the said Ludolf B. Schröder should happen to become bankrupt, or should take the benefit of any act of parliament for the relief of insolvent debtors, then the dividends, interest, and annual proceeds to accrue due in respect of the said trust florins, stock, stocks, or funds and securities re-[350]-spectively, during the remainder of the life of him the said Ludolf B. Schröder, should go and be payable and paid in such and the like manner as the same would go and be payable if the said Ludolf B. Schröder were dead: and it was thereby further agreed and declared, that the said Spencer Bulkeley, Lord Newborough, Henry Hope Werninck, and J. E. Shearman, and the survivors and survivor of them, their or his executors, administrators, and assigns, should stand possessed of the said florins, stock, stocks, or funds, securities, moneys, personal estate, effects, and premises thereinbefore assigned, or intended so to be, subject, and without prejudice, to the trusts thereinbefore expressed and declared, in trust for all or such one or more of the children of the said intended marriage, at such ages, days, or times, in such shares and proportions, if more than one, and with such benefit of survivorship, and limitations over to or for any other or others of the same children, and in such manner and form, as the said Ludolf B. Schröder and Maria Lena Werninck, his intended wife, at any time or times during their joint lives, by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, should direct or appoint, and, for want of any such direction or appointment, and so far as the same should not operate as a full and complete disposition of the said trust premises, then as the survivor of the said Ludolf B. Schröder and Maria Lena Werninck, his intended wife, by any deed or deeds, instrument or instruments in writing, to be by him or her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be signed in the presence of, and attested by, two or more credible witnesses, should direct or ap-[351]-point; and, failing any such direction or appointment as aforesaid, and subject to any incomplete disposition to be made by any of the ways aforesaid, upon trust that they the said Spencer Bulkeley, Lord Newborough, Henry Hope Werninck, and J. E. Shearman, or the survivors or survivor of them, their or his executors, administrators, or assigns, should assign and transfer and pay the said florins, stock, stocks, or funds, securities, moneys, personal estate, effects, and premises respectively, unto, between, and amongst all the children of the said intended marriage, if more than one, equally, share and share alike, and, if there should be but one child of the said intended marriage, then the whole to such one child, for their, his, or her portions or portion, the portion, part, or share, portions, parts, or shares, of such child or children, being a son or sons, to be assigned, transferred, and paid to him or them at his or their age or respective ages of twenty-one years, or as soon afterwards as the trusts thereinbefore expressed and contained for the benefit of his or their parents would permit, and the portion, part, or share, portions, parts, or shares of such child or children, being a daughter or daughters, to be assigned, transferred, and paid to her or them at her or their age, or respective ages, of twenty-one years, or day or respective days of marriage, which should first happen, or as soon afterwards as the said trusts for the benefit of her or their parents would permit; and, in case either or any of the said sons should die under the age of twenty-one, or either or any of the said daughters should die under that age and unmarried, then the portion, part, or share, portions, parts, or shares of such son or sons so dying under the age of twenty-one years, and of such daughter or daughters so dying under that age and unmarried, should go and accrue to the other and others of the same children, and in equal shares and proportions if **[352]** more than one, and be assigned, transferred, and paid at the same time or times as, and together with, his, her, or their original portion, part, or share, portions, parts, or shares, or as near thereto as circumstances would permit, and so that the executors or administrators of any deceased child or children, having attained a vested or transmissible interest, or vested or transmissible interests, respectively, should take the same, but no greater, share than his, her, or their testator or intestate would have been entitled to if living; but, in case there should be no child of the said intended marriage, or if all such children should happen to die before any or either of them should attain a vested or transmissible interest in the said trust premises, then the said trustees, and the survivors and survivor of them, their and his executors, administrators, and assigns, should and would stand possessed of the said florins, stock, stocks, or funds, &c. (subject and without prejudice to the trusts aforesaid, and to the powers thereinafter contained), in trust for such person or persons, for such interest or interests, intents, and purposes as the said Maria Lena Werninck, at any time during the joint lives of herself and the said Ludolf B. Schröder, her intended husband, and notwithstanding her being under coverture, should, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be her last will and testament, or a codicil thereto, to be signed in the presence of, and attested by, two or more credible witnesses, direct or appoint, and, for want of any such direction or appointment, and so far as the same should not operate as a full and complete disposition of the said trust premises, in trust as follows, that is to say, **[353]** in case the said Maria Lena Werninck should survive her said intended husband, then, in trust for the said Maria Lena Werninck, her executors, administrators, and assigns absolutely; but, if the said Maria Lena Werninck should die in the lifetime of the said Ludolf B. Schröder, her intended husband, then, subject as aforesaid, in trust for such person or persons as would have been entitled to the said florins, stocks, &c., at the time of the decease of her the said Maria Lena Werninck, in case she had died possessed thereof unmarried and intestate; and upon this further trust, that the said Spencer Bulkeley, Lord Newborough, Henry Hope, and J. E. Shearman, or the survivors or survivor of them, their or his executors, administrators, or assigns, should, after the decease of the said Maria Lena Werninck, and subject and without prejudice to the beneficial right and interest therein of the said Ludolf B. Schröder, during his natural life, but determinable as aforesaid, pay, apply, and dispose of the whole, or a competent part, in the discretion of the same trustees or trustee, of the dividends, &c., of the share or shares, or presumptive share or shares of the said child or children of and in the said florins, stock, &c. [for the maintenance and advancement of children]; with certain powers of changing the securities upon which the said trust moneys in the said last-mentioned deed mentioned were from time to time to be invested: [Proviso for the appointment of new trustees in the event of death, resignation, &c., of the former trustees]: That, afterwards, to wit, on the 5th of March, 1840, the said intended marriage between the defendant and the said Maria Lena Werninck took place and was solemnized: That the said Lena, otherwise Magdalena Werninck afterwards, and after the passing of the 7 W. 4 & 1 Vict. c. 26, to wit, on the 10th of July, 1840, made her last will and testament in writing, **[354]** signed by her, and published and declared by her to be her last will and testament, in the presence of, and attested by, two credible witnesses, &c., and she the said Lena Werninck did thereby, in pursuance of the power of appointment in the first-mentioned indenture mentioned, and in intended execution thereof, will, direct, and appoint, as to and concerning 2000l., parcel of the moneys which at her death should become due and payable by the said Equitable Assurance Office upon or in respect of the said policy of assurance, in manner following, that is to say, that the said sum of 2000l. should be settled and be upon the same trusts, and to and for the same intents and purposes, for the benefit of the said wife of the defendant and her children, as were expressed and declared in the said indenture of settlement made in contemplation of her said marriage with the defendant, so far as the rules of law and equity would permit and the said testatrix had the power to direct; but that, if it should be held that she had not the power so to direct and appoint the said sum, then she willed, directed, and appointed that the said sum of 2000l. should be paid to the defendant's said wife, or as she should, by any writing or writings under her hand, direct, to and for her own sole and separate use, benefit, and disposal, free from the control, debts, engagements, and intermedlings of her then present or any future husband; and the said testatrix thereby appointed the said Spencer Bulkeley Lord Newborough, Thomas Dyke, John Pownall, Thomas James Werninck, and John Spencer Wynn Werninck, executors thereof: That the said Lena Werninck afterwards, to wit, on the 1st of January, 1842, died without having altered or revoked her said will; and that the said will was proved in the prerogative court of Canterbury, on the 31st of January, 1842: That, by indenture of the 20th of October, 1842, Thomas Dyke was appointed a trustee **[355]** in the place of Henry Hope Werninck: That the plaintiffs, afterwards, to wit, on the 12th of November, 1842, received and had paid to them, as such trustees, in manner in the indenture hereinafter set forth mentioned, the said sum of 2000l. so willed, directed, and appointed to be paid by the said last will as aforesaid, and mentioned in the indenture hereinafter set forth, and which then was property of a personalty nature to which the said Maria Lena, the wife of the defendant, became and was beneficially entitled under and by virtue of the said last will; and the same thenceforth, until the loan hereinafter mentioned, was in the hands of the plaintiffs as such trustees, subject to and charged in equity with the said trusts by and in the said indenture of the 4th of March, 1840, made on the occasion of the said secondly-mentioned marriage, created and contained of and concerning all the right, title, benefit, interest, power, claim, and demand whatsoever of the said Maria Lena Werninck in, to, or out of any fortune or property of a personalty nature, of and to which she might become possessed or beneficially entitled under or by virtue of the last will and testament of her said mother: That afterwards, to wit, on the 12th of November, 1842, the defendant was desirous to procure from the plaintiffs a loan of the said sum of 2000l.; and thereupon an indenture was then made by and between the defendant of the first part, the said wife of the defendant of the second part, and the plaintiffs in this suit of the third part,—which said indenture, sealed with the seal of the defendant, the plaintiffs brought into court, &c.,—the tenor of which said indenture follows in these words, that is to say, &c. The deed was then set out in hæc verba. It recited the settlement of the 3rd of January, 1809; that, in pursuance of the trust therein, a policy for 5000l. was effected upon the life of Lena Werninck; that the said Viscount Bulkeley and Henry Hope both died some time before the **[356]** date of the indenture next thereinafter recited; that, by indenture dated the 30th of January, 1824, John Scriven and Thomas Dyke were appointed trustees of the hereinbefore recited settlement, in the room and place of the said deceased trustees, and by means of the indenture now in recital, and an indenture indorsed thereon, bearing even date therewith, the said policy, and the moneys which should thereby become payable, amongst the other settled property, were vested in the said John Pownall, John Scriven, and Thomas Dyke, upon the trusts of the hereinbefore recited indenture of settlement; that the said John Scriven had not acted in the trusts of the thereinbefore in part recited indenture of settlement of the 3rd of January, 1809, for some time, and was then resident beyond the seas; that the said John Werninck died in the life-time of the said Lena Werninck, his wife, without having joined with her in any exercise of the said power of appointment given to them jointly as aforesaid; that there was issue of their said marriage four children, and no more, viz. Henry Hope Werninck, Thomas James Werninck, John Spencer Wynn Werninck, and the said Maria Lena Schröder, all of whom some time since attained the age of twenty-one years. It then recited the indenture of settlement of the 4th of March, 1840, the indenture of the 20th of October, 1842, whereby Thomas Dyke was appointed a trustee of the settlement of the 4th of March, 1840, in lieu of Henry Hope Werninck, and whereby, and by a deed-poll indorsed thereon, the property comprised therein was assigned to and became vested in the said Spencer

Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke. It then recited that Lena Werninck, by her will, bearing date the 10th of July, 1840, wherein she noticed that the said policy of assurance on her life was then supposed to amount to the sum of 13,525l., did direct and appoint the moneys [357] which upon her death would become due and payable upon or in respect of the said policy of assurance, in manner following, that is to say, as to several sums making up together 8000l., part thereof, for the benefit of two of her sons as therein mentioned, and she directed and appointed that the sum of 2000l., further part thereof, should be settled and be upon the same trusts, and to and for the same intents and purposes, for the benefit of her said daughter Maria Lena Schröder and her children, as were expressed and declared in the settlement made upon her marriage with the said Ludolf B. Schröder, thereby referring to the indenture last hereinbefore recited of and concerning the property comprised in such settlement, so far as the rules of law and equity would permit, and she the testatrix had the power to direct; but, if it should be held that she had not the power so to direct and appoint the said sum, then she directed and appointed that the said sum of 2000l. should be paid to her said daughter, or as she should, by writing or writings under her hand, direct, to and for her own sole and separate use and benefit and disposal, &c.; and the said testatrix appointed the said Spencer Bulkeley Lord Newborough, John Pownall, Thomas Dyke, T. J. Werninck, and J. S. W. Werninck, executors of her said will. It then recited that Mrs. Werninck died in January then last, without having revoked or altered her will, or the appointment thereby made as aforesaid, and that the will was duly proved in the prerogative court of the Archbishop of Canterbury, by the executors (except John Pownall); that the money payable upon the policy, amounting to 13,775l., had then lately been paid by the said Equitable Assurance Office to the said John Pownall, as the surviving trustee named in the said policy, and the same had been received by him for himself and Thomas Dyke as the now acting trustees under the said settlement of the 3rd of January, [358] 1809; that it was considered that Mrs. Werninck had not power to appoint the said sum of 2000l. to be settled upon the trusts of the thereinbefore-recited indenture of the 4th of March, 1840, and therefore, that, under the further or substituted appointment made by her of the same sum as aforesaid, the said Maria Lena Schröder became entitled thereto absolutely, for her separate use; but that a question had been made whether the same sum was not included in, or was not subject to, the assignment made by her by the thereinbefore in part recited indenture of settlement of the 4th of March, 1840, as aforesaid, of her right, title, and interest, in, to, or out of property or to which she might become possessed or beneficially entitled under or by virtue of the last will and testament of her said mother; that therefore the said Maria Lena Schröder, with the approbation of her husband, had proposed and consented that the sum of 2000l. should be paid to the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, as trustees as aforesaid, but upon an express agreement and understanding that the same should be held and disposed of by them upon and for the trusts and purposes thereinafter declared concerning the same; that they the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke had consented to receive and hold and dispose of the same sum of 2000l. accordingly, upon having such indemnities from the said Ludolf B. Schröder and Maria Lena Schröder respectively, as were thereinafter contained, and which indemnity they had respectively agreed to give; and that the said John Pownall and Thomas Dyke, by the direction of the said Maria Lena Schröder, in writing under her hand, had paid the said sum of 2000l. unto the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, as such [359] trustees as aforesaid, and the same was then in their hands, as they did thereby acknowledge. The indenture then witnessed, that, in pursuance of the said recited agreement in that behalf, and in consideration of the premises, it was thereby agreed and declared between and by the parties to those presents, and particularly by the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, and the said Maria Lena Schröder, by that writing under her hand, did expressly order and direct, that the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, and the survivors and survivor of them, or other the trustees or trustee for the time being of those presents, and their or his respective executors and administrators, should and would henceforth stand and be possessed of and interested in the said appointed sum of 2000l., and the securities and stocks and funds in or upon which the same sum, or any part thereof, might from time to time be invested or laid out as thereinafter mentioned, and the interest, &c., upon and for the trusts and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations thereinafter declared and contained and referred to of and concerning the same respectively, that is to say, upon trust that the trustees or trustee for the time being of those presents, and their or his executors or administrators, did and should, from time to time, upon the request in writing of the said Ludolf B. Schröder, but, during the life of the said Maria Lena Schröder, not without her request and consent, to be testified by some writing under her hand, lend and advance the said sum of 2000l., or any moneys, stocks, or funds for the time being held in the place thereof upon the trusts of those presents, or any part or parts thereof respectively, to the said Ludolf B. Schröder, for such time as he should request, or generally, at **[360]** interest, upon the security of his bond, &c.; and did and should,—subject and without prejudice to the trusts thereinbefore declared,—stand possessed of and interested in the said sum of 2000l., or the securities, stocks, or funds for the time being held in the place thereof under the trusts of those presents, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, declarations, and agreements as were by and in the thereinbefore recited indenture of the 4th of March, 1840, declared or expressed and contained of and concerning the foreign stock and other property thereby settled as aforesaid, or such or so many of the same trusts, &c., as were then subsisting or capable of taking effect, or as near thereto as the different circumstances of the case would permit: Provided always, and it was thereby expressly declared, that, if, according to the true construction of the said indenture of the 4th of March, 1840, the said appointed sum of 2000l. ought to be vested in and held and applied by the trustees of the same indenture, upon and for the trusts and purposes thereof, then and in such case those presents should not operate or be construed so as to make any additional provision for the persons interested under the trusts of the last-mentioned indenture, but all interests which might be taken by them under or by virtue of those presents should, to the extent thereof, be taken in satisfaction and discharge of the provisions made for the same persons respectively by the last-mentioned indenture: And the indenture also witnessed, that, in performance of the said recited agreement in that behalf, the said Ludolf B. Schröder, for himself, his heirs, executors, and administrators, did thereby covenant and agree with the said Spencer Bulkeley Lord Newborough, J. E. Shearman, and Thomas Dyke, jointly and severally, and their respective heirs, executors, administrators, and assigns, that he, the said Ludolf B. **[361]** Schröder, his heirs, executors, or administrators, should and would, from time to time, and at all times thereafter, save, defend, keep harmless, and indemnify the said Spencer Bulkeley, Lord Newborough, J. E. Shearman, and Thomas Dyke, and every of them respectively, and their and every of their heirs, executors, and administrators, and their several estates and effects whatsoever, from and against and in respect of all and all manner of actions, suits, claims, and demands whatsoever, whether at law or in equity, or otherwise howsoever, by any person or persons who is or are, or hereafter shall or may be, in any manner interested or entitled under or by virtue of the thereinbefore recited indenture of the 4th of March, 1849, or any of the trusts or provisions thereof, and who should claim adversely to those presents, and not under or by virtue of the same, for or on account or in respect of the said appointed sum of 2000l., and the stocks, funds, and securities in or upon which the same might thereafter be laid out or invested, or any part or parts thereof respectively, and the interest or dividends and annual produce of the same sum, stocks, funds, and securities, or any part thereof respectively, or on account or by reason of any such loan or investment as was thereinbefore directed or authorised to be made of the said sum of 2000l., or the stocks and funds for the time being held upon the trusts of those presents, or any part thereof respectively, and from and against and in respect of all sums of money, damages, losses, costs, charges, and expenses whatsoever which they the said Spencer Bulkeley, Lord Newborough, J. E. Shearman, and Thomas Dyke, or any of them, or their or any of their heirs, executors, or administrators, should or might pay, sustain, incur, or be put into, by means or in consequence of any such action, suit, claim, or demand as aforesaid, or in relation thereto; and that, **[362]** in pursuance of the said recited agreement in that behalf, and in consideration of the premises, the said Maria Lena Schröder did thereby agree and declare and direct that all the property, estate, and effects, whatsoever and wheresoever, to which she then was, or at any time or times thereafter should or might be, entitled for her separate use, independent of her said husband, should be liable to, and chargeable and charged with, the payment and satisfaction of all damages which might at any time or times thereafter be recovered or recoverable upon or by virtue of the covenants or covenant of the said Ludolf B. Schröder thereinbefore contained, nevertheless, as between herself and her said husband and his representatives and estates and effects, as a secondary or auxiliary fund only, in aid of the estate and effects or assets of the said Ludolf B. Schröder, &c. The declaration then proceeded to state that the plaintiffs did, afterwards, and whilst they were such trustees as aforesaid, to wit, on the day and year last aforesaid, upon the request in writing of the defendant, then, and during the life of his said wife, made to the plaintiffs, and at the request, and by the consent of the defendant's said wife, testified by a writing then made by her under her hand, lend and advance the said sum of 2000l. therein-before and in the last-mentioned indenture mentioned, to the defendant, upon the security of a certain indenture then made between the defendant of the first part, his said wife of the second part, and the plaintiffs of the third part,—profert,—whereby the defendant did covenant with the now plaintiffs that he would, in satisfaction and discharge of the same sum, well and truly pay or cause to be paid unto the plaintiffs the said sum of 2000l., and interest at 5 per cent. thenceforth so long as the same should remain owing; provided that, so long as the defendant should remain solvent, or apparently solvent, and should **[363]** well and truly pay or satisfy the interest which should grow due upon the said 2000l., or so much thereof as should remain owing unto the plaintiffs, their executors or administrators, or on their account to the said Maria Lena Schröder, for her separate use, as and when such interest should become due, or within the space of one calendar month afterwards, or otherwise satisfy his said wife from time to time in respect of the same interest, it should not be lawful for the plaintiffs to call in or require payment of the said principal sum of 2000l., or any part thereof, unless at the request in writing of the said Maria Lena Schröder: that the 2000l. and interest, or any part thereof, never had been paid to the plaintiffs, but remained wholly unpaid to them or any other person, and the plaintiffs, by reason of the said loan thereof, became and were liable in equity to be sued by any future trustee of the said trusts in the said indenture of the 4th of March, 1840, made upon the occasion of the said secondly-mentioned marriage contained, and to be compelled to pay or invest the same as thereinafter mentioned. The declaration then set out an indenture of the 24th of September, 1845, to which the defendant and his wife were parties, whereby Thomas James Werninck, Thomas Stephens, and Henry Hope Werninck were appointed trustees of the settlement of the 4th of March, 1840, in the place of the plaintiffs, and which contained a proviso that the said covenant and other provisions of indemnity contained in the said indenture of the 12th of November, 1842, should remain in full force, and should at all times be available by the plaintiffs and each of them respectively, and their respective heirs, executors, and administrators, as fully and effectually as if these presents had not been made or executed. Averment, that thereupon and thereby the said Thomas James Werninck, Thomas Stephens, and **[364]** Henry Hope Werninck then became and were trustees of and for the execution of the trusts contained in the said indenture dated the 4th of March, 1840, made upon the occasion of the said secondly-mentioned marriage, and bound to take care of the due security and investment of the property charged with and subject to those trusts: That afterwards, and before this suit, to wit, on the 1st of January, 1846, the said Thomas Stephens, then being such trustee as aforesaid, and then, as such, interested and entitled under and by virtue of the said indenture of the 4th of March, 1840, and the trusts and provisions thereof, and claiming adversely to the said indenture of the 12th of November, 1842, and not under or by virtue of the same, affirmed and insisted that the said loan of the said sum of 2000l. by the plaintiffs to the defendant, was a breach of the trusts in the said indenture of the 4th of March, 1840, contained, and then claimed and demanded of the plaintiffs that the said sum of 2000l. should be paid by the plaintiffs to the said Thomas Stephens and his said co-trustees, or that so much 3 per cent. consolidated bank annuities as the same would have purchased on the 12th of November, 1842, when it was lent to the defendant as aforesaid, should be transferred by the now plaintiffs into the names of the said Thomas Stephens and his said co-trustees, to be holden by them upon the trusts of the said indenture of the 4th of March, 1840: That the said Thomas Stephens, being such trustee as aforesaid, and interested and claiming as aforesaid, afterwards, and before the commencement of this suit, to wit, on the 14th of March, 1846, for enforcing his said claim and demand, commenced and prosecuted a suit in the high court of Chancery, wherein the said Thomas Stephens was plaintiff, and the now plaintiffs, the now defendant, Maria Lena Schröder his wife, Thomas James Werninck, Henry Hope Wer-**[365]**-ninck, Ludolf Adrian Schröder, a child of the said marriage between the defendant and his said wife, and Wilhelmina Susan Schröder, another child of the same marriage, were defendants; that, in and by the said bill, the said Thomas Stephens alleged, amongst other things, that the plaintiffs had been guilty of a breach of trust in having so as aforesaid made the said loan of the said sum of 2000l. to the defendant, and he thereby prayed that the defendants thereto might answer the same, and that, if, and so far as, that court should think right, the trusts of the said indenture of settlement of the 4th of March, 1840, might be carried into execution by and under the decree and direction of that court, and that it might be declared that the said sum of 2000l. was comprised in the trusts of the said indenture, and that the defendants Ludolf B. Schröder, and Maria Lena his wife, Spencer Bulkeley, Lord Newborough, J. E. Shearman, Thomas Dyke, T. J. Werninck, and Henry Hope Werninck, might be declared to be jointly and severally liable to replace the said sum of 2000l., upon the trusts of the said indenture of settlement, and that, for that purpose, the said last named defendants might be decreed to purchase so much stock in the 3 per cent. consolidated bank annuities as the said sum of 2000l. would have purchased on the 12th of November, 1842, the time when such sum of money was so lent to the defendant Ludolf B. Schröder as thereinbefore was mentioned, or that they might be decreed to repay the said sum of 2000l., as should appear to be most beneficial to the infant cetteux que trust interested under the said indenture of settlement, and that such stock or sum of money might be duly invested and secured upon the trusts of the said indenture of settlement, or that the respective life-interests of the said defendants Ludolf B. Schröder and Maria Lena his wife, in all the stocks, moneys, **[366]** funds, securities, and premises comprised in the said indenture of settlement might be decreed to be applied, so far as the same would extend, in making good the said stock, or the said 2000l., and that the deficiency thereof might be decreed to be replaced or repaid by the defendant Ludolf B. Schröder and Maria Lena his wife, Spencer Bulkeley, Lord Newborough, J. E. Shearman, and Thomas Dyke, T. J. Werninck, and Henry Hope Werninck, and that the plaintiff Thomas Stephens might be discharged from the trusts of the said indenture of settlement, and also from the trusts of the said indenture of the 12th of November, 1842, if the court should be of opinion that he had accepted the same free from all liabilities in respect of such trusts or other the matters aforesaid, and that, if necessary, new trustees might be appointed of all the said last-mentioned indentures, in the place of the plaintiff Thomas Stephens, the said T. J. Werninck and Henry Hope Werninck, and that all necessary and proper directions might be given for effectuating the several purposes aforesaid, and that the defendants Ludolf B. Schröder and Maria Lena his wife, and Spencer Bulkeley Lord Newborough, J. E. Shearman, Thomas Dyke, T. J. Werninck, and Henry Hope Werninck might be decreed to pay to the said plaintiff Thomas Stephens his costs of that suit, and also certain costs, charges, and expenses incurred by him in relation to the matters aforesaid; and for further relief: That afterwards, and pending the said suit, and in the course of and as part thereof, and before this suit, to wit, on the 7th of December, 1846, presented to the Master of the Rolls, and thereby prayed that the now plaintiffs might be ordered within a week after the service of the order to be made upon that petition, to transfer into the name and with the privity of the accountant-general of the said court of Chancery, to the credit of the said cause, **[367]** as much 3 per cent. consolidated bank annuities as might have been purchased with the said 2000l. on the 12th of November, 1842, and that the petitioner might be discharged from the trusts of the said indenture of settlement of the 4th of March, 1840, and also from the trusts of the said indenture of the 12th of November, 1842, if, and so far as, the said court should be of opinion that the petitioner had accepted the same, and that it might be referred to the master to appoint a proper person to be a trustee or trustees respectively of the said indentures, and to settle and approve of proper deeds for that purpose, the petitioner thereby undertaking to execute the same, and also to settle and approve of a proper release and indemnity to the petitioner, and that all proper parties might be ordered to join in and execute the same, and that it might be referred to the master to tax the petitioner his costs, charges, and expenses of and incidental to the said trust, and also his costs of the said suit as between solicitor and client, and that the now plaintiffs and the said Ludolf B. Schröder and Maria Lena his wife might be jointly and severally ordered to pay to the petitioner the amount of such costs, charges, &c., when so taxed as aforesaid, or that his lordship might be pleased to make such further or other order in the premises as to his lordship might seem meet,—of all which premises, the defendant, afterwards, to wit, on the 4th of January, 1847, had notice: That thereupon, the now plaintiffs, being advised, as the fact was and is, that they had no defence to the said suit of the said Thomas Stephens, then gave notice to the now defendant, stating that the said petition would come on to be heard before the Master of the Rolls on or about the 11th of January, then instant, and that, unless the now defendant came forward and took upon himself the defence of the said suit in Chancery, and gave to **[368]** the now plaintiffs a good and sufficient indemnity against all costs to be paid, incurred, or sustained by such defence, they would settle the claim of the said Thomas Stephens in the said suit, by consenting to such order being made upon the said petition as the said court might think proper, and would call upon and hold the now defendant and Maria Lena Schröder, under the indemnity aforesaid, liable to make good and reimburse to them all sum or sums of money, costs, charges, and expenses which they the now plaintiffs, or either of them, might bear, sustain, or be put unto, by reason or in consequence of the claim of the said Thomas Stephens, or of the said suit in Chancery so instituted by him as aforesaid; that the now defendant then neglected and declined to take upon him the defence of the said suit, or to indemnify the now plaintiffs against the same, or the costs of their defence thereto; that such proceedings were thereupon had in the said suit, that the now plaintiffs, in order to compromise and put an end to the same, and to prevent further costs and expenses being incurred therein, upon the hearing of the said petition, before this suit to wit, on the 26th of January, 1847, reasonably and properly consented to such order being made upon the said petition as the said court of Chancery might think proper; that it was thereupon, and before this suit, to wit, on the day and year last aforesaid, ordered by the said Master of the Rolls, that, it appearing that it would be for the benefit of the parties beneficially entitled, to have stock, rather than the proceeds of the sale thereof in the petition mentioned, that the now plaintiffs should, on or before the 27th of March, 1847, transfer into the name and with the privity of the accountant-general of that court, in trust in that cause, as much 3l. per cent. consolidated bank annuities as might have been purchased with the said sum of 2000l. **[369]** on the 12th of November, 1842, the amount of such bank annuities so to be purchased, to be verified by affidavit, and the said accountant-general was to declare the trust thereof accordingly, subject to the further order of that court; and that it should be referred to the master to tax the petitioner his costs, charges, and expenses of and incidental to the said trust, and also his costs of the said suit, as between solicitor and client, up to that time, including the costs of that application, and also to tax the costs, charges, and expenses properly incurred by the now plaintiffs in the said trust, not including any costs relating to the said breach of trust; and that the now plaintiff should be at liberty to apply to that court as to such last-mentioned costs, charges, and expenses, as they might be advised; and that the now plaintiffs should pay to the petitioner the amount of his aforesaid costs, charges, and expenses when so taxed, and that they should be at liberty to apply to the court touching the said costs, charges, and expenses as they might be advised; and that thereupon and thereby the plaintiffs then became liable to, and did, in obedience to the said order, before this suit, to wit, on the 1st of March, 1847, procure, and transfer into the name of the said accountant-general of the court of chancery to the credit of the cause, 2124l. 16s. 8d. of 3 per cent. consolidated bank annuities, and, for and about so transferring the same, were put to the expense and loss of a large sum of money, to wit, 2500l.; and that the now plaintiffs also, by reason of the premises, and of the defendant's not indemnifying them pursuant to his said covenant, before this suit, to wit, on the day and year last aforesaid, became liable to pay to the said Thomas Stephens a large sum, to wit, 600l., for his costs and charges of his said suit, and otherwise; and the now plaintiffs also, by means of the premises, and of the defendant's not indemnifying them pursuant to his said **[370]** covenant, before this suit, incurred and were put to, and became liable to pay, not only the said moneys which they were obliged to and did lay out in procuring and transferring the said 3 per cent. consolidated bank annuities, but also divers other moneys, to wit, 500l., for their costs and expenses in and about procuring themselves to be advised respecting the said claim and their defence thereto and in and about their defence to the said suit, and the compromise thereof; and my means and in consequence thereof, &c.

To this declaration the defendant demurred specially, assigning for causes,—that no profert is made of the several indentures therein respectively mentioned to have been made on the 3rd of January, 1809, the 4th of March, 1840, the 20th of October, 1842, or any or either of such indentures, nor is any excuse for profert of the said indentures respectively, stated in the declaration;—that the indenture of the 4th of March, 1840, did not operate as an assignment of any fortune or property of a personal nature of or to which the said Maria Lena Werninck might thereafter become possessed or beneficially entitled, under or by virtue of the last will and testament of her said mother Lena Werninck (who was then living), nor of any future right, title, interest, benefit, power, claim, or demand whatsoever, of her the said Maria Lena Werninck in, to, or out of any of such fortune or property as last aforesaid; and particularly that the said indenture did not operate as an assignment of the said sum of 2000l. mentioned in the said will of the said Lena Werninck, in the declaration alleged to have been made on the 10th of July, 1840; and that the said indenture was and is illegal, void, and inoperative in the above respects, and particularly as to the said sum of 2000l.;—that, if the said indenture operated as a covenant to assign the said future property, or in any other manner than as a legal assignment thereof, it ought to [371] have been pleaded according to its legal operation and effect, and not as an assignment, so far as regards such future property as aforesaid;—that the said indenture did not apply to, comprise, or include the said sum of 2000l. mentioned in the said will of the said Lena Werninck, because the said Maria Lena, the wife of the defendant, became possessed of, and beneficially entitled to, that sum under and by virtue of the indenture of settlement of the 3rd of January, 1809, in the declaration mentioned, and the appointment made in pursuance thereof by the said will of the said Lena Werninck, and not merely under or by virtue of the said will;—that the said will of the said Lena Werninck,—so far as it purported to direct or appoint that the said sum of 2000l. therein mentioned, should be settled and be upon the same trusts, and to and for the same intents and purposes for the benefit of the said wife of the defendant and her children, as were expressed and declared in the said indenture of settlement made in contemplation of her said marriage with the defendant, so far as the rules of law and equity would permit, and the said testatrix had power to direct,—did not operate as a valid and effectual execution of the powers or authority vested in the said testatrix in and by the said indenture of settlement of the 3rd of January, 1809;—that the other alternative mentioned in the said testatrix's will, whereby she willed, directed, and appointed that the said sum of 2000l. should be paid to the defendant's said wife, or as she should by any writing or writings under her hand, direct, to and for her own sole and separate use, benefit, and disposal, free from the control, debts, &c., of her then present or any future husband, took effect; and that the said sum of 2000l. for the reasons aforesaid, was not subject to, and charged in equity with, the said trusts of the indenture of settlement of the 4th of March, 1840;—that the [372] said indenture in the declaration mentioned to have been made on the 20th of October, 1842, and the deed-poll then indorsed thereon, were not, nor was either of them, sufficient to vest in the plaintiff, Thomas Dyke, a joint interest with the other plaintiffs, in the whole of the said sum of 2000l., nor did the plaintiffs then become joint trustees thereof, as alleged in the declaration;—that it appears that the plaintiffs received, and had paid to them, the said sum of 2000l., not as trustees, for the time being, of the indenture of settlement in the declaration mentioned to have been made on the 4th of March, 1840, but under or by virtue of the indenture of the 12th of November, 1842; and that, under the circumstances aforesaid, the plaintiffs were fully justified and authorised to lend and advance the said sum of 2000l. to the defendant, with the consent in writing of his said wife, in manner and form as stated in the said secondly-mentioned indenture of the 12th of November, 1842;—that it does not sufficiently appear that the plaintiffs, by reason of the said loan, under the circumstances aforesaid, became or were liable in equity to be compelled, without their own consent, and against their will, to pay or invest the amount of the said loan, as stated in the declaration;—that the said petition presented to the Master of the Rolls on the 7th of December, 1846, was an ex parte proceeding, and the prayer of such petition could not have been complied with, except by the consent of the plaintiffs;—that, although it is stated in the declaration that the defendant, on the 4th of January, 1847, had notice of the premises in the declaration mentioned, it was not stated that he had any notice that the now plaintiffs had no defence to the said suit in the declaration mentioned, nor that the now plaintiffs had been so advised; and that the subsequent notice from the now plaintiffs to the now defendant, in the declaration mentioned **[373]** (stating, amongst other things, that the said petition would come on to be heard on the 11th of January then instant), was not sufficiently precise, and was a bad, defective, and insufficient notice, in divers respects, and required too much of the defendant, and did not sufficiently specify the nature of the indemnity then required from him;—that it does not sufficiently appear in or by the declaration, that, according to the course and practice of the court of chancery, the now defendant could, when so required as aforesaid, have come forward and effectually taken upon himself the defence of the said suit (supposing a good defence thereto then really existed), nor how and in what manner he could have put in an answer for the now plaintiffs in the said suit, or otherwise defended the same on their behalf, nor that a reasonable opportunity was offered him for that purpose, nor that a reasonable time elapsed after he had such last-mentioned notice, and before the now plaintiffs consented to such order being made as in the declaration mentioned to have been made on the 26th of January, 1847, nor that the defendant, for an unreasonable and improper time, neglected or declined to take upon him the defence of the said suit, or to indemnify the now plaintiffs against the same, or the costs of their defence thereto;—that the said order of the 26th of January, 1847, was made with the consent of the now plaintiffs, and that in the stage of the cause in which such order was made (no answers appearing to have been put in by any of the defendants), such order could not have been made without the consent of the now plaintiffs; and that, although it is alleged in the declaration that the now plaintiffs reasonably and properly consented to such order being made upon the said petition, it does not sufficiently appear in or by the said declaration, that such consent was reasonable and **[374]** proper, or how and why it was reasonable and proper;—that all the loss, damage, and injury which the plaintiffs are, in the said declaration, alleged to have sustained, appears to have been caused or occasioned by their own consent, and to have resulted from their own act, and not merely by reason of any thing from which the defendant covenanted to indemnify them, as in the declaration mentioned, nor from any breach of such covenant on the part of the defendant;—and that the indenture of the 12th of November, 1842, is void and illegal, for containing a covenant to indemnify and save harmless the plaintiffs against a breach of trust and breach of duty in their character of trustees, &c.

The plaintiffs joined in demurrer.

The demurrer was argued in Trinity term last, before Wilde, C. J., Coltman, J., Maule, J., and Cresswell, J.

June 6, 7, 1848.—Petersdorff, in support of the demurrer. By the deed of the 3rd of January, 1809,—the settlement made upon the marriage of Dr. Werninck with Magdalena Wynn,—it was provided that a policy should be effected with the Equitable Assurance Office, for 5000l., upon the life of Magdalena Wynn, and kept on foot by the trustees; and that the proceeds of such policy should be received and held by the trustees, in trust for such of the children of the marriage, if more than one, in such shares as the husband and wife jointly, or the survivor of them, should appoint, and, in default of appointment, to all the children equally. The next deed set out in the declaration is, a settlement made on the marriage of the defendant with Maria Lena Werninck, a daughter of Dr. and Mrs. Werninck, dated the 4th of March, 1840; by which deed,—reciting that the proposed marriage of Dr. and Magdalena Werninck had been had and solemnized, and that Dr. Werninck had died, leaving his wife **[375]** surviving, without having joined in any appointment under the settlement, and that there were four children of the marriage, of which she the said Maria Lena Werninck was one,—she the said Maria Lena Werninck, with the consent of her intended husband (the defendant), assigned all her right and interest and to any fortune to which she might become entitled under the will of her mother, to trustees (one of whom was Lord Newborough), upon trust for the separate use of her the said Maria Lena Werninck for life, and upon further trust for the children of the intended marriage, as the defendant and his wife should appoint. At this time, the mother was living. These two deeds are introduced as disclosing the title and interest of the plaintiffs, and not as mere inducement to the statement of the deed the breach of which is complained of. The plaintiffs, therefore, were bound to make profert of them, or to shew matter dispensing with profert. On the 10th of July, 1840, Mrs. Werninck made a will, whereby she sought to exercise her power of appointment; and under this will Lord Newborough and Thomas Dyke (two of the plaintiffs) were appointed executors. Dyke is also a trustee under the deed of the 12th of November, 1842. It is perfectly clear, therefore, that these are documents which are in the plaintiff's possession, or the production of which they are in a position to enforce. [Cresswell, J. There might be some foundation for your argument, if this were the action of the new trustees, and not an action by the old trustees upon the covenant of indemnity.] In *Jenkin* v. *Peace* (6 M. & W. 722), it was held, that, in pleading a conveyance by lease and release, profert must be made of the release (*b*). Upon the discussion of that case, all **[376]** the older authorities were noticed. The first of these is the 452nd section of Littleton, where it is said that "every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as to him to whom the release was, if the tenant hath the release in his hand to plead." In § 453 it is said "In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold; and they shall have as great an advantage of this, if they can shew it." In *Dr. Leyfield's case* (10 Co. Rep. 92), the rule is laid down thus, that, "if he who is party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims parcel of the original estate, yet he ought to shew the original deed to the court; and the reason that deeds, being so pleaded, shall be shewn to the court is, that to every deed two things are requisite and necessary,—the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law,—the other concerns matters of fact, sc. if it be sealed and delivered as a deed, and the trial thereof belongs to the country: and therefore every deed ought to approve itself, and to be proved by others: approve itself to the satisfaction of the court in three manners,—first, as to the composition of the words, to be sufficient in law, and the court shall judge that,—2nd, that it be not rased or interlined in material points or **[377]** places, and upon that also the judges in antient times did judge upon their own view the deed to be void, but of late times have left that to the jury, (to say) if the rasing or interlining were before delivery,—3rd, that it may appear to the court and the party, if it were upon condition, limitation, or with power of revocation, &c., to the intent, that, if there be a condition, &c., if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of it." In *Hodgson* v. *Warden* (13 M. & W. 22), which is a very strong case, it was held, that it is not a sufficient excuse for the want of profert of a deed, under which the party pleading it claims a benefit, e.g. an assignment by him to trustees for the benefit of creditors, with a provision that he should be released from his debts on payment of a certain composition,—that there was but one part of the deed executed, and that the same did not belong to the defendant (the party pleading it); that he had no right to the same, nor had the custody of, or any power or control over it, and was unable to procure the possession, power, or control of it; that it always had been in the possession of the trustees, who refused to permit the defendant to have the possession thereof, or to bring it into court. Pollock, C. B., there says: "The refusal of the trustees to permit the defendant to have this deed for the purpose of making profert of it, may render them liable in damages to the defendant, but will not warrant us in departing from the settled rules of law, which were made, not for the vexation of parties, but for very sound reasons." The authorities are all collected in the notes to *Jevens* v. *Harridge* (1 Wms. Saund. 8 b.). Reliance will be placed, on behalf of the plaintiff, on *Dangerfield* v. *Thomas* (9 Ad. & E. 292, 1 P. & D. 207) and *Bain* v. **[378]** *Cooper* (8 M. & W. 751). But, in both these cases,

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(*b*) That is so where the legal estate is suffered to remain in the relessee. But, where the release is, to the bargainee for a year (or to any other lessee,) to the use of a third person, in whom the use is executed, cestui que use, and those claiming under him, are not bound to make profert of the release, which is presumed to be in the hands of the relessee to uses.

the parties who held the instrument, held it adversely to the plaintiff. They do not, therefore, at all impugn the rule laid down in the cases before cited. [Maule, J. Profert is excused, where there is some impossibility or some insuperable difficulty in the way of the production of the instrument by the party pleading it, without any fault of his own.] The question here is, whether the mere voluntarily parting with the deed by assignment, excuses the plaintiffs from making profert of it, where they are seeking to obtain a benefit under it.

The declaration discloses no breach of trust on the part of the plaintiffs, in lending the 2000l. to the defendant; for, the money never was, in point of law, subject to the trusts of the deed of the 4th of March 1840. It is submitted,—first, that Mrs. Werninck's will was not a proper exercise of the power,—secondly, that the settlement of the 4th of March, 1840, did not legally pass the 2000l. to the trustees, because the defendant's wife took that sum, not under her mother's will, but under the settlement of the 3rd of January, 1809,—thirdly, that the 2000l. did not pass to the trustees under the settlement of the 4th of March, 1840, because an assignment of future property to be derived under the will of a living person, is void and inoperative. 1. By the deed of the 3rd of January, 1809, the power to appoint is, "in favour of an only child, or for all and every, or for any one or more, exclusive of the rest, of the children of the said intended marriage, if there should be more than one." Mrs. Werninck, who survived her husband, affects by her will to give effect to that power. By this will, which is dated the 10th of July, 1840, the testatrix directed and appointed that **[379]** the sum of 2000l. should be settled "upon the trusts declared in the indenture of settlement of the 4th of March, 1840, so far as the rules of law and equity would permit, and the testatrix had power to direct and appoint, but that, if she had not such power, then she willed, directed, and appointed that the said sum of 2000l. should be paid to the defendant's wife, or as she, the defendant's wife, should by writing direct and appoint." The trusts of the deed of the 4th of March, 1840, were in favour of the children of that marriage. Now, it is perfectly established, that a power to appoint to children, will not authorise an appointment to grandchildren: *Alexander* v. *Alexander* (2 Vez. sen. 640); *Bristowe* v. *Ward* (2 Ves. jun. 336); *Whistler* v. *Webster* (2 Ves. jun. 367); *Smith* v. *Lord Camelford* (2 Ves. jun. 698); *Crompe* v. *Barrow* (4 Ves. 681); *Adams* v. *Adams* (Cowp. 651); *Brudenell* v. *Elwes* (1 East, 442, 7 Ves. 382); *Butcher* v. *Butcher* (9 Ves. 382). The trustees, therefore, could not be guilty of any breach of trust, in paying the 2000l. under the wife's direction. 2. The indenture of the 4th of March, 1840, only professes to assign what would pass under the will of Mrs. Werninck. If, therefore, Mrs. Schröder takes the 2000l., as it is submitted she does, under the settlement of the 3rd of January, 1809, the trustees did not take it as trustees under the settlement of the 4th of March, 1840. The rule of law is, that, where a party has a mere power of appointment to particular persons, or to a class of persons, those persons take under the power, and not under the execution of it. [Maule, J. That proposition is more tenable with respect to realty than personalty. In the case of realty, the appointment executes the use. But the statute of uses does not apply to per-**[380]**-sonalty.] The difficulty is, that, without the will, there is no specific sum appointed. 3. The settlement of the 4th of March, 1840, professes to assign to the trustees whatever interest Mrs. Schröder might derive under the will of her mother. The will bears date four months after the execution of the settlement. The settlement, therefore, could not operate upon property derived under the will; for, there can be no valid assignment of a future contingent interest under the will of a living person. In *Robinson* v. *Macdonnell* (5 M. & S. 228), it was held, that an assignment of the freight, earnings, and profits of a ship, does not extend to profits not in existence, actually or potentially, at the time of the assignment: where, therefore, C. assigned by deed to S. the freight, earnings, and profits of the ship "W.," which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in that voyage,—it was held that this oil did not pass to S. by the assignment; for, the assignor had no property, actual or potential, in the oil, at the time of the assignment, and the voyage was not then contemplated. [Maule, J. The restriction here rather differs this from the case of property quite at large.] The recent statute which authorises the conveyance by deed of contingent interests (*b*), is not applicable to

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(*b*) 8 & 9 Vict. c. 106, s. 3,—which is a substitution for the 5th section of the 7 & 8 Vict. c. 76.

personalty. In *Lunn* v. *Thornton* (ante, vol. i. p. 379), it was held by this court that a grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein. And that doctrine is confirmed by the court of Queen's Bench, in *Gale* v. *Bur*-**[381]**-*nell* (7 Q. B. 850). The assignment, therefore, in the life-time of Mrs. Werninck, having no operation upon the 2000l., the plaintiffs never became trustees of that fund.

The deed of the 4th of March, 1840, ought to have been pleaded according to its legal effect: and its legal effect, under the circumstances, would be, not an absolute assignment of the 2000l., but a covenant to assign it. Parke, B., in delivering the judgment of the court, in *Price* v. *Williams* (1 M. & W. 6), says: "There is no doubt but that, in deducing title, it is the established rule that conveyances are to be pleaded as they operate; for which several authorities were cited (*c*),—to which that of *Moore* v. *The Earl of Plymouth* (*d*) may be added."

Mrs. Schröder having,—as is recited in the deed of the 12th of November, 1842,—expressly sanctioned the loan of this money to her husband, the trustees, in lending it, committed no breach of trust. To render the defendant liable under his covenant to indemnify, it must appear that the payment was made by the trustees in the ordinary course of law, and under circumstances which made it compulsory on them to pay. If they had resisted Stephens's claim, they must have succeeded; and they cannot shelter themselves under the notice given to the defendant to come in and defend. The payment was a voluntary payment by them in their own wrong.

Assuming that the trustees were guilty of a breach of trust, can the court give effect to a deed to indemnify against an admitted breach of trust? The case might be different, if the breach were doubtful: there, the **[382]** covenant to indemnify might probably be enforced. Here, however, the matter could not be doubtful: *Warwick* v. *Richardson* (10 M. & W. 284).

Channell, Serjt. (with whom was Willes), contrà. The question upon the merits is, whether or not there is any objection in point of law, to the deed declared on; and, if not, whether the declaration shews any breach of the covenant to indemnify contained therein. The short outline of the case is this:—On the 3rd of January, 1809, Dr. Werninck married Magdalena Wynn. Under the settlement made on that occasion, three trustees were appointed. In 1825, there was a change of trustees, and Thomas Dyke, one of the plaintiffs, then became one of the trustees under the original settlement. In March, 1840, the defendant married Maria Lena Werninck, the daughter of Dr. and Magdalena Werninck, and Lord Newborough, another of the plaintiffs, became a trustee. In October, 1840, there was an assignment to new trustees, Thomas Dyke being one of them. The settlement of the 3rd of January, 1809, had provided for effecting a policy for 5000l. in the Equitable Assurance Office; and the deed contained a power to the Dr. and Mrs. Werninck, or to the survivor, to appoint that sum in favour of the children of the marriage. Mrs. Werninck, who survived her husband, by her will, dated the 10th of July, 1840, purported to make a disposition of this property; and, in the course of that year, she died. The money receivable under the policy, would be paid by the office only to the trustees of the original settlement. The money having come to the hands of the plaintiffs, as trustees under the settlement of the 4th of March, 1840, the defendant, with the assent of his wife, proposed to borrow the 2000l. from the trustees; but, some doubt arising whether they were **[383]** authorised to lend it, the trustees took from the defendant the covenant of indemnity upon which this action is founded. On the 4th of September, 1845, other trustees of the settlement of the 4th of March, 1840, were appointed in lieu of the plaintiffs. Thomas Stephens, one of the newly-appointed trustees, being made acquainted with the loan to the defendant of the trust fund before referred to, filed a bill against the plaintiffs, the defendant and his wife, and others, and presented a petition to the Master of the Rolls, praying that the plaintiffs might be ordered to refund the trust moneys so alleged to have been misapplied. Notice of the suit having been given to the defendant, and he declining to take the defence upon himself, the present

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(*c*) *Chester* v. *Willan*, 2 Saund. 97; *Mornington* v. *William*, 1 Ventr. 109; *Osmere* v. *Sheafe*, Carth. 308.

(*d*) 5 B. & Ald. 70. And see 5 Mann. & Ryl. 451, 3 M. & G. 780, 4 M. & G. 710, n.

plaintiffs allowed Stephens to take a decree against them, and now call upon the defendant to indemnify them, pursuant to his covenant.

The first objection to the declaration is, that the plaintiff makes no profert of the indentures of the 3rd of January, 1809, the 4th of March, 1840, and the 20th of October, 1842. The short answer to that objection is, that those deeds are set out as matter of inducement only, and therefore no profert of them was necessary. The substantial ground of action is, the breach of the defendant's contract of indemnity. Profert is only required to be made of such deeds as the party pleading may ordinarily be supposed to have in his possession or power. Many of the authorities upon this subject are collected in the notes in 1 Wms. Saund. 8, 9, where it is said, that, "where a person has no right to the possession of the deed or counterpart, as, the owner of a rent-charge, he may plead it without profert" (*a*). Again, it is said (1 Wms. Saund. 9 (*a*)): "The general rule is, that a party **[384]** is not required to make profert of an instrument to the possession of which he is not entitled:" and, after citing *Dangerfield* v. *Thomas* (9 Ad. & E. 292, 1 P. & D. 207), the learned editors proceed:—The only exceptions to the general rule are, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself if he can get hold of it. So also, in the case of an heir or executor, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several tort-feasors; for, in all these cases, there is a privity between the parties which constitutes an identity of person. But there is no such privity, generally speaking, between a principal and surety; and therefore, where a defendant, a surety, by deed-poll guaranteed to the plaintiff the payment of a sum of money, it was held, that, in an action on the guarantee, the defendant might plead an indenture of release from the plaintiff to his principal, without making profert of the indenture: *Bain* v. *Cooper* (8 M. & W. 751). In the case just cited, Parke, B., says: "The general rule on the subject of profert is that laid down in *Dangerfield* v. *Thomas*, viz. that a party is not required to make profert of an instrument to the possession of which he is not entitled. The only exceptions to that general rule are, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself, if he can get hold of it. So, also, in the case of an heir or executor, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several tort-feasors; for, in all these **[385]** cases, there is a privity between the parties, which constitutes an identity of person. But that is not so in the present case, where the parties are only in the relation of principal and surety, and there is no privity of contract between them, since the surety contracts with the creditor: they are not one person in law, and are not jointly liable to the plaintiff." So, in Stephen on Pleading (5th edit. p. 484, 485), speaking of the necessity of profert, the learned author says,—"The rule extends only to cases where the party claims under the deed, or justifies under it; and, therefore, where the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to shew right or title in the party pleading, but for some collateral purpose, no profert is necessary (*b*). The rule is also confined to cases where the party relies on the direct and extrinsic operation of the deed (*c*). Thus, in pleading a feoffment, no profert is necessary; for, the estate passes, not by the deed, but by livery. So, in pleading a conveyance by lease and release under the statute of uses, it is not necessary to make a profert of the lease, because it is the statute that gives effect to the bargain and sale for a year, and the deed does not ultimately establish the title. But, in pleading the release, profert ought to be made, as the same reason does not apply (*d*). Again, a party is not bound to make profert of an instrument to the possession of which he is not entitled (*e*). The reason assigned for the rule requiring profert is, that the court may be enabled, by inspection, to

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(*a*) Citing *Whitfield* v. *Fausset*, 1 Ves. 391.

(*b*) Citing *Bellamy's case*, 6 Co. Rep. 38 a.; *Holland* v. *Shelley*, Hob. 303; *Bamfill* v. *Leigh*, 8 T. R. 571; Com. Dig. Pleader (O. 8), (O. 16); 1 Wms. Saund. 9 a. n. (1).

(*c*) Citing *Read* v. *Brookman*, 3 T. R. 156.

(*d*) Citing *Jenkin* v. *Peace*, supra, 375. Sed vide note (*b*), ibid.

(*e*) Citing *Dangerfield* v. *Thomas* and *Bain* v. *Cooper*, ubi supra.

judge of the sufficiency of the **[386]** deed" (*a*). The rule is similarly stated in Chitty on Pleading (vol. i., 6th edit. p. 365, 7th edit. p. 378). In the present case, the deeds in question not being any necessary part of the plaintiff's cause of action, or such as might ordinarily be presumed to be in their custody or power, they do not fall within the rule which requires profert to be made.

The plaintiffs are not interested in disputing the proposition, that a power in a settlement, to appoint in favour of the children of the marriage, does not authorize an appointment in favour of grandchildren, though that rule is, according to Sir Edward Sugden (2 Sugden on Powers, p. 281), subject to this qualification, viz., that "in equity, a valid appointment may be made to persons not objects of the power, with the approbation of the real object of the power. Therefore, if, upon the marriage of a child, the parent, by the marriage settlement, under a power to appoint to children, appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child himself, and a settlement of it by him (*d*); nor is it essential that such a settlement should be made upon marriage. The principle is, that the act operates, first, as an appointment, and, secondly, as a settlement by the appointee. Therefore, an appointment of personalty to the children of a married daughter, who is herself the object of the power, is valid, if made with the concurrence of the husband (*e*), for a husband can dispose of such of his wife in expectancy against every one but the wife surviving. And a settlement on a child and her husband, **[387]** and their issue, in strict settlement, was supported in equity, as the child was an assenting party to the settlement, although the power was confined to children; and, so far from the power being referred to, the donee (who was the original settlor) recited that he was seised in fee, and conveyed as owner, and there was no evidence that the child was aware of the existence of the power. This is the case of *Wade* v. *Paget* (1 Bro. C. C. 364), and, strong as the circumstances are, the decision, in the absence of fraud, appears to be right." So, here, there was an assent by the child and her husband, though not, it is true, a contemporaneous or subsequent assent. It is by no means uncommon to settle future property in this way. The power, therefore, was well executed, at least, as to part, and for a period that is still subsisting. *Robinson* v. *Macdonnell* and *Lunn* v. *Thornton* have no application. This amounts to an equitable assignment, which a court of equity would give effect to: *Carvalho* v. *Burn* (4 B. & Ad. 382, 1 N. & M. 700); *Burn* v. *Carvalho* (1 Ad. & E. 883, 4 N. & M. 889); *Burn* v. *Carvalho* in equity (3 Jurist, 1141). The 7 & 8 Vict. c. 76, s. 5, and 8 & 9 Vict. c. 106, s. 3, were intended to operate only on legal rights.

Athough it is true, as a general principle, that written instruments must be stated according to their legal effect, it is nevertheless competent to a party to set it out in hæc verba. In *Moore* v. *The Earl of Plymouth* (3 B. & Ald. 66), Abbott, C. J., said: "If the defendant had wished the court to construe the deed for him, he should have set it out in hæc verba, or at least so much as he meant to rely on." Bayley, J., said: "We can form no judgment what operation it might have, unless we saw the very words of the deed." And Holroyd, J., said: "In **[388]** deducing title, I have understood it to be an established rule, that conveyances are to be pleaded as they operate. It is so considered by Lord C. B. Comyns in his Digest, title Pleader (C. 37). That rule, however, does not apply to an action on a deed of covenant; in such an action it is stated, that, by a certain deed, it was witnessed that the party covenanted; the title in that case is not deduced." So, in *Ross* v. *Parker* (1 B. & C. 358, 2 D. & R. 662), it was held, that, where a declaration states, that, by a certain indenture, "it is witnessed," &c., and sets out the very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports. "The declaration," said the court, "does not affect to state the legal effect of the deed; it merely states, that, by a certain indenture, 'it is witnessed,' &c., and then sets out a covenant, and a breach of it, for which the action is brought. If it had been stated as a fact, that the parties assigned money, and the deed shewed that they assigned stock, there might, on a plea of non est factum,

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(*a*) Citing *Layfield's case*, 10 Co. Rep. 92 b.; Co. Litt. 356.

(*d*) Citing *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Langston* v. *Blackmore*, Ambl. 289; *West* v. *Berney*, 1 Russ. & M. 431.

(*e*) Citing *White* v. *St. Barbe*, 1 Ves. & Bea. 399.

have been some ground for the objection." If, therefore, this deed has any operation to shew any duty on the defendant, or any dammification to the plaintiffs, the latter are entitled to recover. This view of the case is not affected by *Price* v. *Williams* (1 M. & W. 14).

It is said that no dammification was shewn. If, however, the loan was improperly made, Stephens, the new trustee, though no party to that loan, was bound to call it in. Accordingly, he filed his bill, praying that the trusts of the settlement of the 4th of March, 1840, might be carried into effect. [Cresswell, J. You say, that, as there was a breach of trust, the plaintiffs were bound to obey the order of the Master of the Rolls, and **[389]** are entitled to an indemnity.] The plaintiffs allege that the course taken by them was a reasonable course to take; and that they could have no defence to the suit.

Petersdorff, in reply. The plaintiffs in their declaration having affected to describe this as an absolute conveyance of the legal interest, the defendant is entitled so to view it. The assignment should have set out the assignment according to its legal effect. In *Robertson* v. *Showler* (13 M. & W. 609), it was held that a party cannot, in deducing title in pleading, set out a deed or will at length, with averments as to the meaning of its words: he must state it according to its legal effect. [Maule, J. Does that exclude the other alternative, of setting it out in hæc verba?] It is submitted that it does. The plaintiffs were clearly bound to make profert of the indentures of the 3rd of January, 1809, and 4th of March, 1840. [Maule, J. Suppose A. gives bonds to creditors of B., to secure their debts, and B. gives A. a deed of indemnity. A. being compelled to pay the debts, would he be bound, in an action upon the deed of indemnity, to make profert of the bonds?] No. [Maule, J. He would be bound to state them in his declaration. Having been compelled to pay the bonds, he would, of course, have them in his possession (*b*), and yet he would not be bound to make profert of them. That shews that there may be deeds which it is necessary to state in pleading, and which must be in the possession of the party pleading, and yet of which profert is not necessary.] That is not so as to deeds which give the party title to sue. [Maule, J. The title to sue here, is the deed of indemnity.] The will of Mrs. Werninck could have no operation otherwise than as an execution of her power.

Cur. adv. vult.

[390] Coltman, J., now delivered the judgment of the court.

This is an action brought for the breach of a covenant in an indenture dated the 12th of November, 1842. The declaration sets forth an indenture dated the 3rd of January, 1809, being a settlement made upon the marriage of the Rev. John Werninck with Lena, otherwise Magdalena, Wynn, by which last-mentioned indenture it is provided that a policy of assurance should be obtained, for 5000l., from the Equitable Assurance Office, upon the life of the said Magdalena Wynn, afterwards Werninck, and that the proceeds of such policy should be received and held by the trustees therein named, subject to the appointment of the said John Werninck and his intended wife, the said Magdalena Wynn, during their lives, or to the appointment of the survivor, in favour of an only child, or for all and every, or for any one or more, exclusive of the rest, of the children of the said intended marriage, if there should be more than one. The declaration also sets forth a certain other indenture, dated the 4th of March, 1840, being a settlement upon the marriage of Maria Lena Werninck, a daughter of the said John Werninck and Magdalena Werninck, with the defendant, and which last-mentioned indenture recited that the proposed marriage of John Werninck and Magdalena Wynn had been solemnized, and that John Werninck had died, leaving his wife surviving, without having joined in any appointment under the settlement, and that there were four children of the marriage, of which the defendant's wife was one, and by such last-mentioned indenture the said Maria Lena, with the consent of her said intended husband, assigned all her right and interest in and to any fortune which she might become entitled to under the will of her mother Magdalena Werninck, to certain trustees therein named, upon trust for the separate use of the said Maria **[391]** Lena Werninck during her life, and upon further trust (as therein mentioned) for the children of the intended marriage, as the defendant and his wife should appoint, and, in default of appointment, upon trust for the children of the

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(*b*) As deeds or as ex-deeds

marriage, as therein mentioned. The declaration then set forth, according to its tenor, the indenture upon which the action is brought, and of which profert is duly made. This indenture was dated the 12th of November, 1842, and was made between the defendant of the first part, Maria Lena Schroeder, the defendant's wife, of the second part, and the plaintiffs of the third part: and it recited the death of the said Magdalena Werninck, and that she had duly made and published her last will and testament, dated the 10th of July, 1840, and by which she directed and appointed that the sum of 2000l. should be settled upon the trusts declared in the indenture of settlement of the 4th of March, 1840, so far as the rules of law and equity would permit and the testatrix had power so to direct and appoint; but that, if the said testatrix had not such power, then she willed, directed, and appointed that the said sum of 2000l. should be paid to the defendant's wife, or as the said defendant's wife should by writing direct and appoint, to and for her own sole and separate use and benefit: and the indenture recited certain other indentures, by which the plaintiffs became and were trustees under the said indenture of the 4th of March, 1840, and that they had received the said sum of 2000l., which was property of a personal nature, to which the said wife of the defendant was beneficially entitled under the will of her said mother, and that the same was in the hands of the plaintiffs, subject to, and charged in equity with, the trusts expressed in the indenture of the 4th of March, 1840, and that the defendant was desirous to obtain from the plaintiffs a loan of the said sum of 2000l., and that it was considered that the said **[392]** Magdalena Werninck, the mother, had not power to appoint the said sum of 2000l. to be settled upon the trusts of the indenture of the 4th of March, 1840, and therefore, that, under the alternative appointment made by her, the said Maria Lena Schroeder had become entitled thereto absolutely for her separate use, but that a question had been raised, whether the same was not subject to the assignment made by the indenture of the 4th of March, 1840; Wherefore, the said Maria Lena Schroeder, with the approbation of the defendant, her husband, had proposed and consented that the said sum of 2000l. should be paid to the plaintiffs as trustees, to be held by them upon the trust therein declared, they having the indemnities from the defendant and the said Maria Lena Schroeder his wife, respectively thereinafter contained: And by the said indenture, the said Maria Lena Schroeder ordered and directed that the said plaintiffs should stand possessed of the said sum of 2000l., upon trust, upon the request of the defendant during the life of his said wife, —but not without her request, testified as therein mentioned,—lend and advance the said sum of 2000l. to the said defendant, upon the securities therein mentioned: and the defendant covenanted with the plaintiffs to indemnify them in manner set forth in the declaration; and by another indenture, dated also on the 12th of November, 1842, and made between the defendant and his wife and the plaintiffs, it was recited that the plaintiffs, at the request of the said Maria Lena Schroeder, and of the defendant, had lent and advanced the said sum of 2000l. to the defendant; and it is averred in the declaration that the said sum of 2000l. had not been paid to the plaintiffs, and that the plaintiffs, by reason of the loan thereof, were liable, in equity, to be sued by any future trustees of the said trust in the indenture of March, 1840, and to be compelled to pay the same; and that, after the **[393]** making of the said indenture, and of the loan to the defendant, by a certain indenture therein mentioned, dated the 24th of September, 1845, Thomas James Werninck, Thomas Stephens, and Henry Hope Werninck were appointed to be trustees of the trusts of the indenture of the 4th of March, 1840, in the place of the plaintiffs, and the plaintiffs had assigned to them all their interest in the property whereof they were such trustees, and that, before this suit, the said Thomas Stephens then, as such trustee, commenced a suit in the court of Chancery against the plaintiffs and the said defendant and his wife, and Ludolph Adrian Schroeder and Wilhelmina Susan Schroeder, children of the said marriage, and certain other persons were made defendants, and that the said Thomas Stephens afterwards presented a petition to the Master of the Rolls, praying that the plaintiffs might be ordered to transfer to the accountant-general of the said court of Chancery so much 3 per cent. consolidated Bank annuities as might have been purchased with the sum of 2000l. on the 12th of November, 1842; and the declaration further alleged, that notice was given to the defendant of such petition, and that the plaintiffs were advised they had no defence to the said suit, and that, unless the defendant would take upon himself the defence of the said suit, they should consent to such order being made upon the said petition, as the said court might think proper, and would call upon the defendant to reimburse to them all sums of money, costs, charges, and expenses that they might pay or be put to in consequence of the said claim and the said suit: And the declaration alleged, that the defendant had declined to take such defence upon him, and that the plaintiffs afterwards, upon the hearing of the said petition, consented to such order being made as the said court should think proper; and that it was thereupon ordered that the plaintiffs **[394]** should transfer to the account of the accountant-general, in trust in the cause, as much 3 per cent. consolidated Bank annuities as might have been purchased with the said sum of 2000l. on the 12th of November, 1842; and that the plaintiffs should pay the costs of the petition; whereupon and whereby the plaintiffs became liable to transfer to the accountant-general the stock therein mentioned, and were put to the expense thereby of 2500l., and became liable to pay Stephens for costs 600l., and were put, for their costs, to the expense of 500l.; and by means and in consequence thereof, the defendant had broken his said covenant, and had not indemnified the plaintiff.

To this declaration the defendant demurred, and assigned several causes of demurrer, some of which have been argued before us.

The first objection relied upon was, that no profert was made in the declaration of the two indentures therein set forth,—the one being the settlement upon the marriage of John Werninck and Magdalena Wynn, and the other an indenture by which the plaintiffs were appointed trustees under the settlement made upon the marriage of the defendant and his wife, dated the 4th of March, 1840.

The second objection made on the part of the defendant was, that the declaration does not disclose any valid cause of action against the defendant; as the plaintiffs did not commit any breach of the trusts of the indenture of the 4th of March, 1840, by lending the sum of 2000l. to the defendant, because that sum never became subject to the trusts of that deed; but that the defendant's wife became entitled to it absolutely, under the will of her mother, Magdalena Werninck; and that the plaintiffs were, therefore, well justified in lending the same to the defendant, at her request. And, in support **[395]** of this objection, it was argued that the power created in favour of Mrs. Werninck by the indenture of settlement of the 3rd of January, 1809, only authorised her to appoint in favour of the children of her marriage, and that her will was inoperative and void so far as it directed the fund of which the 2000l. was part should be subject to the trusts of the settlement of the 4th of March, 1840, in favour of her grandchildren,—such direction not being within the power conferred; and that therefore the defendant's wife became absolutely entitled to the said sum of 2000l., under the power of appointment contained in the indenture of the 3rd of January, 1809, and under the execution of that power, by that part of Mrs. Werninck's will, which provided, that, if it should be held that she had no power so to appoint, the said sum of 2000l. should be settled upon the trusts of the indenture of the 4th of March, 1840, she then directed and appointed the said sum to the defendant's wife, or as she should appoint.

It was further contended that the said indenture of the 4th of March, 1840, was inoperative as an assignment to the trustees named therein, of the said sum of 2000l., inasmuch as an assignment of future expected property, to be derived under the will of a living person, is illegal and void, and inoperative pro tanto.

It was further insisted, that the indenture of the 4th of March, 1840, was improperly set out as an assignment, for the reason before mentioned, and contrary to its legal effect.

And it was further objected, that the loss which the plaintiffs alleged they had sustained by their obedience to the order of the Master of the Rolls set forth, was a loss occasioned by their own voluntary act, in having consented to the order, which order could not have been made adversely to them; and, therefore, that the damage occasioned by their own voluntary act could **[396]** give no claim for indemnity under the covenant declared upon: and it was argued that no breach of the trusts of the indenture of the 4th of March, 1840, had been committed by the plaintiffs, by the loan of the 2000l. to the defendant.

Upon the part of the plaintiffs, it was contended, in answer to the first objection, that profert of the indentures of the 3rd of January, 1809, and 4th of March, 1840, was unnecessary, inasmuch as those deeds were set out in the declaration merely as inducement, and formed no ingredient in the plaintiffs' cause of action,—which was solely founded upon the indenture of the 12th of November, 1842. And we are of opinion that the answer so given was a valid and sufficient answer to the objection urged in that respect. The plaintiffs' interests were acquired entirely by the deed of the 12th of November, 1842, by force of which the plaintiffs acquired and received the 2000l., and which by the same indenture they agreed to advance and lend to the defendant upon the covenant of indemnity therein contained. That indenture, therefore, coupled with the indenture of the same date, shewing the money to have been lent pursuant to the agreement, together with the loss and damage which the subsequent allegations in the declaration shew that they have sustained by reason of the said loan, forms the entire cause of action disclosed by the declaration. The indenture of the 12th of November, 1842, recites the indenture of the 4th of March, 1840, and that the plaintiffs held the sum of 2000l. upon the trusts of that deed, and that such sum had been agreed to be lent to the defendant upon the covenant of indemnity. And the declaration then avers that the said sum of 2000l. was in fact lent upon the security of that indenture and of a certain indenture of even date, of which profert is also duly made; and it is then averred that the said sum of 2000l. had never been **[397]** paid to the plaintiffs, and that the plaintiffs, by reason of the loan, became liable in equity to be compelled to pay and invest the said sum of 2000l. as thereinafter mentioned. The declaration then states the removal of the present plaintiffs as trustees, and the appointment of new trustees, and that such new trustees had called upon the now plaintiffs to pay the sum of 2000l., or transfer such an amount of stock as such sum would have purchased on the 12th of November, to be held upon the trusts of the said deed of the 4th of March, 1840.

The rule prescribing the necessity of profert being made, is fully expounded in the cases referred to in the note to *Jevens* v. *Harridge* (1 Wms. Saund. 9 b., n. (*d*)); and that such rule does not render it necessary to make profert of instruments set out by way of inducement only, is so well understood that it is not necessary to refer particularly to the authorities: and this case clearly does not fall within any of the exceptions to that rule. The objection for want of profert, therefore, must be overruled.

As to the second exception,—that the indenture of the 4th of March, 1840, did not operate as an assignment, and is therefore improperly set out, and that it ought to have been set out according to its legal effect,—it has been answered, and correctly, that, in pleading (except in deducing title), a deed may be set out, either in its terms, leaving the court to construe it according to the legal effect of those terms, or the party may take the responsibility of stating it according to the legal effect which it is contended to have: Com. Dig. Pleader, c. 37; *Price* v. *Williams* (1 M. & W. 6, Tyrwh. & Gra. 197); 2 Wms. Saund. 97 b., n. (2). In the present declaration, the indenture objected to, is set out in its terms, leaving it to the court to ascribe its **[398]** proper effect to it: and the objection, therefore, as to its being improperly set out, fails. And, with regard to the legal effect of that indenture, in reference to the present action, it is not necessary that it should be valid as an assignment: it is enough, if, in equity, it bound the fund in the hands of the trustees, subject to the trusts therein declared; and the declaration shews that it has been determined in equity to have that effect; and the object of the covenant upon which the action is brought, was precisely directed to indemnify the trustees against the consequences of such a construction by a court of equity,—where the question, in regard to the execution of the trust would come in judgment: and that decision lays a sufficient foundation for the present action.

The remaining objection which has been argued before us is, that by reason of the consent to the order of the Master of the Rolls, made in the suit brought against the plaintiffs, the loss, of which the plaintiffs complain, is the result and consequence of their own acts and procurements, and in respect of which, therefore, they can have no claim against the defendant for indemnity under his covenant set forth in the declaration. It appears to us that this objection cannot be sustained. The declaration states the suit commenced against the plaintiffs adversely, by the new trustees, who had been appointed in the plaintiffs' stead, calling upon the plaintiffs to pay the 2000l., or transfer an amount of stock equal to what that sum would have purchased on the 12th of November, 1842, and that there was no defence to the suit so instituted, and that notice was given to the defendant, calling upon him to undertake the defence of the suit: which he did not do; and the consent of the plaintiffs, as alleged in the declaration, was not a consent to the order which was made, but merely a consent, that, in a certain stage of **[399]** the cause, the court should decide whether the loan to the defendant was a breach of the trusts under which the plaintiffs held the fund, and should decide what order the plaintiffs were subject to in equity in that respect. The allegations in the declaration are admitted by the demurrer: the whole substance of the objection, therefore, is that the plaintiffs have, for the purpose of saving expense, consented to a decision being made in an intermediate stage of the cause, instead of its being made at the hearing,—it not being shewn that the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence or have diminished the damage consequent upon an adverse decision. It does not appear that the decision so pronounced was less binding upon the plaintiffs, or that it was more prejudicial to the defendant, than it would have been if it had been made at the hearing of the cause, according to the ordinary course of equity proceedings. Under these circumstances, we think that the plaintiffs' right of action upon the covenant for indemnity, is not prejudiced by such consent.

The objections, therefore, which have been urged upon this demurrer, cannot be supported; and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

[400] Caunt v. Thompson. Feb. 14, 1849.

[S. C. 6 D. & L. 261; 18 L. J. C. P. 125; 13 Jur. 495. *Fielding* v. *Corry*, [1898] 1 Q. B. 273.]

Knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. But knowledge that the bill has been dishonoured, where the drawer is himself the party who is to pay the bill, (as executor of the acceptor) does amount to notice.—In assumpsit by an indorsee against the drawer of a bill of exchange, the declaration, in the usual form, alleged that the bill was duly presented to the acceptor, that it was dishonoured, and that the defendant had notice thereof. The defendant pleaded,—that the bill was not presented to the acceptor,—and that the defendant had no notice of its dishonour.—At the trial, it was proved that the bill was presented, on the day it became due, at the house of the acceptor; and that the defendant, to whom it was there shewn, said that the acceptor was dead, and that he was his executor,—adding a request that it might be allowed to stand over for a few days, and he would see it paid.—The judge permitted the declaration to be amended, by alleging the death of the acceptor, the appointment of the defendant as his executor, the proving of the will, and the presentment of the bill to the defendant for payment:—Held, that the amendment was warranted by the statute 3 & 4 W 4, c. 42, s. 23.—Held also, that there was sufficient evidence of notice of dishonour to the defendant.

This was an action of assumpsit by the indorsee against the drawer of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on John Whitley, payable to the order of the drawer two months after date; that the bill was accepted by Whitley, and indorsed by the drawer to one Tomlin, and by Tomlin to the plaintiff; that the bill, when due, was presented to Whitley, and dishonoured; and that the defendant had notice thereof, &c.

The defendant pleaded—first, that the bill was not duly presented to Whitley,—secondly, that the defendant had no notice of the dishonour of the bill. Issue thereon.

The cause was tried before Wilde, C. J., at the sittings in Middlesex after Michaelmas term, 1847. It appeared, that Whitley, the acceptor, died before the bill had arrived at maturity, having appointed the defendant, [401] the drawer of the bill, his executor; that the defendant duly proved the will: that, when the bill became due, Tomlin, the indorsee, went to Whitley's house to present it; that he there saw the defendant, to whom he shewed the bill, saying—"I have brought a bill from Caunt's: you know what it is;" and that the defendant thereupon said—"I am executor of Whitley: you must persuade Caunt to let the bill stand over a few days, because Whitley has only been dead a few days: I shall see the bill paid."

On the part of the defendant, it was submitted that this evidence did not sustain the declaration. The plaintiff thereupon prayed leave to amend the declaration, by averring the death of Whitley, the appointment of the defendant as his executor, the proving of the will, and the presentment of the bill to the defendant. This being allowed, it was further objected, that there was no proof of notice of dishonour to the defendant: and the lord chief justice intimating an opinion that what passed between Tomlin and the defendant did not amount to proof of notice of the dishonour of the bill, a verdict was taken for the plaintiff on the first issue, and for the defendant on the second,—leave being reserved to the plaintiff to move to enter a verdict on the second issue in his favour, or for judgment non obstante veredicto thereon,—and leave being also reserved to the defendant to move for a nonsuit, on the ground that the amendment made was not warranted by the 3 & 4 W. 4, c. 42, s. 23.

Lush, in Hilary term last, on the part of the plaintiff, obtained a rule nisi to enter a verdict for him on the second issue, or for judgment non obstante veredicto thereon. He submitted, that, under the peculiar circumstances of this case, the drawer was not entitled to notice of the dishonour of the bill: and that, if he **[402]** was so entitled, the facts proved amounted to notice. He referred to *Bickerdike* v. *Bollman* (1 T. R. 405), *Fitzgerald* v. *Williams* (8 Scott, 271), *Kemble* v. *Mills* (1 M. & G. 757, 2 Scott, N. R. 121), *Sharp* v. *Bailey* (9 B. & C. 44, 4 M. & R. 4), *Burgh* v. *Legge* (5 M. & W. 418), and *Miers* v. *Brown* (11 M. & W. 372).

Byles, Serjt., also obtained a rule nisi to enter a verdict for the defendant on the first issue, on the ground that the amendment was not warranted by the statute.

Dowdeswell and Crouch, for the defendant. The amendment was improperly allowed; and, if well made, the second was a material issue, and the verdict upon it was properly entered for the defendant.

The amendment introduced the fact of the death of Whitley, that the defendant was appointed his executor, and that he duly proved the will (*h*). This was introducing an entirely new case, which the defendant had no opportunity of meeting; for, if the defendant was executor of Whitley, a presentment to him would be sufficient, and would probably dispense with notice to him as drawer. The statute 3 & 4 W. 4, c. 42, s. 23, never intended to authorise amendments which would introduce new matter, which the defendant might have traversed. One of the most recent cases upon the subject is, *Boucher* v. *Murray* (6 Q. B. 362). There, the declaration—on a guarantee—stated, that, in consideration that the plaintiff would make advances of money by way of loan to B., the defendant promised to repay the plaintiff such sums as he should so advance, if B. should make default; assigning for breach, that B. made default, **[403]** and that the defendant did not pay the plaintiff. The defendant pleaded that the plaintiff did not make the said advances to B. in manner and form, &c., whereupon issue was joined. At the trial, the judge ordered the declaration and plea to be amended, under the statute 3 & 4 W. 4, c. 42, s. 23, by stating in the count, that, in consideration that the plaintiff would procure the British and Australian Bank, in which the plaintiff was a partner, to make advances, &c. to B., the defendant promised the plaintiff to repay the said Bank, such sums as the plaintiff should so cause to be advanced, &c.; and, in the plea,—that the plaintiff did not procure the said Bank to make the said advances: and it was held that such an amendment was not warranted by the statute. Lord Denman says: "The introduction of a new fact carries the case beyond any of those in which amendments have been allowed." And Wightman, J., says: "The amendment introduces a new term into the agreement, 'cause to de advanced by the Australian Bank;' and, as the declaration stands when amended, it is not supported by the evidence." So here, new facts are introduced; and that with a view to get rid of the plea of want of notice: the defendant, therefore, was materially prejudiced in his defence. [Cresswell, J. How can it be material to the merits, as far as the drawer is concerned, whether the bill was presented to the acceptor or to his executor? The statute contemplates that the amendment may embarrass the defendant; and, in that case the judge may postpone the trial. The judge cannot know that the defendant will be prejudiced in his defence, unless the defendant tells him so.] The amendment introduces a totally different state of facts: the prejudice to the defendant is patent.

(*h*) Quære the necessity of averring that the will was proved—of stating the evidence of the defendant's executorship.

Then, does the circumstance of the acceptor dying, and the bill being presented to the drawer as his executor, dispense with notice of dishonour? It may be **[404]** that the presentment to the defendant at the place where the bill was made payable, was a sufficient presentment: *Buxton* v. *Jones* (1 M. & G. 83, 1 Scott, N. R. 19). But "notice" is a technical word, and is only to be satisfied by the constituents of a legal notice. In *Burgh* v. *Legge* (5 M. & W. 418), in assumpsit on two bills of exchange, by indorsee against his immediate indorser, averring notice of dishonour, the defendant, by his plea, traversed the notice of dishonour as alleged: the plaintiff, in order to support that issue, proved, that, on the day when the first bill became due, the defendant called upon him, and told him that he knew neither of the bills would be paid, that it was no use sending him a twopenny post letter the next day to give him notice, as it was not worth the money, and that he would send the plaintiff money, in part payment of the bills, on a future day: and it was held that this was not evidence of notice of dishonour, but of a dispensation with it, and that it ought to have been so alleged in the declaration. In the course of the argument of that case, reference being made to a dictum of Holroyd J., in *Cory* v. *Scott* (3 B. & Ald. 625), where he says—"I think, that, where a person draws on his own account, and at the same time knows that the bill, when presented, will be dishonoured, the general allegation of notice, as in the declaration, would be sufficient." Parke, B., observes,—"But Bayley, J., there says, 'If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances which excuse the giving of notice does not seem to be ad idem with such an averment.'" And the counsel continuing—"But, the learned judge adds, 'Possibly, however, it might be considered that such circumstances would be evidence of notice, inasmuch as **[405]** they would be evidence that the party knew the bill would be dishonoured.'"—Parke, B., said: "The case of *Solarte* v. *Palmer* (1 N. C. 194, 1 Scott, 1), and numerous others, appear to shew that the law intends an actual notification, and that the bare fact of knowledge is not sufficient." And afterwards, in giving judgment, the learned baron says: "There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying, in its terms, intelligence of the presentment, dishonour, and parties to be held liable in consequence. That is the true meaning of the word 'notice,' when used in declarations of this kind; and the mere knowledge of the party is not enough." If that be the true rule, it is quite clear that what passed between the defendant and the party who presented the bill in the present case, did not amount to a notice of dishonour within the meaning of the second issue. No intimation was conveyed to the defendant, that he would be called upon, as drawer, to pay the bill. If he had been so called upon, he might have paid the bill, and retained enough out of the first assets of the testator that came to his hands, to reimburse himself. [Maule, J. in *Sharp* v. *Bailey* (9 B. & C. 44, 4 M. & R. 4), where the drawer of a bill made it payable at his own house, it was held that notice of the non-payment to him was unnecessary.] That was on the ground that it might, under the circumstances, be fairly inferred that it was an accommodation bill.

Lush, contrà. [Coltman, J. We are all agreed as to the propriety of the amendment.] The issue is, that the defendant had notice, on the day on which the bill became due, that it was not paid. The evidence was, that the bill was duly presented at the house of the acceptor; that the drawer was there; and that he **[406]** requested that the bill might be held over for a few days, saying that the acceptor was dead, and that he, the drawer, was appointed his executor. The defendant, therefore, clearly had notice of the presentment and non-payment of the bill. It was in fact presented to himself, he being the person whose duty it was to pay it. It may be conceded that evidence of previous knowledge on the drawer's part, that the bill will not be paid by the acceptor, will not sustain an averment of notice: that was decided in *Burgh* v. *Legge*. To constitute a valid notice, all that is necessary is, to shew that the holder of the bill notifies to the drawer that the bill was duly presented, that it is unpaid, and that he (the drawer) is held liable for it. In *Miers* v. *Brown* (11 M. & W. 372) Alderson, B., said—"Knowledge of the dishonour, obtained from a communication by the holder of the bill, amounts to notice." [Maule, J. There, something was said and done by the holder to the drawer. Here, the holder of the bill shews it to the acceptor's executor, who happens to be the drawer. When he asks him to pay the bill, that is not giving him notice of dishonour: neither is the other's request that it may be held over for a short time. What, then, is there to constitute a notice?]

The whole circumstances. [Maule, J. Then, your argument amounts to this,—that there may be a valid notice of dishonour, although the holder does nothing and says nothing.] The law does not require the performance of mere idle ceremonies. [Maule, J. When you allege an idle ceremonial, and a traverse is taken upon it, can you ask for a verdict upon it, on the mere ground that it is idle?] The whole transaction having taken place with the drawer himself, what necessity can there be for telling him that he has refused payment of the bill? The language of the de-**[407]**-claration must be understood with reference to the circumstances. Suppose the drawer of a bill to have married the acceptor in the interval between the acceptance of the bill and its arrival at maturity, would the drawer in that case be entitled to a formal notice of dishonour? [V. Williams, J. Suppose the holder of a bill employs the drawer to present it? Cresswell, J. And suppose the drawer writes to the holder, and tells him that the bill has been dishonoured,—would that amount to notice?] It is submitted that it would, within the principle of *Miers* v. *Brown*. [V. Williams, J. In *East* v. *Smith* (16 Law Journ., N. S., Q. B. 292), Coleridge, J., says: "It seems to be universally held in the mercantile world, now-a-days, that there should be notice, express, or by implication (and, by that, I mean such implication as Mr. Baron Parke alluded to in the case of *Lewis* v. *Gompertz* (6 M. & W. 402)), of three things, namely, presentment, non-payment, and that the party to whom the notice is given, will be looked to for payment."] The notice must be such as the party entitled to notice may confidently act upon.

Where the drawer has no right to expect that the acceptor will pay the bill,—as, where it is an accommodation bill, so that he could not be damnified by the want of notice,—a notice of dishonour is not necessary: *Sharp* v. *Bailey* (9 B. & C. 44); *Fitzgerald* v. *Williams* (8 Scott, 271). In the present case, whatever funds the acceptor had, were in the hands of the defendant as his executor. He could not have sustained any damage from the want of notice; and, at all events, if he had, he should have pleaded it. [Maule, J. For the purpose of this part of the motion, it must be taken that the defendant did not know that the bill had been presented, or that it was unpaid.] He knew that the acceptor was not **[408]** living. [Maule, J. It may be, that, if the defendant had received due notice of dishonour, he would have paid the bill, and would have re-paid himself out of the testator's assets; and that he has since exhausted those assets, by paying debts of equal degree. And so he might be prejudiced.] If he chooses so to part with the assets, his damnification is the consequence of his own wilful act.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This was an action of assumpsit by the indorsee, against the drawer, of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on J. Whitley, payable to the order of the drawer two months after date, that the bill was accepted by Whitley, and indorsed by the drawer to Tomlin, and by Tomlin to the plaintiff, and that the bill, when due, was presented to Whitley, and dishonoured, of which the defendant had notice.

The defendant pleaded,—first, that the bill was not duly presented to Whitley,—secondly, that the defendant had no notice of the dishonour of the bill.

At the trial before Wilde, C. J., at the sittings in Middlesex after Michaelmas term, 1847, it appeared in evidence, that, before the bill became due, the acceptor died, having made the defendant (the drawer) his executor, and that he had proved the will; that, when the bill became due, the plaintiff sent one of the witnesses to the house of the acceptor, to present the bill; that the witness there saw the defendant, to whom he presented the bill, saying,—"I have brought a bill from Caunt's: you know what it is;" and that thereupon the defendant said,—"I am executor of Whitley: you must persuade Caunt to let the bill stand over a few days, **[409]** because Whitley has only been dead a few days: I shall see the bill paid."

Upon this evidence, the plaintiff applied for leave to amend his declaration, by averring the death of the acceptor, the appointment of the defendant as his executor, and the presentment of the bill to him.

The lord chief justice allowed the amendment to be made, and said that the proof of presentment to the executor was not sufficient proof of notice of dishonour.

A verdict was thereupon taken for the plaintiff on the first issue, and for the defendant on the second; leave being reserved to the plaintiff to move to enter a verdict on that issue in his favour, or for judgment non obstante veredicto; and leave being likewise reserved to the defendant to move on the ground that the amendment ought not to have been made.

Cross rules were accordingly obtained in Hilary term, 1848.

At the argument, we disposed of the defendant's rule, thinking the amendment properly allowed: and now, after consideration, we think that the plaintiff's rule, to enter a verdict in his favour on the second issue, must be made absolute.

It may be assumed to be a settled rule, that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. Pothier, Contrat de Change, part i. c. 5, § 147 (*a*)[1], lays down the same rule with reference to foreign (*b*) bills, viz. that the notorious insolvency of the acceptor of a bill does not dispense with protest for non-payment, and notice to the prior parties, because the insolvency of the acceptor, however notorious, may not be known to them, or, in the absence of notice, they may suppose **[410]** that the acceptor, though insolvent, has found means to take up the bill. So also it may be considered as settled, that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence, it has become usual to say that knowledge of the dishonour of a bill is not equivalent to notice. In such cases as those above mentioned, it certainly is not.

The law has not been so well settled, as to the nature of the notice to be given. In *Hartley* v. *Case* (4 B. & C. 339), Abbott, C. J., said: "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." Since that case was decided, there has been some fluctuation of opinion on the subject. In *Solarte* v. *Palmer* (7 Bingh. 530, 5 M. & P. 475, 1 Tyrwh. 371, 1 C. & J. 417), which was finally decided in the House of Lords (1 N. C. 194, 1 Scott, 1, 8 Bligh, N. S. 874), a very strict rule was adopted; but that has not been adhered to. In *Burgh* v. *Legge* (5 M. & W. 418), Parke, B., says: "There must be proof of a notice given from some party entitled to call for payment of this bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence." But, in *Furze* v. *Sharwood* (2 Q. B. 388), and *King* v. *Bickley* (2 Q. B. 419), it was decided that the notice need not, in terms, inform the party to whom it is given, that he is looked to for payment: and, in *Miers* v. *Brown* (11 M. & W. 372), these latter decisions were followed.

The rule does not differ in substance from that given by Ashhurst, J., in *Tindal* v. *Brown* (1 T. R. 167):—"Notice **[411]** means something more than knowledge; because it is competent to the holder to give credit to the maker (*a*)[2]. It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit." In substance, these cases seem to establish, that, in order to make a prior holder responsible, he must derive, from some person entitled to call for payment, information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. In *Miers* v. *Brown*, Alderson, B., describes what is needful, in these terms: "Knowledge of the dishonour obtained from a communication by the holder of the bill, amounts to notice."

In the present case, the defendant knew that the bill was dishonoured; and he knew it from the best source, namely, his own personal act in dishonouring it when presented by the holder: and he knew, from the same source, that time had not been given to the acceptor. He had, therefore, all the information which, according to Ashhurst, J., the notice ought to convey: and, knowing that, he would know also that the holder had placed himself in a situation to call upon him (the drawer) for payment, from which,—to adopt the view of modern decisions,—he might infer that he would be called upon. This is very different from that knowledge which has been spoken of as not equivalent to notice, and is at least as much notice as the knowledge spoken of by Alderson, B., in *Miers* v. *Brown*. Indeed, there would be some absurdity in

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(*a*)[1] Citing Savary, parer. 45.

(*b*) "Foreign" as opposed to "English," not as opposed to "inland."

(*a*)[2] The action was on a promissory note.

requiring that the plaintiff should have stated to the defendant at the time when he dishonoured the bill, "Take notice that this bill has been dishonoured by you." Lord Ellenborough seems to have been of that opinion in the case **[412]** of *Porthouse* v. *Parker* (1 Campb. 82), an action by the payee against the drawer of a bill. It was drawn by one Wood as agent of George James and John Parker, upon John Parker. There was no proof that Wood had authority to draw: but evidence being given that the bill was accepted by a duly-authorised agent for John Parker, Lord Ellenborough held that it was evidence of the bill having been regularly drawn; and that, the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been known to one of them; and the knowledge of one was the knowledge of all.

Upon the authority of that case, and upon principle, we think that the notice to the defendant in this case was established, and that the verdict should be entered for the plaintiff on the issue on the second plea.

Plaintiff's rule absolute.

Defendant's rule discharged.

[413] EDMONDS v. CHALLIS AND ANOTHER. Feb. 14, 1849.

[S. C. 6 D. & L. 581; 18 L. J. C. P. 164; 13 Jur. 389.]

The jurisdiction of the old county courts in replevin is, by the 119th section of the 9 & 10 Vict. c. 95, transferred to the new courts established under that act. The sheriff must, however, still take a bond pursuant to the statute 11 G. 2, c. 19.—But a bond conditioned for the obligor to appear "at the next county-court for the county of M., to be holden at the sheriff's office in, &c., and then and there to prosecute his suit with effect," &c., is bad.—In an action against the sheriff for taking an insufficient replevin-bond, the reasonable measure of damages is, the amount of the rent and the expenses of the distress.—The declaration alleged that the (old) county-court had not jurisdiction at the time of taking the bond:—Held, on motion in arrest of judgment, that the declaration was sufficient, without alleging a want of jurisdiction at the time of the plaint to the sheriff.—At the trial of an action against the sheriff for taking insufficient pledges in replevin, notice having been given to the defendants to produce the bond, the plaintiff's counsel called for it; and, on the defendants' counsel declining to produce it, a copy obtained from the sheriff's office was put in, and was about to be read, when the defendants' counsel interposed, and offered the original, and then objected that it could not be read, without calling the subscribing witness. The judge overruled the objection:—Held, that he was right in so doing.

This was an action upon the case against the sheriff of Middlesex, for having taken a replevin-bond not in conformity with the statute 11 G. 2, c. 19, s. 23.

The declaration stated that the plaintiff, after the 14th of March, 1847, to wit, on the 29th of March, 1847, and within the jurisdiction of the Whitechapel County-court of Middlesex, on certain premises situate in the county of Middlesex, and within the jurisdiction of the Whitechapel County-court of Middlesex, by one George Ellis, his bailiff in that behalf, lawfully took and distrained divers goods and chattels, to wit, &c., then being in and upon the said premises, and of great value, to wit, of the value of 47l. 4s., as a distress for certain arrears of rent, to wit, for the sum of 35l. of lawful money, then due and owing from a certain person, to wit, one Henry Rowe, to the plaintiff for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof, &c.: that the plain-**[414]**-tiff, by the said George Ellis, his said bailiff, detained the said goods and chattels so taken and distrained, for the cause aforesaid, until the defendants, then being sheriff of the said county, afterwards, to wit, on, &c., and within their bailiwick as such sheriff, that is to say, on the complaint of one Kitty Gladman, made to the now defendants, so being then such sheriff as aforesaid, against the said George Ellis in that behalf, and under colour of their office as such sheriff as aforesaid, caused the said goods and chattels to be replevied and delivered to the said Kitty Gladman, and then made deliverance of the said distress to the said Kitty Gladman; that, although it was the duty of the now defendants, as such sheriff, before their making deliverance of the said distress to the said Kitty Gladman as aforesaid, in pursuance of the statute in such case made and provided, to take from the said Kitty Gladman, and two responsible persons as sureties, a bond in double the value of the goods and chattels so distrained as aforesaid, conditioned for prosecuting the suit of replevin of the said Kitty Gladman for the taking the said goods and chattels, with effect, and for duly returning the same, in case a return should be awarded, as the defendants then well knew; nevertheless, the now defendants, so being such sheriff, not regarding their duty, &c., did not nor would, before their making deliverance of the said distress to the said Kitty Gladman as aforesaid, take from the said Kitty Gladman and two responsible sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, or any bond, except the bond thereinafter mentioned; but wrongfully and injuriously omitted so to do, and then, after the said 14th of March, 1847, to wit, on, &c., only took from the said Kitty Gladman, and A. B. and C. D., being two responsible persons, as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for **[415]** the said Kitty Gladman's appearing at the then next county-court for the county of Middlesex, to be holden at the house known as the sheriff's office, in Red Lion Square, in the said county, and for the said Kitty Gladman's then and there, that is to say, in the said last-mentioned county-court of Middlesex, prosecuting her, the said Kitty Gladman's, action with effect against the said George Ellis for taking and unjustly detaining the said goods and chattels, and for the said Kitty Gladman's making return thereof, if return should be adjudged by law, and for the said Kitty Gladman's well and truly keeping harmless and indemnified the said sheriff, &c.,—which said county-court mentioned in the said condition as aforesaid had not, at the time of the taking of the said bond, any jurisdiction to hear or determine any action of replevin for the taking and detaining the said goods and chattels, or any or either of them; that the Whitechapel County-court of Middlesex was, at the time of the taking of the said bond, the only court in which the said Kitty Gladman could validly commence an action of replevin for taking and detaining the said goods and chattels; and that, by means of the said premises, the plaintiff was wholly deprived of the said goods, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the costs and charges of the said distress, amounting to a large sum, to wit, 10l., and, at the time of the commencement of this suit, was likely to lose the said arrears and costs and charges, in consequence of the premises, although a reasonable time for the said Kitty Gladman's commencing, in the Whitechapel County-court of Middlesex an action of replevin for the taking and detaining the said goods and chattels elapsed after the replevying of the same as aforesaid, and before the commencement of this suit, and although the said Kitty Gladman did not, within such reasonable **[416]** time, commence, in the last-mentioned court, such action as aforesaid; but the plaintiff lost the benefit of such bond as the defendants ought to have taken, and omitted to take as aforesaid, and was put to great charges in and about ascertaining what bond the defendants had taken, and about inquiring into the sufficiency of the said bond, and the power of the defendants to assign the same to the plaintiff, &c.

The defendants pleaded,—first, not guilty,—secondly, that the county-court mentioned in the said condition as aforesaid, had, at the time of the taking of the said bond, jurisdiction to hear and determine any action of replevin for the taking and detaining the said goods and chattels.

The cause was tried before Cresswell, J., at the sittings in Middlesex in Michaelmas term, 1847. The facts were as follows:—The plaintiff was the landlord of certain premises situate in Assembly Row, Mile-end Old Town, in the county of Middlesex. On the 29th of March, 1847, rent being in arrear to the amount of 35l., the plaintiff distrained upon his tenant George Rowe, when the goods were claimed by one Kitty Gladman, Rowe's sister. Application having been made to the sheriff, in the usual way, for a replevin, he, on the 1st of April, took from Kitty Gladman and two sureties, a replevin-bond, conditioned for the appearance of Kitty Gladman at the next county-court for the county of Middlesex, to be holden at the house known by the name of the sheriff's office, Red Lion Square, in the said county, and then and there prosecuting her suit with effect and without delay.

The bond being called for, and the defendants' counsel declining to produce it, the plaintiff's counsel called a witness, who produced a copy which he had obtained at the sheriff's office; and, upon the copy being about to be read, the defendants' counsel tendered the original, **[417]** and then insisted that the attesting witness must be called before the bond could be read. The learned judge, however, overruled the objection.

It was insisted, on the part of the plaintiff, that the bond was informal and void, and that it should have been conditioned to appear at the Whitechapel County-court of Middlesex, created by the 9 & 10 Vict. c. 95, within the district of which, the premises in question were situate,—that court having been established under the order in council of the 15th of March, 1847, and having begun the issuing of summonses on the 22nd of the same month.

A verdict was found for the plaintiff, damages 37l. 16s., being 35l. for the amount of the rent in arrear, and 2l. 16s. for the costs of the distress; and leave was reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that the bond was sufficient.

Bramwell, on a subsequent day in the same term, accordingly moved for a rule nisi to enter a verdict for the defendants; and also for a new trial, on the ground of misdirection, and the improper reception of evidence. He referred to 2 Inst. 139, Co. Litt. 145 b., Gilbert on Replevin, p. 85, *Jackson* v. *Hanson* (8 M. & W. 477), *Rearden* v. *Minter* (5 M. & G. 204, 6 Scott, N. R. 237), and the statutes 11 G. 2, c. 19, s. 23, and 9 & 10 Vict. c. 95, ss. 4, 58, 119, 120, 121.

He further moved in arrest of judgment, on the ground that the declaration did not shew that the jurisdiction of the sheriff to grant replevin, was taken away by the establishment of a properly-constituted county-court, — citing *The Queen* v. *The Guardians of the Dolgelly Union* (8 Ad. & E. 561, 3 N. & P. 542), where it was held that the court **[418]** will not take judicial notice of the rules made by the poor-law commissioners, for the government of a union, under the statute 4 & 5 W. 4, c. 76, s. 15. [Maule, J. The court must take judicial notice of the act of parliament, and must assume that it is possible that the jurisdiction of the sheriff may have been taken away: it is averred that the jurisdiction is taken away, and there is an issue thereon.] It is tantamount to an allegation, that, in that particular part of his bailiwick, the sheriff had no jurisdiction. [Maule, J. There being an issue taken upon it as alleged, it was necessary to prove it.] Then, the declaration alleges that "the said county-court mentioned in the condition, had not, at the time of the taking of the said bond, any jurisdiction to hear or determine any action of replevin." That, it is submitted, is clearly insufficient; it should have been "at the time of the plaint made to him." It is the sheriff's duty to take the bond before he delivers the goods. If the new county-court was not established at the time of the plaint, the sheriff could not take the bond in any other form than he did. [Maule, J. The bond is to enforce a future proceeding. If his jurisdiction is taken away, the sheriff has taken a bond for the doing of something which cannot be done.]

Further, the learned judge should have told the jury, that, in the absence of evidence of actual damage, they should find nominal damages only, to which alone the plaintiff could be entitled. In *Bales* v. *Wingfield* (4 Q. B. 580 (*a*)), it was held, that, in an action against the sheriff for negligence in executing a fi. fa., the plaintiff cannot recover more than nominal damages, unless he prove actual damage: and Taunton, J., seems to have doubted whether even nominal damages could be recovered. [Wilde, C. J. Where the sheriff parts with the goods, that may be **[419]** primâ facie evidence of damage to the value of the goods.]

A rule nisi having been granted,

Baines and Massey Dawson, in Michaelmas term last, shewed cause. At common law, the replevin was by writ out of Chancery. But, this remedy being found to be too tedious for the distant parts of the kingdom, a more expeditious remedy was provided by the statute of Marlebridge, 52 H. 3, c. 21, which enacted, "Quod si averia cujus capiantur, et injuste detineantur, vicecomes, post querimoniam (*a*) inde sibi factam, ea, sine impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare possit." "By force of this statute," says the Lord Chief Baron Gilbert (Gilb. Distr. 92), "the sheriff may hold plea in replevin by plaint of any value, as he might, at common law, on a writ of replevin; the writ of replevin being a justicies or commission for that purpose. And to take away all the delays which attended the replevin by writ, the sheriff, by this act, may, upon complaint made, command his bailiff, either by word or

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(*a*) Upon complaint out of court, not post querelam in court.

precept, to replevy the plaintiff's beasts; for, possibly, the sheriff cannot write,—which was frequently the case in those days,—or has not the materials of writing with him; and this the sheriff may do out of his county-court: for, this act, being made for the more speedy administration of justice, hath received the most favourable construction. It would be very inconvenient that the owner of the beasts, for whose benefit the act was made, should stay till the next county-court, which is held only from month to month. But then the sheriff must enter the plaint at the next court, that it may appear on the rolls of the court." The next statutory provision on the subject, is the 1 & 2 Ph. & M. c. 12, s. 3, which, "for the [420] more speedy delivery of cattle taken by way of distress," enacted "that every sheriff of shires, being no cities nor towns made shires, shall, at his first county-day, or within two months next after he hath received his patent of office of sheriffwick, depute, appoint, and proclaim in the shire-town within his bailiwick, four deputies at the least, dwelling not above twelve miles one distant from another; which said deputies so appointed and proclaimed shall have authority in the sheriff's name to make replevin and deliverance of such distresses, in such manner and form as the sheriff may and ought to do," &c. Then came the 11 G. 2, c. 19, s. 23, which, "to prevent vexatious replevins of distresses taken for rent," enacts, "that, from and after the 24th of June, 1738, all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent,—take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond, in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorised and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded,—before any deliverance be made of the distress; and that such sheriff or other officer as aforesaid taking any such bond, shall, at the request and costs of the avowant or person making conusance, assign such bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and, if the bond so taken and assigned be [421] forfeited, the avowant, or person making conusance, may bring an action, and recover thereupon in his own name," &c. The bond having been taken, and the goods restored, the next proceeding, under the old law was, the institution of the replevin suit in the county-court of the sheriff. The 9 & 10 Vict. c. 95, has introduced a new course of proceeding. The 119th section enacts, "that all actions of replevin in cases of distress for rent in arrear or damage-feasant which shall be brought in the county-court, shall be brought, without writ, in a court held under this act." Section 120 enacts, "that, in every such action of replevin, the plaint shall be entered in the court holden under this act for the district wherein the distress was taken." After the passing of this act, therefore, the whole of the proceedings in the replevin suit, from the plaint downwards, are to be had in the new county-court. By the order in council, pursuant to the act, the county of Middlesex is divided into eleven districts. The district court of Whitechapel, which was thereby constituted from and after the 15th of March, 1847, commenced issuing summonses on the 22nd of the same month. The distress in question was made on the 29th, and the replevin-bond taken on the 1st of April following. Notwithstanding the passing of the 9 & 10 Vict. c. 95, it was still the sheriff's duty to take a bond under the 11 G. 2, c. 19; and, if, in so doing, the plain words of the act had been followed, there would have been no difficulty; the bond would have been as available under the new course of proceeding as under the old. Instead, however, of pursuing the words of the statute, the sheriff takes a bond conditioned for the appearance of the obligor "at the next county-court, to be holden at the house known by the name of the Sheriff's Office, Red Lion Square," and for her "then and there prosecuting her action with effect,"—a form which is justly censured [422] by the court of Exchequer, in *Jackson* v. *Hanson* (8 M. & W. 477. 3 M. & G. 206, n.), where Parke, B., in delivering the judgment of the court, says: "The difficulty in this case has arisen from the improper form in which the condition of the replevin-bond has been drawn, viz. to appear at the then next county-court, and then and there to prosecute his suit with effect. The form of the condition should have pursued the words of the act, 11 G. 2, and should have been, for the defendant John

Hanson to appear at the then next county-court, and prosecute his suit with effect and without delay. Upon the condition of the bond in the form in which it is drawn, the question first arises, what is its meaning? If it be, that the defendant is to appear at the then next court, and at that court prosecute his suit to a not unsuccessful termination (which is the true import of the term 'with effect'), the breach is properly assigned. If, however, the true meaning of the condition is, that he shall appear at the next county-court, and then and there prosecute his suit, that is, begin to prosecute it, and afterwards prosecute it with effect, then the breach is improperly assigned; for, it is consistent with the averments in that breach, that the suit may have been begun at the first county-court, and, though not terminated at that court, may still continue; and then the condition has not been broken. And we think that such is the true meaning of the condition; for, if we do not so construe it, the consequence would be, that the bond would, under ordinary circumstances, certainly be forfeited on the day after the first county-court should be held, as it would be impossible for the defendant, according to the course of the county-court, to levy his plaint, issue a summons, and make it returnable, and proceed to trial or judgment, in one day, or at one court; and, though there is a bare possibility of the penalty **[423]** being saved by the death of either party before the first court, or the abatement of the suit on the same day that the first court should be held after the plaint levied, we think that the condition is to be construed with reference to the ordinary course of a suit, and not with a view to such remote contingencies; the object of the bond being, that the question whether the goods were rightly taken, should be properly litigated in the ordinary way, but with reasonable speed. The condition, therefore, ought to be construed in the sense last attributed to it." *Morris* v. *Matthews* (2 Q. B. 293, 1 Gale & D. 677) is to the same effect. [Maule, J. You say that this bond is conditioned for the doing of something which is now impracticable?] Precisely so. It may be that it would be available at the suit of the sheriff, as a single bond; but it clearly is not assignable: and, though the sheriff might have a security under the indemnity clause, the plaintiff has none: *Austen* v. *Howard* (7 Taunt. 327, 1 J. B. Moore, 68); *Turnor* v. *Turner* (2 Brod. & Bingh. 107); *Thompson* v. *Farden* (1 M. & G. 535, 1 Scott, N. R. 275); 1 Wms. Saund. 195 b. n. By the 78th section of the act, it is enacted that five of the judges of the superior courts of common law at Westminster, including the lord chief justice of the courts of Queen's Bench and Common Pleas, and the lord chief baron of the Exchequer, or one of the said chiefs at the least, shall have power to make and issue "all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided," &c.; and that the rules so made and the forms so framed, shall be observed and used in all the courts holden under this act; and, in any case not **[424]** expressly provided for herein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts." Accordingly, shortly after the passing of the act, certain rules of practice and forms of proceeding were prepared by the judges, of which the 24th, 25th, and 26th are applicable to proceedings in replevin. The 24th provides,—"that, where any cattle, goods, or chattels taken as a distress for rent in arrear, or damage feasant, shall have been replevied by the sheriff, the party at whose instance such replevin shall have been made, shall enter his plaint in the court held under the authority of this act, for the district within which such distress may have been made." The 25th provides, that, "on entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars, the cattle, or the several goods and chattels taken under the distress, and of the taking of which he complains." And the 26th provides, that, "all actions of replevin in cases of distress for rent in arrear or damage feasant, shall be tried in a summary way, as other actions in the courts held under the authority of this act; and the judgment therein, in ordinary cases, whether for plaintiff or defendant, shall be according to the forms in the schedule, or to the like effect." The argument on the part of the defendants will be, that the jurisdiction of the old county-court as to replevins is still subsisting, and that the plaint is still to be entered there; though possibly it may be removable thence to the new court, by force of the 4th section of the 9 & 10 Vict. c. 95 (*a*). That notion, however, proceeds upon

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(*a*) Which enacts, "that, for all purposes, except those which shall be within the

[425] the fallacious assumption that the querimonia in the statute of Marlebridge, is identical with the plaint or declaration, in the county-court. The word "may" in that section is to be read "must"; as in the statute 8 & 9 W. 3, c. 11, s. 8, for assigning breaches of covenant (*a*). [Maule, J. I do not understand it to be contended here that this is a case in which the county-court has no jurisdiction. Bramwell. The defendants cannot, and do not, rely on s. 4.] In 2 Inst. 139, Lord Coke, commenting upon that statute, says: "The mischiefs before this statute were, first, where a man's beasts or other goods were distrained and impounded, the owner of the goods had no remedy but a writ of replevin (*b*); by which delay the beasts or other goods were long detained from the owner, to his great loss and damage: secondly, where the beasts or other goods were distrained and impounded within any liberty that had return of writs, the sheriff was driven to make a warrant to the bailiff of the liberty to make deliverance, and that wrought a longer delay; for, at the common law, he could not enter into the liberty in that case. A third mischief was, when the distress was taken out of the liberty, and impounded within. Now, this statute doth apply cures to all these three mischiefs. Post querimoniam inde sibi fact', &c. That is, the sheriff, upon a plaint made unto him without writ, may, either by parol, or by precept, command his bailiff to deliver them, that is, to make replevin of them; and by these words, 'post querimoniam sibi fact', the sheriff may take a plaint out of the county-court, and make replevin **[426]** presently (which he ought to enter in the county-court); for, it should be inconvenient, and against the scope of this statute, that the owner, for whose benefit the statute was made, should tarry for his beasts to the next county-court, which is holden from month to month." The entering of the plaint which is the beginning of the proceedings in the county-court, is the act, not of the sheriff, but of the party: *Ex parte Boyle* (2 D. & R. 13). And, until the sheriff has taken pledges, there is no suit in the county-court: *Tesseyman* v. *Gildart* (1 New Rep. 292). Most of the authorities upon this subject will be found collected in 1 Wms. Saund. 195, et seq. [Maule, J. And also in Selwyn's Nisi Prius (11th edit. p. 1187, et seq).] It may probably be insisted, that, if this bond is void, it is because the jurisdiction of the sheriff to grant replevin, is taken away by the 9 & 10 Vict. c. 95. That, however, is not so. It would require strong words to relieve the sheriff from a duty so early and so stringently imposed upon him. [Maule, J. Who is to take the bond, if the sheriff does not?] No one.

The next objection is, that the learned judge improperly received the bond in evidence, the attesting witness not having been called. The defendants had had notice to produce the bond; and, upon its being called for at the trial, and the defendants' counsel declining to produce it, the plaintiff's counsel tendered a copy, which was proved to have been obtained from the sheriff's office. The copy being about to be read, the defendants' counsel interposed the original, and then insisted that it could not be read without first calling the subscribing witness. The learned judge, however, ruled, and properly ruled, that the objection came too **[427]** late. The rule is laid down in *Jackson* v. *Allen* (3 Stark. N. P. C. 74), in terms precisely applicable to this case. [Maule, J. What right had the defendants' counsel thus to intrude evidence for the plaintiff?] None whatever. The real object was, to compel the plaintiff to put the officer, who was the real defendant, into the box.

The last objection is that there was no evidence to warrant the jury in finding substantial damages. Rent was due to the extent of 35l.; and the bond itself was, as against the defendants, evidence of the value of the goods seized. The amount of damages was clearly for the jury: *Clifton* v. *Hooper* (6 Q. B. 468). In Williams's Saunders (6th edit., vol. i. p. 195 h., n. (3)), it is said: "There is a difference of opinion as to what extent (the extent to which) the sheriff is liable to render damages in an action on the case for taking insufficient pledges in distresses for rent. In the case of *Yea* v. *Lethbridge* (4 T. R. 433), it was held by the Court of King's Bench that the

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jurisdiction of the courts holden under this act, the county-court shall be holden as if this act had not been passed; and all proceedings commenced in the county-court of any county before the time when any court shall be holden under this act in such county, may be continued, executed, and enforced against all persons liable thereunto, in the same manner as if they had been commenced under the authority of this act."

(*a*) See 1 Wms. Saund. 57, n. (1).

(*b*) And see H. 21 H. 6, Fitz. Abr. tit. Retourne de Viscount, pl. 17.

plaintiff is not entitled to recover his costs of the defence of the replevin, but merely the value of the distress taken; for, if the sheriff had taken two responsible sureties, according to the 11 G. 2, the bond would have been satisfied by returning the goods taken; therefore, the value of those goods seemed to the court to be the true measure of damages to be given in this action. But, in a subsequent case, the court of Common Pleas held that the plaintiff might recover in the action the real damages he has sustained, notwithstanding they exceed the penalty of the bond: *Concanen* v. *Lethbridge* (2 H. Black. 36). And afterwards, in *Evans* v. *Brander* (ibid. 547), the court of Common Pleas was of opinion that the penalty of the bond ought to be the measure of the damages against the sheriff." And in the note (*p*), **[428]** *Hefford* v. *Alger* (1 Taunt. 218), *Ward* v. *Henley* (1 Y. & J. 285. And see 3 Bingh. 56, 60), and *Jeffery* v. *Bastard* (4 Ad. & E. 823, 6 M. & M. 303), are cited: and it is said—"These cases have overruled *Concanen* v. *Lethbridge*, and have settled, that the penalty of the bond is the limit beyond which the amount of damages cannot range. They have also overruled *Yea* v. *Lethbridge*, inasmuch as they establish, that, within that limit, the sheriff is liable beyond the value of the distress taken: *Paul* v. *Goodluck* (2 N. C. 220). But they do not establish any absolute rule (as at first sight they may seem to do), that, within that limit, the sheriff is liable to the extent of the rent in arrear at the time of the distress, and the costs of the replevin suit. They warrant, indeed, that proposition, in cases where the value of the goods seized exceeds the amount of the rent due. But, where the value of the goods is less than the rent in arrear, the liability of the sheriff does not extend beyond that value, and the costs: *Hunt* v. *Round* (2 Dowl. P. C. 558), *Gingell* v. *Turnbull* (3 N. C. 881, 5 Scott, 153); *Miers* v. *Lockwood* (9 Dowl. P. C. 975). The liability of the sheriff is co-extensive with that of the sureties (2 H. Blac. 550; 3 Bingh. 59, 60; 2 N. C. 221)." *Wilie* v. *Birch* (4 Q. B. 566) is very much in point; as is also *Perreau* v. *Bevan* (5 B. & C. 284). In *Bales* v. *Wingfield* (4 Q. B. 580 (*a*)), which is relied on for the defendants, the plaintiff was deprived of no security; it has therefore no application to a case like this, where the plaintiff losses the security of the goods.

Bramwell and J. Burchell, in support of the rule. At common law, the sheriff, in cases of replevin, derived his jurisdiction from the original writ sued out of Chancery. The proceeding by writ being superseded **[429]** by the statute of Marlebridge, 52 H. 3, c. 21, the querimonia, or plaint to the sheriff, became the foundation of his authority. This clearly appears from 2 Inst. 139, Gilbert on Distresses, 85, and the forms in Tidd's Appendix (8th edit. pp. 588-603); notwithstanding the intimation to the contrary thrown out in Atkinson on Sheriffs (page 72, edit. 1847), and adopted in Udall on County-Courts (page 156, n.). Unless, indeed, querimonia means "plaint" in the sense of being the commencement of the proceedings in the county-court, there is nothing whatever to warrant the proceeding there. *Tesseyman* v. *Gildart* and *Ex parte Boyle* are in no degree inconsistent with this view. [Maule, J. *Ex parte Boyle* only shews that the plaint, whatever it is, is not a proceeding in the superior court. It may be the sheriff's duty to enter the plaint: and yet it does not follow that he is to be coerced for a neglect of that duty, as if he were acting as the minister of the superior court.]

The part of the former statutory provision relating to the entry of the plaint in the county-court, is repealed by the 9 & 10 Vict. c. 95, ss. 119, 120, and with it the duty of the sheriff to take replevin-bonds. [Maule, J. Surely that duty would not be taken away from the sheriff without being conferred upon somebody else.] It may be that the querimonia, which was formerly made to the sheriff, shall now be made to the new county-court. [Maule, J. That clearly cannot have been meant. But the plaint having been made to the sheriff as before, and the sheriff having granted a replevin, the recent statute provides, that, instead of declaring in the old county-court, the party shall come and lodge a plaint in the new county-court. There is nothing in the statute to militate against that construc-**[430]**-tion; and a contrary one would be to suppose the whole action of replevin entirely gone.] The high bailiff may very well in this respect be the officer to perform the duty which was before performed by the sheriff. The 121st section of the 9 & 10 Vict. c. 95, enacts, "that, in case either party to any such action of replevin shall declare to the court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise, is in question, or that the rent or damage in respect of which the distress shall have been taken, is more than the sum of 20l., and shall become bound, with two sufficient sureties, to be approved by the clerk of the court, in such sums as to the judge shall seem reasonable, regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the court by which such suit shall be tried, that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20l., then, and not otherwise, the action may be removed before any court competent to try the same, in such manner as hath been accustomed." The result is, that two bonds may now be necessary. [Maule, J. The new county-court has only jurisdiction in cases of distress for rent in arrear and damage feasant. If the distress is for neither of these, and the value exceeds 20l., there is still something for the sheriff to do.] The sheriff has no means of knowing what the distress is for, and the parties are not bound to tell him. And, if the plaint is not to be recorded in the sheriff's court, how is the party to get a return of the goods?

Assuming the jurisdiction of the sheriff to take replevin-bonds to be still subsisting, the bond in the present case is in the proper form. The plaint must **[431]** still be entered in the sheriff's court: the plaint in the district court is quite independent of that. The bond, therefore, properly calls on the party to prosecute her suit with effect, and in the appropriate place. A bond is not bad merely because it contains something more than is requisite. There are many cases in which bonds not strictly taken in conformity with the statute 11 G. 2, c. 19, are assignable, within the statute, so as to enable the assignee to maintain an action for a breach of a branch of the condition which is well taken: *Gwillim* v. *Holbrook* (1 Bos. & Pull. 410). In *Short* v. *Hubbard* (9 J. B. Moore, 667), the bond was held good, though it contained a condition to indemnify the sheriff. And in *Dunbar* v. *Dunn* (10 Price, 54), the bond was held to be assignable, although not conditioned to prosecute the suit without delay. If, by reason of the alterations introduced by the late statute, the bond has become useless, or difficult to put in suit, the sheriff is not responsible for that. [Maule, J. He certainly incurs no responsibility if he takes a bond in the form required by the statute 11 G. 2, c. 19. But the question is, has he done so here?] The bond will not be vitiated by surplusage. [Maule, J. The difficulty I feel is, to see that the plaintiff in replevin had any thing to do in the sheriff's court.] He is there to make a formal entry of the plaint. [Maule, J. The entry of the plaint is the sheriff's duty.] The contrary was held in *Ex parte Boyle*. [Maule, J. Upon whom ever the duty of entering the plaint was cast under the old course of proceeding, he must now do it in the district court. Every proceeding in the new county-court is to be by plaint,—which is equivalent to a declaration.] Still it is necessary that the querimonia should be entered in the old county-court. [Maule, J. **[432]** It is somewhat strange if an entry be still required to be made in a court that is almost entirely stripped of its functions. If two plaints are requisite, are not both to be entered in the new county-court?] It is submitted that they are not: the act of the sheriff is supposed to be done in his own court.

As to the necessity for calling the attesting witness,—having entitled themselves to read the copy, the plaintiff's counsel perhaps need not have put in the original bond; but, having put it in, they were bound to make it legal evidence. [Baines. It was the copy that was in fact read. Maule, J. Whether the thing read was the original or the copy, is perfectly immaterial.] Lord Ellenborough, in *The King* v. *The Inhabitants of Harringworth* (4 M. & S. 350), says that the rule which requires the subscribing witness to be produced, or his absence accounted for, is "as fixed, formal, and universal as any that can be stated in a court of justice." In *Call* v. *Dunning* (4 East, 53), the answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, was held to be only secondary evidence, and not receivable as evidence per se of the execution, without shewing that due diligence had been used to discover who the subscribing witness was (who was alleged to be unknown). So, in *Gordon* v. *Secretan* (8 East, 548), it was laid down, that, where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which instrument when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness,—the production of it in that manner does not dispense with the necessity of proving the **[433]** instrument by means of the subscribing witness, though unknown before to the party calling for it. In *Gillett* v. *Abbott* (7 Ad. & E. 783), in an action of covenant for not indemnifying the plaintiff against liabilities incurred by him as trustee under a former deed, to which the plaintiff and defendant were parties, the declaration set out the deed of indemnity, which recited in part the deed of trust: the defendant pleaded that he did not become liable by reason of his having been trustee under the trust deed, nor was the loss complained of a consequence of the trusts, or of the plaintiff's having been such trustee as aforesaid: and it was held, that neither the form of the issue, nor the recital in the deed of indemnity, entitled the plaintiff to put in the deed of trust, without proof, by the subscribing witness, of its execution. In *Collins* v. *Bayntun* (1 Q. B. 117), the defendant,—to prove that he had been in partnership with the plaintiff,—offered in evidence a written contract purporting to be made by the plaintiff and defendant, as partners, with K., a builder, for work to be done by K. upon the premises where the plaintiff carried on the business in which the defendant alleged himself to be partner. The document was in the plaintiff's custody, and produced by him on notice: and it was held, that the contract was not admissible without proof of the execution, as an instrument under which the plaintiff claimed an interest. Upon these authorities, it is perfectly clear that the plaintiff could only entitle himself to read the bond by calling the subscribing witness, and that nothing that occurred at the trial relieved him from the necessity of so doing.

As to the damages. There was no doubt the rent was due. But the damages to which the sheriff in such a case is liable, are not inevitably the amount of **[434]** the rent or the value of the goods. The rent may have been paid; or the party may be capable of paying it: the plaintiff was bound to give some evidence of actual damage. [Maule J. He does give some evidence of damage, by shewing that the rent was due, and that the goods were sufficient to satisfy it.] In actions against the sheriff for escape on mesne process, the plaintiff is always called upon to prove the amount to which he is damnified: per Littledale, J., in *Scott* v. *Henley* (1 M. & Rob. 227). And in *Morris* v. *Robinson* (3 B. & C. 196), Holroyd, J., says—"In an action against a sheriff for an escape, small damages are often given, on the ground that the debt is not extinguished, and the whole amount may afterwards be recovered, notwithstanding the recovery against the sheriff." In *Bales* v. *Wingfield* (4 Q. B. 580 (*a*)), nominal damages only were held to be recoverable for the negligent execution by the sheriff of a writ of fi. fa., in the absence of proof of actual damage.

The declaration is bad in arrest of judgment, for the reasons stated on moving for the rule.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court (*d*).

This was an action brought against the sheriff of Middlesex, for not having taken a replevin-bond, in conformity with the statute 11 G. 2, c. 19, s. 23.

The cause was tried before my brother Cresswell, and a verdict was found for the plaintiff, for 35l.: but leave was reserved to enter a verdict for the defendants, if the court should be of opinion that the bond which was taken, was sufficient, within the meaning of the act.

[435] In the same term, a rule nisi was obtained for entering the verdict for the defendant, or for a new trial, or to arrest the judgment.

It appeared, by the judge's report, that the distress out of which the action arose, was taken within the district of the Whitechapel County-court of Middlesex: and the condition of the bond was, that the obligor should appear at the next county-court for the county of Middlesex, to be holden at the house known by the name of the Sheriff's Office, in Red Lion Square, and should then and there prosecute her action with effect against George Ellis, for taking and unjustly detaining her goods, to wit, &c., and make return thereof, if return should be adjudged by law.

The bond which has been taken in this case, is in a form often used before the passing of the 9 & 10 Vict. c. 95: and the question is, whether such a form, since the passing of that statute, is sufficient.

By the 119th section of the act, all actions of replevin, in cases of distress for rent in arrear, which shall be brought in the county-court, shall be brought, without writ, in a court held under the act: and, by s. 120, the plaint shall be entered in the court holden for the district wherein the distress was taken.

(*d*) The judges present at the argument, were, Coltman, J., Maule, J., and Cresswell, J.

As this statute leaves the former statutes relating to replevin unrepealed, there is no reason why the sheriff, on complaint made to him, should not grant replevin, as before, and take bond under the statute 11 G. 2, as before; and, if the bond were taken in the terms of the statute, conditioned to prosecute the suit with effect and without delay, and to make return, if return should be awarded, the sheriff would have been under no difficulty. But, the bond being taken with a condition for the plaintiff to appear at the next county-court for the county of Middlesex, to be holden at the Sheriff's Office, in Red Lion Square, and then and there to pro-**[436]**-secute her action with effect, and to make return, if return should be adjudged,—the question arises, whether such a bond is sufficient.

Various cases are to be found, in which the courts have held that bonds not strictly conformable to the statute of G. 2, are assignable within that statute, so as to enable the assignee to maintain an action on the bond, where there had been a breach of one of the branches of the condition which had been taken conformably to the statute. Thus, in the case of *Short* v. *Hubbard* (9 J. B. Moore, 667), it was held to be no objection to such a bond, that it was conditioned, inter alia, to indemnify the sheriff. So, in *Dunbar* v. *Dunn* (10 Price, 54), where the bond was conditioned to prosecute with effect, to make return, if, &c., and to indemnify the sheriff,—it was held that the assignee might sue on the bond, though it was not conditioned to prosecute the suit without delay. These were questions between the assignees of the sheriff and the obligors of the bond: but the question may be different, when it arises between the party distraining and the sheriff, who has taken a bond not conformable to the statute.

In order to determine this question, it will be convenient to consider the effect of a bond taken in the form here used, before the passing of the statute 9 & 10 Vict. c. 95. The object of taking a bond conditioned for the obligor to appear at the next county-court, and then and there to prosecute his suit, appears to be, to secure the commencement of the action without delay, so as to meet the requirement of the statute, that the obligor shall prosecute his suit without delay; and, if the obligor omitted to appear at the next county-court, and there prosecute his suit, it was an infringement of the statute, and the bond was forfeited, and **[437]** might be put in suit by the assignee: *Dias* v. *Freeman* (5 T. R. 195). The effect and meaning of a bond conditioned like the bond now in question, was under the consideration of the court of Exchequer, in the case of *Jackson* v. *Hanson* (8 M. & W. 487): and the court held the meaning of such a bond to be, that the obligor should appear at the next county-court, and then and there begin to prosecute his suit, and afterwards prosecute it with effect: and, by prosecuting with effect, is meant, prosecuting with effect, not only in the county-court, but in every other court into which the cause may be removed in ordinary course: *Chapman* v. *Butcher* (Carth. 248); *Gwillim* v. *Holbrook* (1 Bos. & Pull. 410). Now, the meaning which ought to be put on the bond is not altered by the passing of the statute 9 & 10 Vict. c. 95; and the question will be, whether such a bond still is a substantial compliance with the requisitions of the statute 11 G. 2.

The condition of the bond being,—first, that the obligor shall appear at the next county-court, and then and there begin to prosecute his suit, this branch of the condition will be merely idle, if the effect of the statute of Victoria is, to substitute a proceeding in the district court in lieu of the old proceeding in the county-court. And it appears to us that such is the intention and effect of the act.

The words of the act,—s. 119,—are express, that all actions of replevin, in cases of distress for rent, shall be brought in a court held under the act: and it cannot be supposed that the plaintiff in replevin is to bring two concurrent actions,—one in the old county-court, the other in the district court: it must, therefore, be intended that the proceeding in the district court shall be substituted in lieu of the former proceeding in the county-court.

[438] It may be said, however, that, although this branch of the condition is idle, as imposing a duty on the obligor which the statutes do not any longer warrant, and for a breach of which the assignee of the bond could maintain no action, yet, the rest of the condition is conformable to the statute of 11 G. 2, and may be enforced by the assignee of the bond.

Now, the remaining branch of the condition is, that the obligor shall prosecute his suit with effect; and, the proceeding in replevin having been well commenced, in the first instance,—by the plaint to the sheriff out of court, and the bond entered into to him,—and the proceedings being, in effect, by force of the act of 9 & 10 Vict. c. 95, directed to be transferred to the district court, and there prosecuted, the effect of this portion of the condition may be, to bind the obligor to prosecute with effect in the district court; on the same principle on which it was held that such a condition bound him to prosecute, not only in the sheriff's court, but in every other court into which the cause might be removed in due course of law.

Still, there is another requisition of the statute, which the bond does not comply with; for, the bond should be conditioned for the prosecuting of the suit without delay. As the law stood before the passing of the statute 9 & 10 Vict. c. 95, this was considered as being sufficiently provided for by requiring the obligor to appear at the next county-court, and then and there to prosecute his suit; but this provision is no longer applicable; the suit is no longer to be prosecuted in the county-court, but in the district court. The district courts are to be held, by section 56, at such times as the judge shall appoint: and it may well be that the court for the district within which the distress was taken, and in which the plaintiff ought to enter his plaint, will be holden before the holding of the **[439]** next county-court in the Sheriff's Office, in Red Lion Square: and, be that as it may, there is no condition requiring the plaintiff to prosecute his suit at the next or any other district court; and the proceeding may be indefinitely delayed, without any breach of the conditions of which the assignee of the bond can take advantage.

We think, therefore, that the bond is insufficient, and, consequently, that the defendants are not entitled to have a verdict entered for them.

The ground on which the application for a new trial was rested was, a supposed misdirection in receiving in evidence the replevin-bond, without due proof of the execution, by the subscribing witness.

It appeared by the report, that notice had been given to the defendants to produce the bond. The plaintiff's counsel called for the bond; which the defendant's counsel declined to produce. On the part of the plaintiff, a copy was produced, and proved to have been obtained from the sheriff's office, and was about to be read: whereupon, the counsel for the defendants produced the original, and insisted that it could not be read until the subscribing witness had been called. The document, however, was read, without the production of the witness: and it is contended that this ought not to have been done.

We are, however, of opinion that the evidence was properly received. The document having been, in the first instance, kept back, and the plaintiff having entitled himself to read a copy, without any proof being given that there was a subscribing witness to the original instrument, and having put it in to be read, the defendants' counsel had let slip their opportunity, and had no right then to interpose, and produce the original: and although, in point of fact, the original was read, that was by a sort of legerdemain; and the **[440]** proper evidence must be considered as having been read,—which was, the copy produced and proved by the counsel for the plaintiff.

The case of *Jackson* v. *Allen* (3 Stark. N. P. C. 74) bears out our view of the rights of the plaintiff's counsel under such circumstances.

Another ground on which the motion for a new trial was rested was, the amount of the damages,—which were, to the whole amount of the rent distrained for. But we see no reason to think them too large. If a bond had been taken, conditioned to prosecute without delay, the bond, under the circumstances of this case, would have been forfeited, and the amount of the rent would have been a reasonable measure of the damages.

The case is not like the case of an escape on mesne process; for, the distrainor has a real security for his debt: and, if the replevin had not been granted, he would have sold the goods, and would have put the money in his pocket. If a replevin-bond is taken, and afterwards forfeited, or if the sheriff omits to take a bond with a proper condition, the plaintiff ought to be put in as good a situation as he was in before.

The ground on which it was sought to arrest the judgment was, that the declaration only alleged that the county-court had not jurisdiction at the time of taking the bond, and that it ought to have alleged a want of jurisdiction at the time of the plaint to the sheriff: but we think that this is in substance alleged; for, the allegation that the county-court had not jurisdiction, at the time of taking the bond, to try an action of replevin for taking and detaining the said goods, would not be true, if it had had jurisdiction at the time of the plaint to the sheriff; for, if it had had jurisdiction at that time, its jurisdiction having once [441] attached, would have continued, by virtue of the 4th section of the act, and would have existed at the time of taking the bond.

The rule, therefore, must be discharged.

Rule discharged.

MURRAY, ASH, AND KENNEDY v. HALL. Feb. 14, 1849.

[S. C. 18 L. J. C. P. 161; 13 Jur. 262.]

Trespass quare clausum fregit lies by one of several tenants in common against his co-tenant, where there has been an actual expulsion.

This was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods

The defendant pleaded,—first, not guilty,—secondly, as to the breaking and entering the dwelling-house, leave and licence,—thirdly, that the premises were not the premises of the plaintiffs,—fourthly, as to the goods, leave and licence,—fifthly, that the goods were not the goods of the plaintiffs: upon which issue was joined.

The cause was tried before Maule, J., at the sittings at Westminster, in Easter term, 1847. The facts that appeared in evidence were as follows:—The three plaintiffs and one Hart had jointly become tenants of the premises in question,—a room used as a coffee-room by the members of a temperance society,—to one Hall. On the 23rd of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant, it was proved that Hart, on the 5th of November, 1846, surrendered his [442] interest to the defendant, by a document of which the following is a copy:—

"Mr. W. Hall.

"Sir,—The premises I and my co-partners hold of you, being situated No. 11 Stacey Street, St. Giles's, I, in the name of the same, give up, as we cannot pay you the rent due, my co-partners having misapplied the same.—Your's, &c.

"JOHN HART.

"P.S.—I have given the key to Mr. G. for you."

It was then insisted, for the defendant, that the surrender by Hart at all events enured as a surrender of his own interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion: *Cubitt* v. *Porter* (a).

On the part of the plaintiffs, it was objected, that since the new rules, a surrender must be pleaded specially.

The learned judge told the jury, that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs (b).

The jury returned a verdict for the plaintiffs, damages 35l.

Wallinger, in the course of the same term, obtained a rule nisi to enter a nonsuit, pursuant to leave reserved.

Parry, in Easter term last, shewed cause. That one of several tenants in common may maintain ejectment [443] against his co-tenant, will not be disputed. The question is whether trespass also is not maintainable, where there has been an actual expulsion of one tenant in common by his companion. *Wilkinson* v. *Haygarth* (16 Law Journ., N. S., Q. B. 103) is a distinct authority that it is. It was there held that trespass lies by one tenant in common against his co-tenant (or the lessee of the latter) for digging up and carrying away the soil of the close (peat) of which they are tenants in common; such an act being an ouster. And Lord Denman says: "My notion of peat is, that it is not any thing growing, but that it is decayed vegetable matter, which has become a part of the soil itself,—part of the close which is the subject-matter of this co-tenancy. Now, it is admitted,—indeed, it could not be denied,—that an actual ouster will entitle one tenant in common to maintain trespass against his co-tenant; and that the taking of some things is an ouster. There can be no doubt, the destruction of the thing itself, is an ouster. Here, the thing itself is destroyed by the act of the defendant: and *Clayton* v. *Corby* (5 Q. B. 415) is a distinct authority that one tenant in common may maintain the action of trespass against the other, when that which is the subject of the common property and enjoyment has ceased to exist in consequence of the wrongful act of such co-tenant." In *Cubitt* v. *Porter*, the alleged trespass was, the pulling down a party-wall, for the purpose of rebuilding: that clearly was no destruction of the subject-matter of the tenancy in common.

(a) 8 B. & C. 257, 2 Mann. & R. 267. And see *Wiltshire* v. *Sidford*, 1 Mann. & R. 403.

(b) The jury were discharged, by consent, as to the fourth and fifth issues.

At all events, this defence was not open to the defendants, it not having been pleaded specially. A question of title cannot be raised under a plea of possession. *Heath* v. *Milward* (2 N. C. 98, 2 Scott, 160); *Browne* v. *Dawson* (12 Ad. & E. 624). Lord **[444]** Denman, in delivering the judgment of the court of Queen's Bench, in *Whittington* v. *Boxall* (5 Q. B. 139), says: "If the defendant not only contests the possession in fact, but also relies upon title, in case actual possession is proved by the plaintiff, it is far more consistent, not only with the object of the new rules, but with the rules of pleading generally, and with the principles of justice, that his defence on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only. If the defendant contests the primâ facie title of the plaintiff, he is at liberty to do so under the plea denying that the close is his: but, if he means to set up superior title in answer to the primâ facie title of the plaintiff, he should plead in confession and avoidance. The court of Common Pleas, in the case of *Heath* v. *Milward*, and this court, in the case of *Browne* v. *Dawson*, took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and considered that it put the possession only, in issue." And, after referring to *Purnell* v. *Young* (3 M. & W. 288), where Parke, B., says that "the plea denying the close to be the plaintiff's, since the new rules, is a denial of the plaintiff's title to the close, to the same extent that he would have been obliged to prove it before, under the general issue," his lordship continues,—"With the greatest respect for the opinion of that very learned judge, we cannot, for the reasons already given, come to the same conclusion. It does not appear to us to be warranted by any sufficient analogy between the general denial before the new rules, in the plea of not guilty, of the defendant's being a trespasser modo et formâ, and a plea traversing only one of the plaintiff's allegations. The same effect **[445]** cannot, in our opinion, be given to both, in allowing the defendant not only to contest the possession, which, if proved, satisfies the allegation traversed, but also to avoid the effect of it, by giving evidence shewing that the defendant is himself entitled to the possession. This dictum in *Purnell* v. *Young* is that from which alone we dissent, concurring fully with the decision of that case."

Channell, Serjt., and Wallinger, in support of the rule. The substance of the charge in the declaration is, the breaking and entering the premises; the expulsion is alleged merely as matter of aggravation: a justification of the breaking and entering, therefore, in the absence of a new-assignment, answers the whole charge: *Layton* v. *Grindall* (2 Salk. 643): *Bennett* v. *Allcott* (2 T. R. 166); *Taylor* v. *Cole* (3 T. R. 292); *Taylor* v. *Wells* (2 Wms. Saund. 74 a.). It is not contended that Hart could surrender the interest of his co-tenants: but it is submitted that the effect of the document signed by him on the 5th of November, 1846, was, to make the defendant tenant in common with the plaintiffs and the other parties. It may be conceded that ejectment may be maintained by one tenant in common against his co-tenant, where there has been an actual ouster: but it is insisted, notwithstanding the case of *Wilkinson* v. *Haygarth*, that one tenant in common cannot, under the like circumstances, maintain trespass. The reasoning that applies in the one case is inapplicable in the other. There are several authorities upon the subject that were not adverted to in *Wilkinson* v. *Haygarth*. Thus, Littleton, in § 319, says: "Also, as there be tenants in common of lands and tenements, &c., as aforesaid, in the same manner there be of chattels reals and personals. As, if **[446]** a lease be made of certain lands to two men, for term of twenty years, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common." § 302. "Also, if two have jointly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himself belongeth of the same ward, then the grantee, and the other which did not grant, shall have and hold this in common, &c." § 321. "In the same manner it is of chattels personals. As, if two have jointly, by gift or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And, in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive, shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his life-time, &c., because that their titles and rights in this were several, &c." § 322. "Also, in the case aforesaid, as, if two have an estate in common for term of years, &c., the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of ejectione firmæ of the moietie, &c." § 323. "In the same manner it is, where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment de gard, of the moietie, &c., because that these things are chattels reals, and may be apportioned and severed, &c., but no action of trespass, viz., quare clausum suum fregit, et herbam suam, &c., conculcavit et consumpsit, &c., et hujusmodi **[447]** actiones, &c., the one cannot have against the other, for that each of them may enter and occupy in common, &c., per my et per tout (*a*), the lands and tenements which they hold in common. But, if two be possessed of chattels personals in common by divers titles, as, of a horse, an ox, a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time, &c. In the same manner it is of chattels reals, which cannot be severed,—as, in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action of the law, but to take the infant out of the possession of the other when he sees his time." Lord Coke, in commenting upon these sections, says (Co. Litt. 199 b.): "Here, by this and the other, &c. in these two sections, are to be understood divers diversities between actions which concern right and interest (as, if ejectione firmæ, ejectment de gard, quare ejecit infra terminum of a chattel real upon an expulsion or ejectment,) and actions concerning the bare taking of the profits arising off the land, or doing of trespass upon the land, as hereby the examples do appear; for, the right is several, and the taking of the profits in common. The second diversity is between chattels real that are apportionable or severable, as, leases for years, wardships of lands, interests of tenements by elegit statute-merchant, staple, &c., of lands and tenements, and chattels real entire, as, wardship of the body, a villein, for years, &c., for, if one tenant in common take away the ward or the villein, &c., the other hath no remedy by action, but he may take them again. Another diversity **[448]** is, between chattels reals and chattels personals; for, if one tenant in common take all the chattels personals, the other hath no remedy by action, but he may take them again: and herein the like law is concerning chattels reals entire and chattels personal, for this purpose. But of chattels entire, as, of a sheep, horse, or any other entire chattel, real or personal, no survivor shall be between them that hold them in common: and tenants in common shall not join in an ejectione firmæ, nor in a writ of ejectment de gard, or a quare ejecit infra terminum, &c., for, these actions concern the right of lands, which are several. If two tenants in common be of a manor, to the which waif and stray doth belong, a stray doth happen, they are tenants in common of the same, and if the one doth take the stray, the other hath no remedy by action, but to take him again. But, if, by prescription, the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertains to the other. If two tenants in common be of a dovehouse, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass quare vi et armis columbare le pl' fregit et ducentas columbas, pretii 40s., interfecit, per quod volatum columbaris sui

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(*a*) See note at end of this case.

totaliter amisit; for, the whole flight is destroyed, and therefore he cannot, in bar, plead tenancy in common. And so it is if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth. If two tenants in common be of land, and of mete stones, pro metis et bundis, and the one take them up and carry them away, the other shall have an action of trespass quare vi et armis against him, in like manner as he shall have for the destruction of doves." In Comyns's Digest (title Estate Undivided (K. 8)), it is said: "Tenants **[449]** in common are those who claim by several titles, or in several rights though by one title, and have their possession in common." If one actually ousts his companion of the possession, the other may maintain an ejectment against him. So, if one ousts the other of his ward, or other chattel real, the other shall have ejectment of ward against him. So, if one tenant in common destroys the flight of a dove-cote, the other shall have trespass. Or destroys all the deer in their park, &c. Or removes the mete-stones pro metis et bundis terrarum suarum. This action of trespass proceeds upon the footing that the plaintiff is entitled to the entirety. In *Cubit* v. *Porter*, Littledale, J., says (8 B. & C. 268): "Assuming the parties to have been tenants in common of this wall, then it is said that trespass will lie in this case by one tenant in common against the other, because there was in this case a destruction of the subject-matter of the tenancy in common. In Comyns's Digest (title Estates, by Grant (K. 8)), there are various cases as to the remedy which one tenant in common has against another. It appears, that, with regard to actions in respect to matters not chattels, in some cases an ejectment will lie, if one actually oust his companion of the possession, and trespass will lie where there has been a complete and total destruction of the subject-matter of the tenancy in common: as, if one tenant in common destroys the whole flight of a dove-cote, or all the deer in their park. In other cases, where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste, or an action on the case, will lie by one tenant in common against another: as, if one tenant in common of a wood or piscary does waste, against the will of the other, he shall have waste; or, if one corrupts the water, the other shall have an action **[450]** on the case. There are other cases where the only remedy is, to retake the property: as, if one take a chattel real or personal entire, the other may retake it when he has an opportunity; but he has no remedy by action. If, again, there be two tenants in common of a house or mill, and it fall into decay, the one is willing to repair, and the other will not, he that is willing shall have a writ de reparatione faciendâ. It has been said that trespass will lie in this case by one tenant in common against the other, because there has been an expulsion amounting to an actual ouster. Now, if there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie; for, in trespass, the breaking and entering is the gist of the action; expulsion or ouster is a mere aggravation of the trespass. If the original entry, therefore, be lawful, trespass will not lie." And, after referring to *Taylor* v. *Cole*, the learned judge continued—"Then, if the expulsion be mere aggravation, trespass will not lie for it, because the original entry is lawful. The original entry being the gist of the action in trespass, and the expulsion mere aggravation, I doubt much whether trespass can be maintained even for an expulsion." In *Wilkinson* v. *Haygarth*, the declaration charged the defendant with breaking and entering the close, and carrying away the soil thereof. Here, there is no charge beyond the breaking and entering the premises, and expelling Adams therefrom. In that case it appears to have been thought by the court that the taking of the turf amounted to an actual ouster, and that therefore trespass would lie. That, however, is opposed to the earlier authorities above referred to. [Coltman, J. Upon which plea do you contend the defence arises?] Upon not guilty, and also (more clearly) upon not possessed. The courts of Queen's Bench and Exchequer seem to have enter**[451]**-tained different views as to the effect of the plea of not possessed, in trespass. In *Cubit* v. *Porter*, the defendant was allowed to give evidence of title under the general issue. In *Purnell* v. *Young* (3 M. & W. 288), it was held, that, to a declaration in trespass quære clausum fregit, a plea denying the close to be the plaintiff's, is a denial of possession, if the defendant was a wrongdoer; if otherwise, of the right to the possession: but, on either supposition, it is a denial of title, as even possession is title against a wrongdoer. The point again arose in the court of Queen's Bench, in *Browne* v. *Dawson* (12 Ad. & E. 624): there, the master of a free school had possession of the school-room for the purposes of his office, but was summarily dismissed by the trustees for an alleged breach of the rules, and gave up the room, which was taken possession of by the trustees, and locked up. He returned on the next day, broke open the room, and held it for eleven days, at the end of which the trustees forcibly ejected him. He then brought trespass, describing the premises as "a room of the plaintiff." The defendants pleaded a plea denying that the room was the room of the plaintiff: and it was held that the plaintiff had not, by his re-entry, a primâ facie right of possession against the trustees as wrongdoers; and that they might set up the above facts in defence, without having pleaded "not possessed." *Heath* v. *Milward* (2 N. C. 98, 2 Scott, 160), having been cited there, Lord Denham said: "We think that case well decided, and agree, that the question of title is not to be raised on a plea of possession." In *Whittington* v. *Boxall* (5 Q. B. 139), the court of Queen's Bench again held, that, in trespass quare clausum fregit, if issue be joined on a plea that the close was not the property of the plaintiff, in manner **[452]** and form, &c., the plaintiff's case is established, if he proves possession; and the defendant cannot, on such pleadings, offer evidence of title in himself. Lord Denman there says: "If the defendant not only contests the possession in fact, but also relies upon title in case actual possession is proved by the plaintiff, it is far more consistent, not only with the object of the new rules, but with the rules of pleading generally, and with the principles of justice, that his defence on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only. If the defendant contest the primâ fiacie title of the plaintiff, he is at liberty to do so under the plea denying that the close is his: but, if he means to set up superior title in answer to the primâ facie title of the plaintiff, he should plead in confession and avoidance. The court of Common Pleas in the case of *Heath* v. *Milward*, and this court in the case of *Browne* v. *Dawson*, took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and considered that it put the possession only in issue." And in *Harrison* v. *Dixon* (12 M. & W. 142, 1 D. & L. 454), the court of Exchequer held, that, in trespass de bonis asportatis, a plea denying that the goods are the plaintiff's, puts in issue the property in, as well as the possession of, the goods: Parke, B., saying (12 M. & W. 145)—"The defendant should have denied that they were the goods of the plaintiff. The doctrine laid down by the court of Queen's Bench in *Whittington* v. *Boxall*, is applicable to land, and not to goods. How can a defendant dispute the plaintiff's title to goods, except by denying his possession? There is no plea of liberum tenementum in such a case. This court and the court of Queen's Bench have certainly come to a different de-**[453]**-cision on the same point; the court of Queen's Bench having held that there ought to be a special plea in order to dispute the plaintiff's title, as distinguished from his mere possession: we have thought differently. Before the new rule, the general issue, not guilty, put in issue the plaintiff's title; because under that plea the plaintiff might dispute both the fact of the trespass, and also the fact that it was committed on the plaintiff's close. Now, the plea denying the close to be the plaintiff's, is a denial of his title, to the same extent as he would have been obliged to prove it under the general issue." The question is, to which of these conflicting opinions this court will adhere. In 14 Viner's Abridgment, 514 (*a*), it is said that "one tenant in common shall not have an action of trespass of a close broken, against the other; but it is a good plea, that he and the plaintiff are tenants in common, and shall shew of whose feoffment specially: the reason seems to be because it is of his own part: but, if this had been pleaded in the plaintiff with a stranger, it would be otherwise, as it seems; and so it appears there by the opinion of Danby." This shews that, even before the new rules, this defence must have been specially pleaded.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom; to which the defendant pleaded,—first, not guilty,—secondly, leave and licence,—thirdly, a denial that the dwelling-house was the plaintiffs'.

(*a*) Title Joint-tenants (S. a.), pl. 4; translating Bro. Abr. Tenants in Common, pl. 22, where 32 H. 6, fo. 14 (M. 32 H. 6, fo. 14, pl. 21), and Fitzh. Abr. title Issue, pl. 91, in which that case is well abridged, are cited.

[454] At the trial before Maule, J., one ground of defence was, that the defendant was tenant in common of the house with the plaintiffs, and that therefore the action was not maintainable. The learned judge told the jury, that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs, damages 35l.

The defendant afterwards obtained a rule to shew cause why a nonsuit should not be entered (pursuant to leave given at the trial), on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion.

On shewing cause, it was argued (before the lord chief justice, and justices Coltman, Cresswell, and V. Williams), that this defence, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point; for, we are of opinion that the defence is not sustainable.

The court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in *Cubit* v. *Porter* (8 B. & C. 269). That learned judge there said, that, although, if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for, that, in trespass, the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle* v. *Tombs* (3 Wils. 118), that a tenant in common may maintain an action of trespass for **[455]** mesne profits against his companion, it appears to us that there is no real foundation for the doubt suggested.

We are, therefore, of opinion that the direction of Maule, J., at the trial, was right; and consequently this rule must be discharged.

Rule discharged (*a*).

(*a*) Vide supra, 446, n. In 2 Bla. Comm. 182, it is stated that "Joint-tenants are said to be seised per my et per tout; by the half, or moiety, and by all." It is true, that, for certain purposes, joint-tenants are potentially seised of aliquot parts of the land held by them in jointure; as, for the purpose of alienation in severalty, either by grant (Litt. s. 288), or by demise (*Doe d. Errington*, 3 N. & M, 647); so, for the purposes of merger (Preston on Merger, 447). And, where the joint-tenancy happens to be between two persons only, their potential aliquot parts may, without impropriety, be termed moieties. But this is not, as the learned commentator, followed by numerous subsequent writers, has supposed, implied in the terms "per my et per tout;" the term "my" signifying, not "a moiety," but "not in the least." See the epitaph on La Fontaine's Picard wolf, cited 7 M. & G. 172, n. And therefore Lord Coke gives the exact force of the expression "seised per my et per tout," by describing the party so seised as one qui nihil habet et totum habet.

Littleton was rightly understood by Howard, who translates, or modernises, Litt. s. 288, thus: "On dit communément que chaque jointenant n'a la propriété de rein et est propriétaire de tout; ce qui veut dire qu'il tient tout conjointement, et ne tient rien en particulier. En effet, la terre, considérée en sa totalité, ou dans chacune de ses parties, ne lui appartient que conjointement avec son assocíé."—Anciennes Loix des François, vol. i. p. 362.

Though in the books, it is said of joint-tenants only, that they are seised per my et per tout, the position seems to be equally applicable to all tenants who hold pro indiviso, whether they are joint-tenants, parceners, or tenants in common.

It may be thought somewhat extraordinary that Blackstone should not have suspected the true meaning of the old French negative "my," as he goes on to say, "They have not, one of them, a seisin of one half or moiety, and the other of the other moiety: neither can one be exclusively seised of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety:" for, he even cites the very accurate language of Bracton, "Quilibet totum tenet, et nihil tenet; scilicet, totum in communi, et nihil separatim per se." And see 4 M. & G. 573, n.

[456] Doe d. William Kinglake v. Dinah Beviss. 1849.

[S. C. 18 L. J. C. P. 128. Referred to, *Ward* v. *Pitt*, 1913, 29 T. L. R. 293.]

An antient roll, found amongst the muniments of a manor, containing the reeve's account of moneys received by him on account of the lord, followed by an account of moneys expended by him on account of the lord, was tendered as evidence of a fact noticed in one of the items of discharge for which the reeve took credit in the account. This entry was rejected, on the ground that it did not appear on the face of the account that the reeve gave credit for any sum applied to the discharge of that particular item. Held, (by Coltman, Maule, Cresswell, and V. Williams, JJ., absente, et, ut videtur, dissentiente, Wilde, C. J.) that the evidence was properly rejected.

Ejectment, for lands in the parish of Taunton St. Mary-Magdalen, in the county of Somerset.

The cause was tried before Platt, B., at the last spring assizes for the county of Somerset.

The land sought to be recovered was a district called Haidwood, which was shewn to be within and parcel of the manor of Taunton and Taunton-Deane (*a*).

Before the Conquest, and down to the passing of the land-tax redemption act, this manor formed part of the possessions of the see of Winchester (vide 1 Dugd. Monast. Anglic. ed. 1655, p. 980).

By indenture of bargain and sale, duly sealed and delivered, and intended to be inrolled, and bearing date the 19th of February, 1822, between the Bishop of Winchester, of the first part; Lord Glenbervie and Lord Radstock,—two of the commissioners appointed for the purpose of regulating, directing, approving, and confirming all sales and contracts for sale, which should be made by any bodies politic or corporate, or companies, for the purpose of redeeming any land-tax charged on all or any of the manors, messuages, lands, tenements, or hereditaments belonging to such bodies politic, &c.,—of the second part; Thomas Southwood, of the third **[457]** part; and W. Kinglake (the lessor of the plaintiff), of the fourth part;—the bishop, in exercise of the powers vested in him by the acts thereinbefore referred to, some or one of them, with the consent, authority, and approbation of the said commissioners, testified, &c., granted, bargained, sold, and conveyed to Southwood and his heirs, All that the manor or lordship of Taunton and Taunton-Deane, in the county of Somerset, and all and every the messuages, barns, stables, dove-houses, yards, gardens, orchards, tofts, lands, tenements, cottages, meadows, pastures, feedings, leasows, woods, underwoods, commons, common of pasture, and wastes, in the said manor or lordship, and in the tithings, hundreds, places, or parishes of Holway, Hull, Poundsford, Staplegrove, Naylesborne, Otterford, and Rimpton, or any of them: and also all and every the quit-rents, rents of assise, rents-seek, rents and services of the free and customary tenants, and all fee-farms, annuities, escheats, reliefs, aids, heriots, fines, amerciaments, customs, rents, common fines, courts-leet, and courts-baron, view of frankpledge, and all that to court-leet and to court-baron or view of frankpledge did appertain, goods and chattels waived, estrays, day-works of tenants, chattels of felons (felons of themselves and others), fugitives, outlaws, persons attainted or put in exigent, escheats, deodands, estovers and common of estovers, fairs, market tolls, customs, and all other royalties, jurisdictions, franchises, liberties, privileges, rights, easements, profits, commodities, advantages, emoluments, and heriots whatsoever to the said manor or lordship belonging or anywise appertaining, in as full and ample a manner as they then were, or at any time theretofore had been, held, used, occupied, or enjoyed by the said bishop or any of his predecessors,—saving and excepting certain lands, &c., which were under lease for lives, and mines and minerals, &c., and advowsons; habendum, to Southwood and his heirs, to such uses as **[458]** Southwood should, by any deed, &c., appoint; and, in default of appointment,

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(*a*) Formerly called "the manor of Taundene" (vide post, p. 474), afterwards "the manor of Taunton and Tawn Dene," i.e. the manor of the town, and of the valley, of the river Taun or Tone.

to the use of Kinglake, his heirs and assigns, in trust, for Southwood, his heirs and assigns.

By agreement of 21st August, 1822, between Southwood and Kinglake, Southwood agreed to sell, and Kinglake agreed to purchase, for 11206l. the hundred of Holway (except the lands in the said hundred, in which Southwood had copyhold interest, or freehold in the parish of Angersleigh), the tithing or parish of Otterford, the tithing or district of Taunton castle and Taunton borough, being parts and parcels of the manor of Taunton and Taunton Dean, together with the rents, fines, heriots, and services payable thereout to Southwood, as lord of the said manor, except as before excepted; reserving to Southwood, his heirs and assigns, as lord of the said manor, all patent offices belonging to the said manor, all common or right of soil as lord of the said manor, and the royalty of hunting, &c., and all casual and other profits of all other parts and portions of the said manor, and the inheritance thereof, in fee simple, free from incumbrances.

Southwood, by his will, bearing date 13th May, 1829, after several devises and bequests not affecting the property in question, proceeded as follows:—"And all the rest of my manors, houses, and buildings, advowsons, and all my chattels not before disposed of, I give to my faithful servant Robert Mattock (*a*)[1]; and I do hereby nominate him my sole executor and residuary legatee."

By indenture of 16th November, 1842, between Mattock and Kinglake, Mattock released to Kinglake all **[459]** that the said hundred of Holway, &c. (ut supra), habendum to Kinglake, his heirs and assigns (*a*)[2].

The defendant claimed, as customary tenant, to be entitled to hold the property as part of the premises included in the following surrender:—

"Monday, 9th December, 1800.—Abraham Bond, late of Thurlbeer, but now of Orchard-Portman, gentleman, doth surrender into the hands of the lord the pasture wood and underwood of Haydwood, containing, by estimation, sixty acres, with the appurtenances, in the tithing of Holway, heretofore of Sir Thomas Ackland, baronet, afterwards of Peregrine Palmer, Francis Newman, and Henry Fownes Luttrell, Esquires, and late of Abraham Bond, deceased, to the use and behoof of John Wheadon of Chard, in the county of Somerset, gentleman, and John Beviss the younger, of Wambrook, in the county of Dorset, gentleman, their heirs and assigns for ever, according to the custom of the manor of Taunton-Deane; To be holden upon the conditions declared in certain articles of agreement therein mentioned. Taken the 9th day of December, 1800."

and in the following fine-paper,—

"3rd May, 1840. Dinah Beviss, of Wambrook, in the county of Dorset, widow, relict, and heir (*b*) according to the custom of the manor of Taunton-Deane of John

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(*a*)[1] This devise containing no words of inheritance, an arrangement was, in 1831, entered into between Mattock and the heir of Southwood the testator, by which, in consideration of 1500l., the heir released all his right to Mattock; but, as this did not affect the legal estate in the hundred of Holway, which remained throughout in the lessor of the plaintiff, the deed by which the arrangement was effected was not produced.

(*a*)[2] This instrument did not operate upon the legal estate, which was already in the relessee; and even the equitable interest,—supposing the equitable title to be material,—had been transferred by the agreement of 21st August, 1832.

(*b*) In this manor the wife is the customary heir of her husband, to the exclusion of his children, and if she marry again, the second husband may acquire, in fee-simple, the entire customary estate, by the following process:—

"In case a woman seised of any customary lands of inheritance, parcel of the said manor, marry an husband, the same husband ought, and by the custom of, &c., hath used to fine with the lord of the said manor, for her and her land, at the old precedent fine of the same land, and thereof to make an entry with the clerk of the castle aforesaid, and to put in pledges at or before the first law-day-court after the said marriage. By virtue of which marriage, entry, and pledges, the husband becomes owner of the same land, and is to be admitted tenant thereunto, to hold the same to him and his heirs for ever, according, &c."—Vide "Ancient Customs of the manor of Taunton-Deane," (Tiverton, 1821), No. 20.

Beviss, [460] the younger, lately of Wambrook aforesaid, gentleman, deceased, who was the surviving surrenderee named in four certain surrenders, bearing date the 9th day of December, 1800, and made by Abraham Bond, then of Orchard-Portman, gentleman, of the lands hereinafter described, for (*a*) the pasture, wood, and underwood of Haydwood, containing by estimation sixty acres, with the appurtenances, in the tithing of Holway, heretofore of Abraham Bond, deceased, afterwards of the first named Abraham Bond, and late of John Wheadon, deceased, and the said John Beviss, deceased; and which premises came into the hands of the lord upon the death of the said John Beviss, to be holden upon the conditions contained in the surrenders hereinbefore referred to. And this entry was made the 30th day of May, A.D. 1810, in the presence of Edwards Beadon and William Upham, tenants of the lord" (*b*).

[461] The land sought to be recovered had, as far back as living memory went,—one of the witnesses speaking to a period of sixty years,—consisted of arable and pasture land forming part of a farm occupied by the tenants of the defendant and her predecessors, who took the timber growing upon the land (vide post, 463), exercising the rights of customary tenant of the soil, as well as of the surface. For the lessor of the plaintiff, it was, however, contended, that this was a usurpation upon the rights of the lord. It was shewn, that, from the fifteenth century,—the earliest period to which the entries of surrenders and fines were in existence,—until 1745, the parties to alienations of this property, uniformly surrendered "pasturam bosci et subbosci de Haydwood," and the new tenants fined "pro pasturâ bosci et subbosci de Haydwood." The last entry in this form was of the 2nd of November, 1722, when Mary Dyke, of Tetton, in the parish of Kingston, widow, relict and next heir of Thomas Dyke, late of the same place, esquire, her husband, deceased, fined, "pro pasturâ bosci et subbosci de Haydwood, con-[462]-tinent. per estimationem, 60 acras cum pertinenciis in decennâ de Holway, quondam Thome Dyke, nuper de Kingston, generosi, defuncti, et nuper Thome Dyke, de Dulverton, generosi, defuncti, et que permissa in manus domini devenerunt post mortem prefati Thome Dyke, nuper viri sui, defuncti, Habendum, &c.

(*a*) I.e. made fine for.

(*b*) In this manor, no formal admittance takes place, either of the surrenderee, upon a surrender, or of the heir, upon a descent. There being thus no recorded act of the lord accepting the surrenderee or the heir as a tenant, his tenancy is not per copiam rotuli. Though a customary tenant of base tenure, he is not, therefore, strictly speaking, a copy holder. His interest, notwithstanding that it is complete and permanent by the custom of the manor, is, in point of form, merely an incipient, incomplete,—an undeveloped copyhold. As this peculiar and anomalous species of base tenure has acquired no distinctive appellation, it is known only under the general term of "customary estate."

Another observation arises upon the form of transfer of customary lands in this manor. In this, as in other manors, when the customary tenant makes a surrender, he employs terms sufficient to define the extent of the interest which he means to pass from himself to the surrenderee; but it is no affair of his, nor is it required from him by the surrenderee, that any trammels by which the estate may be bound, or any infirmity, real or nominal, by which it may be affected, should be expressed in the surrender. When, however, the lord comes to regrant, in pursuance of the surrender, the steward takes care that the originally precarious nature of the tenure shall distinctly appear upon the face of the recorded grant,—a precaution formerly of great importance; inasmuch as, if the surrenderee were a villein (of which the very acceptance of a tenure in villenage would afford no small presumption), a copyhold grant, omitting the words "at the will of the lord," would enure as an enfranchisement. The omission, therefore, of the words "at the will of the lord" in the lord's grant, would be strong evidence that the grant, though entered on the rolls of the manor, passed a freehold interest,—that it created that which is properly designated a customary freehold, and not a customary estate of base tenure. The evidence would appear, indeed, to be conclusive, unless holding at the will of the lord, can be considered as involved in the holding according to the custom of the manor. But the omission, or, rather, the non-appearance, of such words in a surrender,—a transaction to which the lord is neither party nor privy,—leads to no such inference. And see 3 Mann. & Ryl. 335 (*a*); ante, *Brown* v. *Gill*, vol. ii. p. 861.

Et hec intratio facta est secundo die Novembris, A.D. 1724, in presencia Iohannis Bull, gen., et Thome Wills, tenencium domini."

The next entry was an entry made after the passing of 4 G. 2, c. 26, whereby, inter alia, "all proceedings in courts-baron, courts-leet, and customary-courts, and all copies thereof," were directed to be "in the English language only" (*a*)[1]. This entry (of 5th April, 1745) runs thus:—"Dame Elizabeth, now the wife of Sir Thomas Acland, of Petherton Parke, in the county of Somerset, Bart., lately called Elizabeth Dyke, only daughter and next heir of Mary Dyke, widow, deceased, who was the relict and next heir of Thomas Dyke, late of Tetton, Esquire, deceased, with her lands, to wit, for the pasture wood and underwood of Haydwood, containing by estimation sixty acres, with the appurtenances, in the tything of Hollway, heretofore of Thomas Dyke, of Tetton, esquire, deceased, and late of Mary Dyke, widow, deceased (late father and mother of the said dame Elizabeth), to be had, &c. And this entry was made the 5th day of April, 1745" (*b*)[1].

[463] The subsequent remainders and fine-papers were in the same form as that of 5th April, 1745.

In this manor, the timber belongs to the customary tenants of the soil on which it grows; and, in order to shew that the antient tenants of the "pastura bosci et subbosci de Haydwood" had not the soil itself, but had merely the herbage of the wood, the pipe-rolls of the manor were produced from the bishop's exchequer of the manor kept in the castle of Taunton, in the custody of the clerk of the castle of Taunton—a patent officer appointed for life by the lord of the manor. These pipe-rolls (*a*)[2] contained the annual accounts of the reeves of six of the seven hundreds into which the manor is divided, the account of each reeve being entered upon a separate roll (*b*)[2]. In some of these accounts, the reeves debited themselves with the amount of moneys received by them upon sale of the timber brought from the lord's woods, and, amongst others, for moneys received from the sale of timber and underwood from Haydwood.

The plaintiff also proposed to read entries from these rolls, of sums for which the reeve of the hundred of Hollway took credit, as paid to the woodwards of the lord's woods, for which service each of the four woodwards,—of whom the woodward of Haydwood was one,—received an annual salary of 1s. 1d. This was objected to, on the ground that it did not appear, upon the face of the particular entries, or on any other part of the account, that the reeve acknowledged the receipt of **[464]** the specific sum for which, by the entry, he claimed a credit. To this it was answered, that, as the debits and credits formed but one account, every amount for which the reeve gave credit, went in extinction of the items contained on the credit side, and that it was immaterial whether an accountant acknowledged that his claim had been satisfied by payment or by a set-off. The evidence was rejected.

The following extract was produced by the plaintiff, and read in evidence, from "A survey of the Castle of Taunton, and the manor or lordship of Taunton and Taunton-Deane, with the borough of Taunton there, examined before Hugh Paulett, Knt., and others, 18 September, 14 Eliz., by virtue of a commission to them directed, and upon the oaths of several juries for the several hundreds and districts. A.D. 1572.

(*a*)[1] By the 2nd section of that statute, it is enacted, "that mis-translation, variation in form by reason of translation, mis-spelling, or mistake in clerkship, in pleadings or proceedings begun or to be begun before the said twenty-fifth day of March, 1733, being part in Latin and part in English, shall be no error, nor make void any proceedings by reason thereof; but that all manner of mis-translation, errors in form, mis-spellings, mistakes in clerkship, may at any time be amended, whether on paper or on record, or otherwise."

(*b*)[1] On the following day, 6th April 1745, there is a similar entry by Sir Thomas Acland, for Dame Elizabeth, his wife.

(*a*)[2] The pipe-rolls of the episcopal exchequer of Taunton were probably so called from a similarity of character to the pipe-rolls of the royal exchequer. It did not appear that the Taunton pipe-rolls had been, at any time, conveyed to their repository, as at Westminster, through a pipe. 3 Mann. & R. 348 (*a*).

(*b*)[2] The accounts for the district of Taunton Castle were rendered, not by a reeve, but by a receiver, to whom the reeves of the hundred accounted. The accounts of Taunton Borough were rendered by two reeves jointly. Those of Taunton Liberty were rendered by a bailiff.

"Custom(arii) (*a*)^{1} tenentes. Hundred de Holway.

"Idem Robertus Hill tenet medi(etat)em pasture de Haidwood, h(ab)endum sibi et heredibus suis, secundum consuet(udinem) maner(ii) p(re)d(icti), redd(endo) inde per annum, ad ter(m)i(nos) supradictos, quinq(ue) solid(os).

"Idem Robertus Hill tenet al(iam) medi(etat)em pasture bosci et subbosci de Haidwood, nuper Joh(ann)is Soper, h(ab)endum sibi et heredibus suis, secundum consuet(udinem) maner(ii) p(re)d(icti), redd(endo) inde per annum, ad ter(minos) supra(dictos), quinq(ue) solid(os)" (*b*)^{1}.

[465] One of the pipe-rolls rejected contained the account of the reeve of the hundred of Holway, for the year 1520-1521, and was as follows:—

"Holewey.] Comp(ut)us Rob(er)ti Webbe, p(re)p(ositi), ib(ide)m, a festo S(an)c(t)i Mich(ael)is Arch(angel)i, anno r(egni) r(egis) H(enrici) VIII. xii^{o}, usque idem festum S(an)c(t)i Mich(ael)is Arch(angel)i, ex tunc sequente, anno r(egni) r(egis) s(u)p(ra)d(icti), xiii^{o}, et anno tr(ans)lation(i)s d(omi)ni Ric(ard)i Foxe, Winton. epi(scopi), xx."

After this heading come the several heads of charge, i.e. the debit side of the reeve's account with the lord.

"Arr(eragia). Nulla.

"Redd(it)us ass(ise).] Set r(espondet) de xxx^{li} xvi^{s} v^{d} ob(olo) q(uadrante) et iiii^{t} p(ar)te q(uadrantis) de toto redd(it)u ass(ise) ad term(inum) Nat(al)is D(omi)ni: Et de xxx^{li} xvi^{s} v^{d} ob(ole) quad(rante) et iiii^{ta} p(ar)te q(uadrantis) de toto redd(it)u ass(ise) ad term(inum) Pasch(e): Et de xxx^{li} xvi^{s} v^{d} ob(olo) q(uadrante) et iiii^{ta} p(ar)te q(uadrantis) de toto redd(it)u ass(ise) ad term(inum) Nat(ali)s S(an)c(t)i Joh(ann)is Bapt(is)te: Et de xxx^{li} xvi^{s} v^{d} ob(olo) q(uadrante) et iiii^{ta} p(ar)te q(uadrantis) de toto redd(it)u ass(ise) ad term(inum) S(anc)ti Mich(ael)is Arch(angel)i: Et de ii^{s} iv^{d} de incr(emento) redd(it)us, pro quadam p(ar)cella terre de vasto solo d(omi)ni t(ra)dit(a) div(er)sis tenentibus d(omi)ni; ut patet in libris p(re)cedentibus.

"Summa, cxxiii^{li} viii^{s} iii^{d} q(uadrans)" (*a*)^{2}.

"Consuetud(ines).] Et de xix^{sol} ix^{d} ob(olo) de pannagio porcorum, hoggett(orum) et porcellorum, ad festum S(anc)ti Martini hoc anno: Et de xxiii^{sol} ix^{d} de c(er)ta consuet(udine) de hundredpeny, ad festum Na-**[466]**-t(ali)s D(omi)ni: Et de xvii^{sol} vi^{d} de c(er)ta consuet(udine) de Hockdey (*a*)^{3} ad idem festum: Et de xl sol(idis) de c(er)ta consuet(udine) de Hokedayswyte. "Summa, ci^{sol} ob(olus)" (*b*)^{2}.

"Annual(es) recogn(itiones) (*c*).] Nulle.

"Vendicio h(er)iett(orum).] Set r(espondet) de vi^{s} viii^{d} rec(eptis) de p(re)cio

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(*a*)^{1} The letters within the parentheses are inserted from conjecture, to complete the words. These, and the punctuation, are supplied by (one of) the editors. The blanks left are so in the original. Words illegible, or not decyphered, are supplied by asterisks.

(*b*)^{1} It appears from this document that the tenement was then held in distinct moieties, though both moieties were vested in the same person. It is also observable that the description is less full in the statement of the first moiety than in that of the second. The surrender may have been really more full in the one case than in the other, or the transcriber may have abbreviated in one case and not in the other.

(*a*)^{2} 123l. 8s. 3$\frac{1}{4}$d.

(*a*)^{3} Madox Formul. Anglic. p. 225.

(*b*)^{2} 5l. 1s. 0$\frac{1}{2}$d.

(*c*) Under the head of Annual Recognitions, the reeve of Poundesforde charges himself: "Et de viii^{d} rec(eptis) de annuali recogn(itione) Joh(ann)is Sevenoke, ut possit t(ra)here moram extra dominium d(omi)ni quamdiu d(omi)no placuerit, et venerit ad duos turnos."

Under this head (Annual Recogn.) the reeve of Nailesborne charges himself: "Et de vi^{s} viii^{d} de Will(ielm)o More, nat(ivo) d(omi)ni, de annual(i) recogn(icione) sua, ut possit manere apud Enmer, et ad faciend(um) sect(am) ad ii turn(os), et manere nat(ivum) d(omi)ni ut prius, pplm. Thome Blancheflore."

unius equi p(ro)venien(tis) de h(er)ietto (*d*)^{1} Joh(ann)is Robins, jun., hoc anno: Et de xx^{s} receptis de p(re)cio unius equi p(ro)venien(tis) de h(er)ietto (*d*)^{1} Joh(ann)is Pope, hoc anno: Et de xs. rec(eptis) de p(re)cio unius equi p(ro)venien(tis) de h(er)ietto Johanne Coke, hoc anno: Et de xx^{s} rec(eptis) de p(re)cio unius bovis p(ro)venien(tis) de h(er)ietto Will(ielm)i Whithorne, hoc anno: Et de viii^{s} rec(eptis) de p(re)cio i equi p(ro)venien(tis) de h(er)ietto Rog(er)i Ede, hoc a(nn)o: Et de xx^{s} rec(eptis) de p(re)cio unius bovis p(ro)venien(tis) de h(er)ietto Joh(ann)is Rousewell, hoc anno: Et de xvi^{s} viii^{d} rec(eptis) de p(re)cio unius vacce p(ro)venien(tis) de h(er)ietto Joh(ann)is Pilswell, hoc anno: Et de xi^{s} rec(eptis) de **[467]** h(er)ietto Joh(ann)is Palmer, pro ii cot(agiis), hoc anno: Et de xii^{d} rec(eptis) de h(er)ietto Nich(ola)i Gretanner, pro duobus cot(agiis), hoc anno: Et de vi^{d} rec(eptis) de h(er)ietto Joh(ann)is Fisher, pro i cot(agio), hoc a(nn)o: Et de iiii^{s} vi^{d} rec(eptis) de h(er)ietto Johanne Grynfelde, pro ix cot(agiis), hoc anno. "Summa, cviii^{s} iiii^{d}" (*a*)^{1}.

"Vendicio bosci.] Et de xvi^{s} viii^{d} rec(eptis) de Nich(ola)o Lacy, pro quinquaginta plaustrat(is) subbosci sibi vendit(is) in Haidwode, p(re)c(io) plaustrat(e) iiii^{d}, hoc anno. "Summa, xvi^{s} viii^{d}" (*b*)^{1}.

"Vendicio pastur(e).] Et de vi^{d} rec(eptis) de pastura itineris quod ducit a Taunton usque Shordyche. "Summa, vi^{d}" (*c*)^{1}.

"Firme.] Et de vi^{s} de firma pasture de Tapingwer (*d*)^{2}, ad quatuor anni term(in)os: Et de viii^{d}, de uno cot(agio) p(er)tinente ad dictam wer. in longo: Et de viii^{s} de firma unius acre terre undique inclus(e) juxta Redemore, et dimiss(e) Joh(ann)i Lobb(e) ad term(inum) vite sue: Et de xvi^{s} viii^{d} de firma pasture et subbosci novi p(ra)ti de Corffe, ex dimiss. Walt(er)o Eshe et Thome Sachell; tamen reddere solebat per annum xxiii^{s} iiii^{d} de firma pasture et pessone in Hintewood et Hintemede modo qu. pro salvacione de la apryng ib(ide)m. Set r(espondet) de aliquibus denar(iis) percept(is) de agistamento averi(orum), hoc anno pro copitis ib(ide)m salvand(is). "Summa, xxiv^{s}" (*e*)^{1}.

"Vendicio op(er)um.] Et de xxxiv^{lib} xiv^{s} xi^{d} obolo **[468]** di(midio) qu(adrantis) de op(er)ibus vendit(is); ut patet in anno xx^{o} H(enrici) VI. "Summa, xxxiv^{s} xiv^{d} xi ob(olus), dimidium qu(adrantis)" (*a*)^{2}.

"Fines et maritag(ia) (*b*)^{2}.] Et de xiii^{s} iiii^{d} de Agnet(e) nuper ux(ore) Henr(ici) Weyland, pro viii acr(is) terre de ov(er)land vocat(is) Feltham, ii acr(is) terre de ov(er)land apud Well, in dec(enna) de Holeway, que nuper fuerunt p(re)dicti Henr(ici) nuper viri sui, retinend(is): Et de iii^{s} de eadem Agnet(e), pro i p(ar)cella terre nuper Henr(ici) Weyland, vocat(a) William's Mede, in dec(enna) de Holewey, et qu(am) p(re)dictus Henri(cus) d(omi)ni (*c*)^{2} tenuit in socag(io), h(ab)end(a): Et de viii^{s} vi^{d} de Will(ielm)o More, capell(ano), pro iiii^{or} acris terre de ov(er)lond voc(ate) Pirlond, in dec(enna) de Holewey, nup(er) Walt(eri) Stele, capell(ani), et postea Joh(ann)is North, capell(ani), et quod remanet in manus (*d*)^{3} d(omi)ni p(ro) def(ectu) finient(is) (*e*)^{2},

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(*d*)^{1} The heriot due from the customary tenants of bond-lands in this manor, is, a heriot-custom,—a heriot due in respect of tenure, i.e. in respect of the relation of tenant, and not a heriot-service, or heriot due in respect of the tenement. Vide Manning's Exch. Pract. 2nd ed. p. 341; 5 Mann. & R., 417. Heriot-service, therefore, is extinguished by unity of possession; secùs, of heriot-custom. Vide M. 14 H. 4, fo. 5.

(*a*)^{1} 5l. 8s. 4d.

(*b*)^{1} 16s. 8d.

(*c*)^{1} 6d.

(*d*)^{2} Cal. Rot. Parl. 212 a.

(*e*)^{1} 1l. 4s.

(*a*)^{2} 1l. 14s. 11½d. ⅛.

(*b*)^{2} Under the head of Fines and Marriages, the reeve of the hundred of Stapulgrove charges himself: "Et de xx^{d} de Joh(ann)e Corner, pro eo quod Joh(ann)es Hindbury concessit Alicie ux(ori) Joh(ann)is Corner, post mortem dicti Joh(ann)is Corner quodd(a)m corrod(iu)m exiens de i mesuag(io) et di(midio) virg(ate) terre nat(ive) in dec(enna) de Pirlond, videl(ice)t, aisiamentum infra aulam, et liber(um) introitum et exitum ad ignem et aquam, et i cam(er)am in occident(ali) p(ar)te aule et t(erci)am garb(am) cujusl(ibe)t gen(er)is g(ra)nor(um): etiam p(ar)tem pom(orum) super p(re)miss(is) crescen(tium)."

(*c*)^{2} Sic.

(*d*)^{3} Sic.

(*e*)^{2} Vide supra, 459 (*b*).

h(ab)end(is): Et liv^{s} vi^{d} de Henr(ico) Skynner, pro i mes(uagio) et i ferlingo terre nat(ive) (*g*) i acr(a) p(ra)ti de ov(er)lond **[469]** in Haydemede, et i acr(a) terre de ov(er)lond in Blakedon, in dec(enna) de Russheton, ex r(eddicione) Joh(ann)is Cobbe, h(ab)end(is): Et de xiii^{d} de Ric(ard)o Tedbury, pro di(midio) acr(e) p(ra)ti de ov(er)lond juxta Wydemedebrigge, in dec(enna) de Holewey, ex r(edditione) Will(ielm)i Wey, generosi: Et de xii^{s} iiii^{d} de Thoma Hill, pro i cot(agio) cum curt(ilagio) et suis p(er)tin(entibus), contin(ente) vi dayn (*a*)^{1} terre de ov(er)lond juxta Redhill, in dec(enna) de Ex(tra)port(am), nup(er) Joh(ann)is Ad(a)ms, de Estyate, ex r(eddicione) Henr(ici) Wilson, de Appulby, h(ab)end(is): Et de xx^{d} de Alex(andr)o Togswill, pro i dayn (*a*)^{1} terre de ov(er)lond in boreali p(ar)te i cl(aus)i, voc(ati) Tauntfeld, in dec(enna) de Holewey, ex r(eddicione) Thome Togswill, attrahend(o) sibi residuum terre Isabelle Milbone, videl(ice)t, i (h)orreum et iiii^{or} acr(as) terre de ov(er)lond in Tauntfeld, et vi acr(as) p(ra)ti de ov(er)lond, voc(atas) Medelond, in dec(enna) p(re)dict(a), **[470]** cum acciderit, h(ab)end(o): Et de x^{s} ii^{d} de Will(ielm)o Skoryer, jun., pro i cot(agi)o cum curt(ilagio), cont(i)nent(e) ii dayn (*a*)^{2} terre, in dec(enna) de Ex(tra)port(am), nup(er) Joh(ann)is Haukins, et i cot(agi)o cum cur(tilagio), in dec(enna) de Ex(tra)port(am), nup(er) Rob(er)ti et Anne Weston, ex r(eddicione) Willi(elmi) Skoryer, p(at)ris sui, h(ab)end(is): Et de xi^{s} de Joh(anne) Sandon, fil(io) Thome Sandon, pro i mes(uagio) et i ferling(o) terre nat(ive), in dec(enna) de Russheton, et pastura de ii ani(malibus) in Russheton agro, in dec(enna) de Russheton, ex r(eddicione) d(i)ct(i) Thome Sandon h(ab)end(o): Et unde idem Joh(ann)es prius finivit (*b*) pro i dayn (*a*)^{2} terre nat(ive) in Gravellond, in dec(enna) de Russheton, ex r(eddicione) Rob(er)ti Gardiner, attrahend(o) sibi residuum ten(ementi) et terre d(i)ct(i) Thome Sandon, cum acciderit, h(ab)end(o): Et de vi^{s} viii^{d} de Johanna nup(er) ux(ore) Joh(ann)is Slye, pro i acr(a) p(ra)ti in Pitmede, in dec(enna) de Holewey, que nup(er) fuit p(redi)c(t)i Joh(ann)is, nup(er) viri sui, retinend(a): Et de xx^{d} de Thoma fil(io) Nich(ola)i Ley, pro i dayn (*a*)^{2} terre in fine gardini, in dec(enna) de Holewey, ex r(eddicione) d(i)ct(i) Nich(ola)i, attrahend(o) sibi residuum ten(ementi) et terre d(i)ct(i), Nich(ola)i, videl(ice)t, ii cot(agia) et viii acr(as) terre de ov(er)lond, in dec(enna) p(re)dict(a), cum acciderit, h(ab)end(o): Et de xx^{s} iiii^{d} de Ric(ard)o Gardiner, pro i mes(uagio) et i ferling(o) terre nat(ive), et quinq(ue) acr(is) terre nat(ive), i cot(agio) cum curt(ilagio), cont(inente) ii dayn (*a*)^{2} terre, et i acr(am) p(ra)ti de ov(er)lond, in Pitmede, in dec(enna) de Stoke, ex r(eddicione) Petri Sacyn, h(ab)end(is): Et de vi^{s} x^{d} de Joh(ann)e Sandon, pro i mes(uagio) et quin(que) acr(is) terre nat(ive), et pastura ad ii an(imali)a, in Russheton More, ex r(eddicione) Willi(elm)i Colake, al(ia)s Gander, h(ab)end(is): Et

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(*g*) Terra nativa (bond-land) consists of customary tenements upon which there are or have been ancient dwellings. This description of tenement (as the name imports) is held in villenage. This character of villenage, however, appears to apply to the other class of customary tenements denominated overlond (overland), which consists of customary tenements whereon there was anciently no dwelling. (Customs, No. 1.) The present difference between the two classes of tenements, is, that the tenants of bond-lands are liable to heriots, and are bound to do suit at the lord's courts, from both of which the tenants of overland are exempt (Customs, No. 1, 8, 27); and that the customary tenants of lands of overland have power to divide and parcel out their tenements at their pleasure, subject to an equal apportionment of fines and rents. (Customs, No. 6.) These distinctions appear to be explained by the ancient state of the two classes of customary tenements.

(*a*)^{1} A dayne appears to be a distinct portion of a tenement. Thus, in Customs, No. 8, we find: "The surrender of the said customary lands, by the custom of the said manor, are and have been called by divers denominations, viz. some absolute surrenders, some conditional or mortgage surrenders, and some dayne surrenders. * * * A dayne surrender, is, where a customary tenant doth surrender a parcel of his customary lands, be it much or little, bondland, or overland, to any other person, by the name of a dayne, to draw to the same person and his heirs the residue of the same lands and tenements, when it shall happen, after the death of the surrenderor. In this case, he to whom the same surrender is made, by the custom of the said manor, hath and ought to have the dayne presently in possession, unless it be otherwise agreed; to have and to hold the said dayne to him and his heirs for ever, according," &c.

(*a*)^{2} Vide supra, 469 (*a*).

(*b*) Supra, 459 (*b*).

de xxx^{s} **[471]** ii^{d} de Thoma Marler, pro i mes(uagio) et quinque acr(is) terre nat(ive), et pastura ad ii ani(mali)a, in Russheton More, et ii acr(is) p(ra)ti de ov(er)lond, in Goschey, in dec(enna) de Russheton, ex r(eddicione) Johannis Marler, h(ab)end(is): Et de xx^{d} de Thoma Marler, pro eo q(uo)d concessit prefate Johanne, quodd(a)m corrod(iu)m (*a*)^{1} exiens de i mes(uagio) et quinque acr(is) terre nat(ive), et ii acr(is) p(ra)ti de ov(er)lond, durante vita ip(s)ius Johanne, videl(ice)t, aisiament(um) et lib(eru)m introitum et exitum ad ignem et aq(uam), ac i cam(er)am, necnon victum et vestitum sufficient(es), et iii^{s} annuatim solvend(os): Et si dict(u)s vict(us) et vestit(us) **[472]** non ei placuerit, q(uo)d ex tunc p(re)dict(us) Thomas solvet p(re)fate Johanne annuatim xxxiii^{s} iiii^{d} ad quatuor ann(i) term(in)os solvend(os): Et si contingat, &c. q(uo)d extunc, &c.: Et de v^{s} iiii^{d} de Ric(ard)o Godde, pro i cot(agio) cont(inente) iii dayn terre (*a*)^{2}, in dec(enna) de Ex(tra)port(am), ex r(eddicione) Johanne Scorwey, h(ab)end(o): Et de xii^{d} de Thoma Sandon pro ii acr(is) et di(midio) terre de ov(er)lond, in Blakedon, in dec(enna) de Russheton, ex r(eddicione) Alicie Fisher, h(ab)end(o): Et de ii^{s} vi^{d} de Ric(ard)o Abcombe pro i acr(a) terre nat(ive) voc(ata) Highwey, in dec(enna) de Stoke, ex r(eddicione) Nich(ola)i Abcombe, attrahend(o) sibi residuum ten(ementi) et terr(e) dicti Nich(ola)i, videl(ice)t, unum mes(uagium) et quinq(ue) acr(as) terre nat(ive), in dec(enna) p(re)dict(a), cum acciderit, h(ab)end(o); ita q(uo)d d(omi)nus h(ab)ebit no(m)i(n)e h(er)iett(i) i jument(um) p(re)c(ii) viii^{s} vi^{d} : Et de xvii^{s} vi^{d} de Thoma Hill, pro i mes(uagio) et quinq(ue) acr(is) terre nat(ive), et ii acr(is) terre et p(ra)ti de ov(er)lond, in dec(enna) de Holewey, ex r(eddicione) Joh(ann)is Marshall, h(ab)end(is); et p(re)dictus Thomas manucepit pro fine (*b*) Jo(hann)is Marshall, et exon(er)abit Joh(ann)em ab eod(em), &c.: Et de vi^{s} ii^{d} de Johanna, nup(er) ux(ore) Joh(ann)is Blakeslond, pro i mes(uagio) et quinq(ue) acr(is) terre nat(ive), et iii dayn (*a*)^{2} terre voc(ate) Heandole, in dec(enna) de Holewey, que nuper fuerunt dicti Joh(ann)is nuper viri pro sui, retinend(is): Et de vii^{s} de Ric(ard)o Heyward, i cot(agio) cum curt(ilagio) cont(inente) day (*a*)^{2} terre de ov(er)lond, in dec(enna) de Ex(tra)port(am), nuper Joh(ann)is Dier, ex r(eddicione) Joh(ann)is Adams, de Estyate, h(ab)end(o): Et de xxxiii^{s} viii^{d} de Will(ielm)o Rocheman, pro Thomasia Redy, cum terra sua, videl(ice)t, i mes(uagio) et i ferling(o) terre nat(ive) et pastura ad ii ani(mali)a in Russheton More, in de-**[473]**-c(enna) de Russheton, h(ab)end(is): Et de xx^{d} de Rob(er)to Atwill, laborer, pro i cot(agio), cum suis pertin(entiis), in dec(enna) de Ex(tra)port(am), nuper Johanne Combe, ex r(eddicione) Henr(ic)i Dyte, h(ab)end(o): Et de iii^{s} iv^{d} de Will(ielm)o Jenyn, pro i acr(a) terre nat(ive), voc(ata) Litelmede, juxta aquam, in dec(enna) de Wodelond, ex r(eddicione)

(*a*)^{1} "There is, and always hath been, within the said manor another kind of surrender conditional of customary estates of inheritance, as, namely, where there is a particular interest reserved to the surrenderor, or to his wife or any other person, for life or lives, or any number of years, either of the whole lands, or of any rent or profit to be issuing out of the same lands so surrendered; in which case the particular interest, rent, or profit so reserved upon the same surrender, is, and always hath been, called a customary corody; into which corody the party to whom the same corody hath been limited, hath used, by the custom of the said manor, to enter and enjoy the same accordingly, to his own private use." Customs, No. 10.

"If an abbot of his own head grants to A. a corody, without more, nihil operatur, unless he says also,—to wit, 12 cast of bread and 12 bagunkills of beer per week; which is a good grant of a right to have these things. This, however, is not a corody, but a profit; for, every corody rests upon foundership (of the religious house in which the corody is to be granted)." T. 22 E. 4, fo. 18, pl. 43, per Hussey, C. J., and Fairfax, J. It seems doubtful whether, in the absence of express reservation, a right to grant, or rather a right to require an abbot to grant or furnish, a corody, accrues to a common person being a founder, or whether such right is matter of prerogative, and is confined to cases where the religious house is of royal foundation: *Abbot of St. Oswald's case*, T. 44 E. 3, fo. 3, pl. 24, pl. 33, reported also, 50 Lib. Ass. fo. 325, pl. 6; M. 1 E. 4, fo. 10, pl. 20; M. 21 E. 4, fo. 81, pl. 34 (upon a demurrer in Chancery, argued in the Exchequer Chamber, on the return to a commission upon a petition of right brought by abbot of Leicester, praying to be relieved of a corody): Longo Quinto, fo. 118; Bro. Abr. Corodie, pl. 16. And see F. N. B. tit. Prohibition.

(*a*)^{2} Vide supra, 469 (*a*).

(*b*) Vide supra, 459 (*b*).

Will(ielm)i Fairshere, attrahend(o) sibi residuum ten(ementi) et terre d(i)c(t)i Will(ielm)i, Fairshere, videl(ice)t, i mes(uagium) et di(midium) virg(ate) terre nat(ive) in eadem dec(enna), cum acciderit, h(ab)end(is); ita q(uo)d d(omi)n(u)s h(ab)ebit no(m)i(n)e h(er)iett(i) i vaccam p(re)ci(i) xiv^{s}, si, &c.: Et de ii^{s} de Will(ielm)o Jenyn, pro eo q(uo)d concessit Isabelle ux(ori) Will(ielm)i Fairshere, quodd(a)m corrod(iu)m exiens de i mes(uagio) et di(midio) virg(ate) terre nat(ive), in dec(enna) de Wodelond, videl(ice)t, lib(eru)m introitum et exitum ad ignem et aquam, unam cam(er)am voc(atam) le ynner chamber, et i solar(iu)m, et ii plaustrat(as) focal(is), necnon xxvi^{s} viii^{d} annuatim solvend(os) ad quatuor anni t(er)mi(n)os, fructus ii arbor(um) voc(atorum) appultrees, et fructus i arbor(is) * * *, h(ab)end(um) et tenend(um) corrod(iu)m p(re)dictum p(re)fate Isabelle ad term(inu)m vite sue, si ip(s)a Isabella ip(s)um Will(ielmu)m supervixerit; et si contingat dictum corrod(iu)m aretro fore, in p(ar)te vel in toto, ex tunc, &c.: Et de xiii^{s} iv^{d} de Joh(ann)e Soper, jun., pro eo q(uo)d d(omi)n(u)s concessit ei medieta(te)m firme pasture, pessone (*a*)^{1}, et subbosci, novi p(ar)ci de Corffe, in dec(enna) de Stoke, h(ab)end(um) sibi secundum consuet(udinem) manerii de Taunton(*b*)^{1}, immediate post mortem Walt(er)i White et Will(ielm)i Sachell, qui tenent p(re)dict(am) firm(am) ad term(inu)m vite eorund(em), et alterius eorum diutius viven(tis), reddend(o) inde annuatim d(omi)no ep(iscop)o et successoribus suis, cum **[474]** acciderit, viii^{s} iv^{d} ad iiii^{or} anni term(inos) in p(re)dicto manerio de Taundene (*a*)^{2} usuales, omnes quercos, fraxinos, et swartrees (*b*)^{2} infra dictam firmam crescen(tes) et nutriend(os), d(omi)no ep(iscop)o et success(oribus) suis omnino except. et reservat. absq(ue) aliquo alio fine per p(re)dictum Joh(ann)em Soper post mortem dict(orum) Walt(er)i et Will(ielm)i redd(end)o, sive faciendo, durante vita d(i)c(t)i Joh(ann)is Soper, h(ab)end(o): Et de xiii^{s} iv^{d} de Rob(er)to Hille, pro eo q(uo)d d(omi)nus concessit ei alteram medi(et)at(em) firme pasture, pessone (*c*), subbosci novi p(arc)i de Corffe jacent(is) in dec(enna) de Stoke, h(ab)end(um) sibi secundum consuetud(inem) man(er)ii de Taundene (*a*) immediate post mortem Walt(eri) White et Will(ielm)i Sachell, qui tenent p(re)dictam firmam pro term(ino) vite eorum et alterius eorum diutius viventis, redd(end)o inde annuatim d(omi)no ep(iscop)o et successoribus suis, cum acciderit, viii^{s} iiii^{d} ad iiii^{or} anni term(inos) in p(re)dicto man(er)io de Taundene (*a*)^{2} usuales, omnes quercos, fraxinos, et swartrees (*b*)^{2} super p(re)dict(am) firmam crescen(tes) et nutriend(os), d(omi)no ep(iscop)o et success(oribus) suis omnino except. et reservat. absq(ue) aliquo alio fine per p(re)dict(um) Rob(er)tum Hille post mortem p(re)dict(orum) Walt(er)i et Will(ielm)i redd(endo), sive faciend(o), durante vita dicti Rob(er)ti: Et de v^{s} de Henrico Willes, pro i roda terre nat(ive) in Wyndikes, ex r(eddicione) Lucie Milward, attr(ah)end(a) sibi resid(uum) tenementi et terre dicte Lucie, videl(ice)t, i mes(uagium) et di(midium) virgate terre nat(ive), v acras p(ra)ti, vocat(as) Somerlese alias Meedlond, in dec(enna) de Galmyngton, p(re)dicto mes(uagio) annex(as), xi acras p(ra)ti de ov(er)lond in Uncar., iii acras **[475]** p(ra)ti vocat(as) Chilmerysmede, et i acram ibid(em), nuper Joh(ann)is Billyng, in dec(enna) p(re)dicta, cum acciderit, h(ab)end(is); ita quod d(omi)nus h(ab)ebit, no(m)ine h(er)ietti, i bovem p(re)ci(i) xxvi^{s} viii^{d}, si, &c.: Et de x^{s} de Margaretta Taverner, pro ii cotag(iis) cum curtilag(iis) continen(tibus) dayn terre, in dec(enna) de Ex(tra)port(am), nup(er) Joh(annis) Taverner, quondam viri sui, retinend(o): Et de x^{s} de Rob(er)to Hille, pro ii cot(agiis) cum curtilag(iis), continent(ibus) dayn terre nat(ive), in dec(enna) de Ex(tra)port(am), ex r(eddicione) Margerie Taverner, h(ab)end(o): Et de ii^{s} de Joh(ann)e Kene, pro di(midio) acre terre na(tive) in Dustlond, in australi parte ejusdem, in dec(enna) de Stoke, ex r(eddicione) Stefani Kene, patris sui, attrahend(o) sibi residuum tenementi et terre dicti Stefani, videl(ice)t, i mes(uagium) et di(midium) virgate terre nat(ive) in dec(enna) p(re)dicta, acras p(ra)ti de ov(er)lond in Widemede, et acras p(ra)ti de overlond in Pitmede, in de(cenna) de Holewey, cum acciderit, h(abe)nd(o); ita quod d(omi)nus habebit, no(min)e h(er)ietti, i vaccam p(re)cii x^{s} iv^{d}, si, &c.: Et de xx^{s} iv^{d} de Joh(ann)e Wytherton, alias Cardemaker, pro i cotag(io), cum suis pertinent(iis), in dec(enna) de Ex(tra)port(am), ex r(eddicione) Joh(ann)is Fyssher

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(*a*)^{1} Pastio porcorum in silvis (Pannage). 1 Monastic. Anglic. p. 594.

(*b*)^{1} Vide infra, 474 (*a*).

(*a*)^{2} Here, the manor bears different names in the same sentence. Vide supra, p. 473: vide etiam, supra, p. 456 (*a*).

(*b*)^{2} Quare the meaning of this word.

(*c*) Vide supra, 473 (*a*).

h(ab)end(o): Et de xii^{d} de Rob(er)to More, pro i acro p(ra)ti de ov(er)lond in Hardemede, nuper in tenura Will(ielm)i Goly, ex r(eddicione) Joh(ann)is Coton, h(ab)end(o): Et de xx^{d} de Thoma Sandon, pro eo q(uo)d Joh(ann)es Sandon concessit p(re)fato Thome q(uo)d(a)m corrod(iu)m exiens de i mes(uagio) et i ferling(o) terre na(tive), in dec(enna) de Russheton, videl(ice)t, aisiamentum infra aulam, lib(er)um introitum et exitum ad ignem et aquam, ac omnia (sic) domos et cam(er)as infradicti mes(uagii) sibi sep(ar)al(iter) omni tempore anni, et i acram terre voc(atam) le Cakeside; h(ab)end(um) et tenend(um) corrod(iu)m p(re)dict(um) **[476]** p(re)fato Thome, ad term(inum) vite sue, absq(ue) aliquo inde redd(end)o, ad quorumq(ue) manus dicte mes(uagium) et terre in posterum devenerint, h(ab)end(o): Et de iv^{li} x^{s} de Johanna, nup(er) uxore Will(ielmi) Whittehorne, pro i mes(uagio) et di(midio) virgate terre nat(ive) ac pastura ad iiii^{or} a(n)i(m)alia in Russheton More, in dec(enna) de Russheton iiii^{or} acris terre de ov(er)lond, in Blakedon, et ii acris p(ra)ti de ov(er)lond, in Hardmede, in dec(enna) p(re)dicta, que nup(er) fuerunt p(re)dicti Will(ielm)i, nu(per) viri sui, retinend(is): Et de iii^{s} iv^{d} de Cecilia Selwode, eo quod dat d(omi)no de fine pro licencia dimittendi (*a*)[1] ad firmam, i mes(uagium), i toftum, et ii ferling(os) terre nat(ive), et i acram terre de ov(er)lond apud Le Hayne, in dec(enna) de Stoke, in hundredo de Holway, cuidam Will(ielm)o Hakeshall, h(ab)end(um) et tenend(um) mes(uagium), toftum, et terram p(re)dictam p(re)fato Will(ielm)o, a festo S(anc)ti Mich(ael)is Arch(angel)i proxime futuro usque ad finem term(ini) duodecim annorum ex tunc proxime sequent(ium) et plenarie complend(orum), redd(end)o d(om)ino ep(iscopo) annuatim durante term(ino) p(re)dicto, redd(it)us p(re)dict(orum) mes(uagii), tofti, et terre p(re)diete, debit(os) et consuet(os): Et de xx^{s} vi^{d} recept(is) de d(omi)na Johanna Grynfeld, vidua, pro ii cot(agiis) cum curt(ilagiis) et suis pert(inentiis), in dec(enna) de Ex(tra) port(am), ex r(eddicione) Thome Spyring, h(ab)end(is).

"Summa, xxiii^{li} xvii^{s} iv^{d}" (*b*)[1].

"Perquis(ita) curie (*c*)[1].] Et de viii^{s} vii^{d} de perquis(itis) turni S(anc)ti Martini, hoc anno: Et de x^{s} x^{d} de perquis(itis) turni de Hockdey, hoc anno: Et de lxxii^{s} xi^{d} de perquis(itis) omnium pernearum (*d*)[1] cur(ie), hoc anno, cum xviii^{s} x^{d} de fine custum(ariorum) tenen-**[477]**-c(ium) pro eorum secta, de tribus septiman(is) in tres, relax(anda) (*a*)[2]; xii^{s} x^{d} de extrahuris curie; xii^{s} iii^{d} de alliis p(er)quis(itis) (*b*)[2].

"Summa, iiii^{li} xi^{s} iii^{d} (*c*)[2].

"Summa tot(alis) receptum, iiiixx^{li} ii^{s} iii^{d} q(uadrans)" (*d*)[2].

Then follow the several heads and items of discharge, i.e. the credit side of the reeve's account with the lord:—

"Acquiet(ancie) redd(it)us et op(er)um.] Idem comput(at) in acquiet(ancia) redd(it)us et op(er)um unius budelli per annum, p(ro)ut allo(catur) in quamplurib(us) comput(is) p(re)cedent(ibus), iiii^{s} x^{d}: Et in acquiet(ancia) op(er)um p(re)pos(iti) ib(ide)m per annum, causa off(ic)ii sui exercend(i), p(ro)ut allo(catur) in diversis comput(is) p(re)cedentibus, iiii^{s} iii^{d}: Et in acquiet(ancia) unius budelli de wodlond, UNIUS WOD(WARDI) DE HAIDWODE, unius wodward(i) de Knolle Wode, videl(ice)t, quol(ibe)t eorum ii^{d} ob(olus) per annum, causa offic(iorum) su(orum) exercend(orum), p(ro)ut allo(catur) in diversis comput(is) p(re)cedentibus, vi^{s} i^{d} ob(olus): Et in acquiet(ancia) op(er)um diversorum custom(ariorum) op(er)ancium dayn circa nettiam.

(*a*)[1] Vide Customs, Nos. 7, 44.

(*b*)[1] 23l. 17s. 4d.

(*c*)[1] Vide 3 Mann. & R. 163.

(*d*)[1] Query meaning of this term.

(*a*)[2] As to fines payable for being freed from the obligation to attend the three-weeken court, see Customs, No. 32.

(*b*)[2] In the account of the two reeves (supra, 463, n.) of Taunton borough for this year (1521-1522), credit is given for 20d. as perquisites of the Pipoudre court.

(*c*)[2] 4l. 11s. 3d.

(*d*)[2] 80l. 2s. 3¼d.

Under the head—Exitus Manerii—the reeve of Nailesborne charges himself: "Et de ii^{s} vi^{d}, de residuo denar(iorum) be(ati) Petri (Peter's pence, otherwise called Romescot) ib(ide)m, per annum."

mol(endi)norum castri et alibi infra do(miniu)m, P(RO)UT CONSI(MI)LES ALLO(CATIONES) FACTE SUNT EX ANTIQUA CONSUETUD(INE); sicut continet(ur) in diversis comput(is) p(re)cedentibus, iii^{s} ii^{d} "Summa, xviii^{s} vi^{d} ob(olus)" (*e*).

[478] "Et in defectu redd(it)us terre quondam , superius onerati in (titulo redd(it)us assise ad xii^{d}, tract(e) in d(omi)nicum—summa xii^{d}: Et in defectu redd(it)us terre quondam Ric(ar)di Ligh, superius onerat(i) in titulo redd(it)us assise ad viii^{s} vi^{d}, tract(e) in d(omi)nicum per annum, prout allocatur in quamplurib(us) comput(is) p(re)cedent(ibus) de viii^{s} vi^{d}: Et in defectu redd(it)us terre de Pixton, superius onerat(i) in dicto titulo ad xl^{s} v^{d} per annum, eo quod date sint Baldewino, filio Gerard(i), in excambio pro Corff, Fulford, et Naylesborne, per ep(iscop)um Ric(ard)um xl^{s} v^{d}: Et in defectu redd(it)us terre quondam Jordani de Fiddew, superius onerat(i) in dicto titulo ad iv^{s} vi^{d} per annum, tract(e) in d(omi)nicum per ep(iscop)um Godefrid(um) (*a*)^{1} iiii^{s} xi^{d}: Et in defectu redd(it)us terre de Brigwater, superius onerat(e) in dicto titulo ad iii^{s} per annum, eo quod ablat(e) sint per Will(iel)mum Bruer tempore ep(iscop)i Geoff(red)i (*a*)^{1} iii^{s}: Et in defectu redd(it)us terre quondam Joh(ann)is Cleelle, in la Flore superius onerat(i) in dicto titulo ad vi^{s}, tract(e) in d(omi)nicum d(omi)ni vi^{s}: Et in defectu redd(it)us, quondam Philippi Dawe, pro una acra p(ra)ti ibid(em) superius onerat(i) in dicto titulo ad xii^{d}, tract(a) in d(omi)nicum, per annum xii^{d}: Et in defectu redd(it)us terre quondam Thome Godelake, pro una acra p(ra)ti juxta , superius onerat(i) in dicto titulo ad vi^{d}, tract(a) in d(omi)nicum, per annum vi^{d}: Et in defectu redd(it)us terre quondam Nich(ola)i Atwille pro ii acris p(ra)ti superius onerat(i) in dicto titulo ad iiii^{s}, tract(is) in d(omi)nicum, per annum iiii^{s}: Et in defectu redd(it)us unius acre p(ra)ti juxta vivar(ium) quondam Thome Wallyng, superius onerat(i) in dict(o) titul(o) ad iiii^{d}, tract(e) in d(omi)nicum, per ann(um) iiii^{s}: Et in defectu redd(it)us i acre p(ra)ti, quondam Ric(ard)i: Et in defectu redd(it)us terre quondam Walt(eri) Portman, **[479]** superius onerat(i) in dicto titulo ad v^{s}; modo dimittitur pro iii^{s}: Summa defectus, ii^{s}: Et in defectu redd(it)us cujusdam vie per quondam Will(ielm)um Gore, jacen(te) juxta terr(am) nuper Joh(ann)is Lychefield, in Ex(tra)port(am), tenden(te) usque terram p(re)dicti Will(ielm)i, superius onerat(e) in dicto titulo ad xx^{d} per annum, eo quod p(re)dict(us) Will(ielm)us mortuus est et via predicta non occupat(ur): Summa defectus, "Summa, liiii^{s} xxiii^{d}" (*a*)^{2}.

"Et in denar(iis) liberat(is) Joh(ann)i Welling receptori (*b*) castri de Taunton, de exitibus hujus anni, per manus dicti receptoris. £x (*c*).

"Et quietus est."

The other pipe rolls of the hundred of Holway, rejected by the learned judge, contained entries of a similar character, and were in the same form. In one, credit is taken by the reeve for a payment to workmen for making bricks for the lord in his wood at Haidwood; in another, for a payment to a carpenter for repairing a gate in Haidwood.

The learned judge, in summing up the case to the jury, said:—"The question for your consideration is, **[480]** whether the intention was, to grant the surface, or to grant the land: and it lies within a narrow compass. But, to prevent the necessity of the parties coming again, I will take your opinion upon two points, which are not

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(*e*) 18s. 6½d.

(*a*)^{1} Godfrey and Geoffrey were the same bishop.

(*a*)^{2} 2l. 15s. 11d.

(*b*) "The customary tenants are, upon being summoned, to attend once a year at a choice court, at which they are to make choice of the lords officers for the year following,—a receiver, one several reeve for every hundred to collect the lord's rents, beadles to serve the lord's courts and to gather the amercements and customary works, and to make account thereof to the reeve." Customs, No. 30. Et vide supra, 463 (*b*).

(*c*) "All rents, fines, heriots, works, and customs which are due and payable to the lord of the manor every year have usually been paid by the reeves in every hundred, and others to whom it doth appertain, unto the lord's officers at Winchester, according to their usual and accustomed times; and ought never, by the custom of the said manor, to be drawn any further for the payment of the same." Customs, No. 45.

wholly questions of law. In the first English court-roll, relating to this property, which is of the year 1745, the copyhold estate is described as 'The pasture, wood, and underwood of Haydwood, containing by estimation, sixty acres, with the appurtenances.' In all the subsequent court-rolls, the copyhold is described in the same terms.

"I will take your opinion, first, upon the question,—whether, by these words, was meant 'pasture land, wood land, and underwood land,' referring to the user, which may be resorted to for the purpose of explaining the words used, and ascertaining whether it was intended to pass the land itself" (a)1.

The learned judge then read the evidence of Ham and the other witnesses called for the defendant as to the state and user of the land (b)1. The jury said, "We consider that the words included the land itself."

The learned judge proceeded,—

"With respect to the second point on which I desire to have your opinion, I would observe, that there was some evidence that this wood, called Haidwood, had, in early times (c) been in the hand of the lord." His lordship then called the attention of the jury to such of the pipe-rolls as had been received in evidence; adding: "It is said by the defendant that no explanation has been given as to the nature of those rolls; and you should take into your consideration the survey of 1572, and correct, if possible, the one set of entries by the other. From the first time the roll is in English, we find a change. This **[481]** may have arisen from the tenant's requiring a statement of his actual interest. I will, therefore, put the same question with reference to the ancient Latin entries as I did with reference to the modern English entries,—whether, by the words 'pasture of the wood and underwood of Haidwood,' it was intended to point out the land on which the wood and underwood grew? (a)2—whether the terms were used as descriptive of the land itself? Can you so infer from the modern user" (a)2? The jury said, "We find as before."

Exceptions were tendered in respect of each of the questions submitted to the jury; but that course was abandoned (b)2, and no bill of exceptions was sealed.

Manning, Serjt., in Easter term last, moved for a new trial, on three grounds,—the improper rejection of evidence,—misdirection,—and, that the verdict was against the evidence.

Upon the first point, he referred to an entry in which the reeve of Holway takes credit for money paid to a carpenter for repairing a gate in Haidwood, the reeve charging himself in the account with 14s. received for wood sold from Haidwood in the same year, and with 13s. 4d. for wood sold in Whitford the same year. [Wilde, C., J. I have been in several cases in which it was distinctly decided that it was receivable in evidence by force of the discharge (c)2. Some of those cases have been reported. I don't know whether *Ward* v. *Lord Durham* was (d).] It was so decided in the reported **[482]** cases of *Crease* v. *Barrett* (1 C. M. & R. 919, 5 Tyrwh. 458), and *Doe* v. *Turford* (3 B. & Ad. 890). The document being admissible for one purpose, was admissible for all purposes; *Mayor of Exeter* v. *Warren* (5 Q. B. 773).

Secondly, there was misdirection in the learned judge's first taking the opinion of the jury upon the effect of the modern entries coupled with the modern user, and withdrawing their attention from the ancient entries. There could be no doubt, that, looking at the modern entries and the modern user alone, the construction to be put upon those entries would be that the whole interest passed; and the jury found the only verdict which upon that one-sided view of the case they could find. The learned judge then put the second question,—whether by the old Latin entries the whole interest was intended to pass? Here, they were hampered by the answer which they had returned to the first question. As the jury had already found that the copyhold estate had, for more than 100 years, included the whole interest in the land, it would have been inconsistent with the immemorial continuous identity of the customary tenement, to find that the Latin entries had conferred a more limited right upon the copyholder.

(a)1 This question was excepted to.

(b)1 Supra, p. 461.

(c)1 Within legal memory.

(a)2 This formed the subject of another exception.

(b)2 Upon the prosecution of the bill of exceptions, the most favourable result would have been the awarding of a venire de novo, which, after much expense and delay, would not have been more beneficial than a new trial, except as containing on the record an intimation as to the course which ought to be pursued.

(c)2 The lord chief justice was not in court when cause was shewn against the rule.

(d) Tried at the Hants Summer Assizes, 1838, cor. Gaselee, J.

But the learned judge ought not to have left these matters to the jury at all. It was for him to decide upon the effect of these written documents, after the jury had ascertained the existence or non-existence of any extrinsic facts which could affect the construction of those documents.

Thirdly, the evidence actually admitted by the learned judge, was sufficient to entitle the plaintiff to a verdict.

Kinglake, Serjt., and M. Smith, now shewed cause. The contention on the part of the lessor of the plaintiff **[483]** will be, that, under the words "*pastura bosci et sub-bosci*," in the antient grants produced at the trial,—and which, in the modern entries, since the statutes 4 G. 2, c. 26, and 6 G. 2, c. 14, are rendered "pasture, wood, and underwood,"—the herbage only passed, and not the soil itself. There is nothing in the nature of the entries in question to render inadmissible evidence of usage, to explain the ambiguity of the terms used, and to shew that they were intended to convey the land. And for this purpose the evidence that was given at the trial was amply sufficient. The authorities shew that the word "*pastura*" is sufficiently large to carry the land. In Co. Litt. 4 b., it is said: "If a man hath twenty acres of land, and by deed granteth to another and his heirs vesturam terræ, and maketh livery of seisin secundum formam chartæ, the land itself shall not pass, because he hath a particular right in the land: for, thereby he shall not have the houses, timber-trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, that is, the corn, grass, underwood, swepage, and the like, and he shall have an action of trespass quare clausum fregit. The same law, if a man grant herbagium terræ, he hath a like particular right in the land, and shall have an action quare clausum fregit: but by grant thereof and livery made the soil shall not pass, as is aforesaid." "A man seised of divers acres of wood, grants to another omnes boscos suos, all his woods,—not only the woods growing upon the land pass, but the land itself, and by the same name shall be recovered in a præcipe; for, boscus doth not only include the trees, but the land also whereupon they grow. The same law if a man in that case grant omnes boscos suos crescentes, &c., yet the land itself shall pass; as it hath been adjudged." "If a man doth grant all his pastures, pasturas, the land itself employed to the feeding of beasts doth pass, and also such **[484]** pastures or feedings as he hath in another man's soil. Between pastura and pascuum the legal difference is, that pastura in one signification containeth the ground itself called pasture, and by that name is to be demanded. Pascuum, feeding, is, wheresoever cattle are fed, of what nature soever the ground is, and cannot be demanded in a præcipe by that name." The same doctrine is to be found in Comyns's Digest (title Grant (E. 5)). That usage may be received to construe an obscure grant, is clear from many authorities. Dallas, C. J., in *Chad* v. *Tilsed* (2 Brod. & Bingh. 406, 5 J. B. Moore, 192), says: "The rule laid down in a book of authority on this subject (*c*), is, 'If the language of an antient grant be obscure or doubtful, constant usage may be resorted to, to expound, though not to control the deed;' and the uniform course of modern authorities shews, that, however general the grant, usage may afford a true construction of it, reducing this question to a question of fact, viz. what was the usage here?" In *Stammers* v. *Dixon* (7 East, 200), it was held, that one may hold the prima tonsura of land, as copyhold, and another may have the soil and every other beneficial enjoyment of it, as freehold: and antient admissions of the copyholder and those under whom he claims the land, by the description of "tres acras prati," may be construed only to carry the prima tonsura, if, in fact, they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes,—which was in his own wrong. "The word *close*," said Lord Ellenborough, "imports, in the abstract, the interest in the soil; and, if the defendant only **[485]** make out that he has a partial interest in the land, such as the right primæ tonsuræ, the issue must be found against him. And the evidence shews, that, from all time, the defendant's benefit has been

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(*c*) Phillipps on Evidence, 5th edit., vol. i. p. 547.

confined to the taking the fore-crop (*a*)[1], and that every other benefit of the land has been enjoyed by those from whom the plaintiff claims. We must, then, construe the rights of the parties, however derived from antient grants, consistently with the possession: and there will then exist a copyhold interest in the prima tonsura for the defendant, and every other freehold interest in the land for the plaintiff. But this, it is said, is inconsistent with the entries on the court-rolls, which grant an interest in the soil to the tenant, and were evidence for the jury, to shew in what right the defendant claimed and took the fore-crops. The admissions are, to 'tres acras prati:' but, can it be said that the word *prati* is not open to receive any construction which will carry a less interest than the whole right to the soil? The judge thought, that, if the usage in fact were that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the fore-crop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment: and I think he was right in that opinion. And then he properly put the question to the jury to say how the fact of the enjoyment was: and, when they found that the possession of everything but the prima tonsura had been with the plaintiff, he gave it as his opinion that the word *prati* would admit of such a construction as to pass only the fore-crop to the defendant, and that therefore, notwithstanding those admissions, the jury might find for the plaintiff,—reserving for the **[486]** judgment of this court the simple question of law, upon the legality of such construction. With that direction, so understood, I do not find fault, thinking it substantially right." That case is precisely in point. [Maule, J. The entries before 1745 seem to exclude the wood and underwood, rather than the land.]

The documents that were objected to, and rejected by the learned judge,—the pipe-rolls of the manor of Taunton Deane,—came from the custody of the clerk of the castle. These were tendered as evidence on the ground that they contained accounts in which the deceased reeves charged themselves with moneys received on account of the lord. They were objected to as altogether inadmissible, on account of the custody from which they came, and also on the ground that it did not appear, upon the face of the particular entries, or on any other part of the account, that the reeve acknowledged the receipt of the specific sum for which by the entry he claimed a credit. To render documents of this sort admissible, they must be in some way authenticated: it is not in general enough to shew that the party is dead. As to antient documents, the rule has to some extent been relaxed; but still there must be something upon the face of the document to indentify it as the document which it purports to be: *The Mayor, &c., of Exeter* v. *Warren* (5 Q. B. 773). These accounts do not appear to have been audited, or signed; nor is any balance struck: they are evidently imperfect; and there is nothing upon the face of them,—as there was in the documents tendered in *The Mayor, &c., of Exeter* v. *Warren*,—to shew that they were originals. In Phillipps on Evidence (9th edit., vol. i. p. 310), it is said: "It is a question of considerable importance how far declarations against interest are receivable in respect of matters forming a part of **[487]** the declarations, but not in themselves affecting the interest of the declarant. Where declarations of deceased persons, acknowledging the receipt of money, have been admitted, it appears that they have often been admitted as evidence, not merely of the fact of the deceased having received the money, but also of the circumstances stated as the occasion of the payment" (*a*)[2]. In *Warren* v. *Greenville* (2 Stra. 1129), upon a question whether a surrender to a recovery could be presumed, the book of a deceased attorney was produced, which contained a charge of a sum for suffering a recovery, two items of which related to the drawing of a surrender; and it appeared by the book that the bill was paid: the court held that the entries were admissible evidence, and material upon the inquiry into the reasonableness of presuming a surrender. In *Higham* v. *Ridgway* (10 East, 109), upon a question respecting the age of a person suffering a recovery, an entry made by a deceased accoucheur in his book, of having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, and marked the charge as paid, was held admissible evidence of the time of the child's birth. Lord Ellenborough there said: "The question is, whether the books of a man-

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(*a*)[1] Tenerrima prata subsecuisse. Ov. art. i. 299.

(*a*)[2] See the cases collected in the note to *Barker* v. *Ray*, 2 Russ. 67.

midwife attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries. That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion **[488]** in this case formed with reference to the declarations of parents, &c., received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted, viz. that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case, the party repelled by his entry a claim which he would otherwise have had upon the other for work performed and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made: the date of which is the 22nd of April, when it appears, by other evidence, that the man-midwife was, in fact, attending at the house of William Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied. It is idle to say that the word paid only shall be admitted in evidence, without the context, which explains to what it refers: we must, therefore, look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of, the other entry, of which it is explanatory." That case was much considered in *Davies* v. *Humphreys* (6 M. & W. 153). There, by a promissory note, Evan Humphreys, W. Davies, and John Humphreys jointly and severally promised to pay to John Evans 300l., with interest. W. Davies having afterwards paid John Evans 280l. on account of the note, the latter made the following indorsement upon it:—"Received of W. Davies the sum of 280l. on account of the within note, the 300l. having been **[489]** originally advanced to Evan Humphreys." In an action brought by W. Davies, who had paid the whole amount due, against John Humphreys, to recover contribution from him "as a co-surety," it was held that the indorsement was admissible in evidence to prove not only the payment of the 280l., but also that the money was originally advanced to Evan Humphreys as principal. And Parke, B., in delivering the opinion of the court, said (6 M. & W. 166): "In the case of stewards' books, the receipts of money as rent, would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit; and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it; as in the case of *Higham* v. *Ridgway*, where the memorandum of the payment of the midwife's charge for attending a birth, was held to be evidence of the date of the birth (*b*); and *Doe* v. *Robson* (15 East, 31), where the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn, which the proof by an eye-witness of the same payment on account of such charges, would not have been: and there are many other cases to the same effect. Without overruling these cases (and we do not feel ourselves authorised to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that 280l. was paid by the plaintiff to the payee, as for a debt due from Evan Humphreys as principal, but also of the fact that the debt was due from Evan Humphreys **[490]** to him." The language of the court there pretty strongly intimates that the inclination of judges of the present day is, not to extend the rule. In *Stead* v. *Heaton* (4 T. R. 669), where the question was as to the existence of a customary payment for the repair of a parish church, churchwardens' accounts were produced, in which were the following entries:—"Received of Haworth, who this year disputed this our antient custom; but, after we had sued them, paid it accordingly, 8l., and 1l. for costs." At the head of the same page was written—"It is an antient custom thus to proportion church-lay: first, the chapelry of Haworth pay one-fifth, Bradford a third of the remainder, and the rest to be legally divided accord-

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(*b*) Was held to make the corresponding entry in the other book evidence of the date of the birth.

ing to the churchwardens of the several other townships in the parish. The court were of opinion that the entry of payment was clearly admissible, because the officers thereby charged themselves with the receipt; and that the other entry was admissible because immediately referred to; and that both of them, being written on the same page, and on the same subject, must be taken into consideration together,—being both parts of one and the same transaction, each explaining the other. In *Rudd* v. *Wright* (Cor. Lord Lyndhurst, C. B., Exch., 11th July, 1832; cited 1 Phill. Evid. 9th edit. 314), a survey was tendered in evidence, which had been made for the use of Trinity College, Cambridge, the impropriators of a living of which the plaintiff was vicar, and in this survey certain closes were stated as being titheable to the vicar. Lord Lyndhurst observed, that, although this document would be evidence against the college in a suit between them and the vicar, it would admit of some consideration whether it was admissible in evidence against a third person; but that it was unnecessary to decide that question, because the object of producing **[491]** the survey in evidence arose out of a marginal note to the survey. He thought the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation made by the person who framed the survey; and that it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received. The point was much discussed in *Chambers* v. *Bernasconi* (1 C. M. & R. 347: and see 1 C. & J. 451). By the course of the officer of the sheriff of Middlesex, the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to Wright, a sheriff's officer, to arrest Chambers, Wright arrested him accordingly, and made the following return,—"9th November, 1835. Arrested A. H. Chambers, in South Molton Street, at the suit of W. Brereton;" which return was signed by the officer, and sent by him to the sheriffs' office on the execution of the writ, and was then filed with the writ, according to the course of the office. The writ and certificate were produced by the undersheriff at the trial. In an action brought by Chambers against a third party, it was held that the certificate was not admissible, after the death of the officer, to prove the place where the arrest was made. The case of *Rowe* v. *Brenton* (3 M. & R. 267) does not advance the position for which it was cited. The only portion of the account that was received there was, that by which the receiver charged himself,—upon the principle of its being an entry against the interest of the party making it. The only authority which in any degree tends to shew that the discharging portion of an antient steward's **[492]** or reeve's account is admissible in evidence is, the case of *Bullen* v. *Michel* (2 Price, 399). It was there held, that antient entries made by the monks of an abbey, relating to an endowment by them of a vicarage (whether perfect or not) are evidence (quantum valeant) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects ejusdem generis: and, being admitted, they may be read throughout, for the purpose of proving anything which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognisance of the matter to which it relates. The ground upon which the admissibility of the documents was there rested, can hardly be supported at the present day. The accounts, says Gibbs, C. B., "purport to be accounts of the reeve of the abbey, allowed by the bailiff of the abbey; the reeve receives certain profits of land for the abbey, and he discharges himself by certain sums which he seeks to have allowed in his account, and which the bailiff, on behalf of the abbey, does allow. So that one side of the account (according to the doctrine applicable to such instruments), the charging side, will be evidence, because the reeve charges himself; and the discharging side will be evidence, not only because it is part of the same account, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself; and, in the other case, it is against the bailiff to allow his discharge. Now, the articles of discharge contain certain payments which the reeve insists that he made for the tithes of those lands out of which the profit with which he charges himself arose; and those are tithes of lands within the parish of Newton Sturminster. As far as those accounts go to **[493]** shew that those tithes to which the accounts immediately relate were at that time rendered, we think they are admissible. I use the word 'admissible' studiously:

we do not say that they determine the point, nor do we say (whether they determine the point or not), what effect that ought to have upon the verdict of the jury on the general question; but we think that they are admissible evidence to prove the fact which they purport to announce, viz. that those tithes mentioned in the accounts were paid." [Maule, J. That case also, probably, proceeded upon the ground of the entries being against the interest of the party making them.] *Knight* v. *The Marquess of Waterford* (4 Y. & C. (Exch.) 293), is precisely in point. There, in order to shew that former lords of a manor had been liable for land-tax and poor-rates on tithes, the defendants' counsel proposed to put in certain steward's accounts, containing entries for and against himself, the entries in his favour being in the nature of deductions from those to his debit, but appearing as separate items, though dated about the same time. Thus on one side of these accounts was, "April 16th. Received of Thomas Watson, Esq., for half a year's rent for the corn and petty tithes of Heatherslaw, due at Whitsunday, 1759, 30l." On the opposite side was an entry in discharge of the former item, by payment or allowance to Thomas Watson of 13s. for land-tax and poor-rates on the tithes. The counsel for the defendants contended that this latter entry was receivable; for, that, if, instead of being placed on the opposite page, the 13s. had been merely deducted from the former item, by the use of the words "after deducting 13s.," the entry in that shape would clearly have been receivable in evidence for the defendants, as proof of the balance; and that there could be no difference between receiving one **[494]** entry in that shape, and the two in the manner proposed: and *Stead* v. *Heaton*, *Bullen* v. *Michel*, *Williams* v. *Geaves* (8 C. & P. 592), and *Doe d. Lord Teynham* v. *Tyler* (6 Bingh. 541, 4 M. & P. 377), were cited. But Alderson, B. said: "The payment of the half-year's rent is a simple fact stated. In *Stead* v. *Heaton*, the matter stated referred to something else; it required that other thing to be read, in order to explain the fact as stated. There is a material distinction between the one case and the other. I think *Stead* v. *Heaton* goes to the extreme verge of the law. If, in this case, the sum charged was stated to be a sum less by the deduction on the opposite side of so and so, possibly, according to *Stead* v. *Heaton*, you might have referred to the opposite side. In *Bullen* v. *Michel*, the decision was right, without taking into consideration all the reasons given for it. I think I cannot admit this evidence." And it was accordingly rejected. In *Marks* v. *Lahee* (3 N. C. 408, 4 Scott, 137),—where an entry of a tender and refusal, made by a deceased clerk of the plaintiff's attorney, in a day-book kept for the purpose of minuting his daily transactions, was held to be admissible to prove the tender,—Tindal, C. J., says: "I am unwilling to extend the effect of the decisions on this subject; for, I am sensible how important it is to proceed, if possible, upon evidence given upon oath, and subject to cross-examination. Exceptions to that practice ought to be strictly limited: but the ground on which I consider this entry admissible in evidence is, that I cannot read it without seeing that it does charge the party making it, with the receipt of 100l., for which he was to account to his employer." The circumstance of the two sides of the account being connected with each other, as relating to the same subject-matter, clearly makes no **[495]** difference. In *Prince* v. *Samo* (7 Ad. & E. 627), it was held that a witness who has been cross-examined as to what the plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to which it is proposed to re-examine, be connected with the subject-matter of the suit.

It was in evidence, that the plaintiff granted the very tenement which was the subject of this action, to the defendant, under this very description. It clearly was not competent to him to derogate from his grant.

The rejected evidence merely went to a point which was put to the jury as a matter that was not in contest between the parties, viz., that, at some period or another, the lord was in possession of Haidwood. Even if the evidence was improperly rejected, therefore, that is no ground for a new trial. In *Doe d. Welsh* v. *Langfield* (16 M. & W. 497), it was held,—upon the authority of *Doe d. Lord Teynham* v. *Tyler* (6 Bingh. 541, 4 M. & P. 377), and *Crease* v. *Barrett* (1 C. M. & R. 919, 5 Tyrwh. 458, 475),—that, where evidence tending to establish a point already supported by more direct proof, is improperly rejected, the court will not grant a new trial on that ground, if they see that the case would not have been advanced further by admitting the particular piece of evidence.

There is no pretence for saying that the verdict was against the evidence.

Manning, Serjt. (with whom were Butt and Slade), in support of the rule. The accounts in question were pre-**[496]**-served among the muniments of the manor at the castle of Taunton. [Maule, J. They are a sort of quasi record of the officer of the lord, in which he copied the accounts of the reeves. How would these documents charge the reeve, had he been living?] Coupled with the fact that the reeves were in the habit of accounting annually at the castle, these accounts clearly would be evidence to charge them. In *Brune* v. *Thompson* (Car. & Marsh. 34), in assumpsit for tolls, a computus of a prepositus or reeve, of 33 H. 6, which was brought from the muniment-room of the lord of the manor, and in which the reeve purported to charge himself with the receipt of money,—was held to be admissible in evidence, though not signed, and without any proof of the handwriting. The accounts there were precisely in the same form as the accounts tendered here. [Maule, J. There are cases which shew that entries in which a man charges himself on the one side, and discharges himself on the other, are admissible altogether, where the whole is so incorporated as to shew it to be one entire subject-matter, and where the thing would be otherwise unintelligible; as in the case of the accoucheur,—*Higham* v. *Ridgway*. But the question is, can you read an entry which per se would not be admissible, merely because it accompanies entries that are admissible, where it is not essential to the understanding of that which is legitimate evidence?] In *Williams* v. *Geaves* (8 C. & P. 592), it was held to be no objection to the admissibility of an entry by which a deceased steward charges himself, that the balance of the account is in favour of the steward. In the notes to *Higham* v. *Ridgway*, in Smith's Leading Cases (vol. i. p. 195 b.), it is said: "It was stated, in the commencement of this note, that it seemed to follow from the decision in *Doe* v. *Vowles* (1 M. & Rob. 261) coupled **[497]** with Lord Ellenborough's observations in the principal case, that an entry is not admissible, as against interest, in which a man acknowledges the discharge of a debt, of the existence of which there is no evidence, save from the entry. The same rule, however, even if *Doe* v. *Vowles* be still law, does not necessarily apply to the case of a receiver charging himself with money on one side of an account, and discharging himself upon the other. It is true, indeed, that one part of the entry is for his benefit. Still, he does not entitle himself to any thing positive, as in the former case; and, if he strike a balance against himself at the foot of the account, and acknowledge that balance to be unpaid, the result of the whole is clearly to his disadvantage. But, even if the balance appear to be paid, the case will not be like that of *Doe* v. *Vowles*: since, in an action brought against the receiver by his employer, the entry would be evidence against him, and the jury might, if they thought proper, or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of moneys, and disbelieve the part which went in his discharge; whereas, in *Doe* v. *Vowles*, it would have been impossible to use that part of the entry which militated to the disadvantage of the tradesman, without first positively admitting that which was for his advantage, inasmuch as the receipt assumes the existence of the debt admitted therein to have been received. The question as to the admissibility of such an account, was discussed in *Doe d. Teynham* v. *Tyler*. But it had previously received an express decision during the trial of the great case of *Rowe* v. *Brenton*: the point for which that case is now cited, appears in 3 M. & R. 267. It arose as follows:—Stephen Pearce, a witness, proved that his father was toller to the Lemon family: his memory did not go back so far as 1765; but he produced a book, in his father's handwriting, of that **[498]** year, containing a debtor and creditor account of receipts of (tin-) tolls, and said, that, as far back as his recollection went, his father used to keep similar books. Sir James Scarlett proposed to put in this toll-book; to which Brougham objected, arguing, that 'where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a statement, unless it were true. But, suppose there is, in part of the same document in which the charge appears, a discharge also, which squares the account, or, perhaps, leaves a balance in his favour; then, taking the whole together, charge and discharge, both sides of the account, the reason fails, because it is no longer a declaration by a party against his own interest; it may be a declaration for his own interest,' Littledale, J. 'A man is not likely to charge himself, for the purpose of getting a discharge.' Lord Tenterden, C. J. 'Almost all the accounts that are produced, are accounts on both sides. That objection would go to the very root of that sort of evidence.' The same point has been since decided by Patteson, J., in *Williams* v. *Geares*, upon the ground above taken, where the balance actually was in favour of the person making the entries." One of the earliest cases upon this subject is, *Warren* v. *Greenville* (2 Stra. 1129), where an entry in the book of a deceased attorney, of a charge for suffering a recovery, was admitted to prove that the recovery had been suffered. [V. Williams, J. The entry was made evidence by the admission of payment.] The whole entry was evidence. So, in *Doe d. Reece* v. *Robson* (15 East, 32), entries of charges made by an attorney in his books, shewing the time when a certain lease, prepared for a client of his, **[499]** was executed, and which charges appeared to have been paid (*a*),—were held to be evidence, after the attorney's death, to shew that the lease executed under a power to lease in possession and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term from the 29th of September then next ensuing, was not in fact executed till after the 29th of September, inasmuch as the charge for drawing and ingrossing the lease was under the date of October, 1770. Lord Ellenborough there said: "The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." And Bayley, J., said: "It has long been an established principle, that, if a party who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest." In *Crease* v. *Barrett*, it was held that an entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. In *Lancum* v. *Lovell* (6 C. & P. 443), it was proved that it had been the practice, as long as the witness who was conversant with the subject could remember, for the town-treasurer to furnish the town-clerk with information from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town-clerk's statement: entries in books of that description, commencing with the year 1766, were ten-**[500]**-dered in evidence; some of them were signed by the auditors as allowed, and to some of them appeared only an unsigned entry of their having been examined: it was held that those which were signed by the auditors were admissible, without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing charging himself,—partly on the ground that there was reasonable evidence of his having made the town-clerk his agent for the making out of the accounts. In *Doe d. Bodenham* v. *Colcombe* (Car. & M. 155), it appeared that the rent-rolls of an estate were unsigned, and were drawn out in four columns; the first and second columns, containing the tenants' names, and the amount to be paid by each, were in the hand-writing of the owner of the estate; the third and fourth columns, containing the amount actually received of each tenant, and the date when received, were in the hand-writing of a deceased steward: it was held that these rent-rolls were receivable in evidence, as accounts of a deceased steward, charging himself. The accounts here consisted of entries by which the reeve debited himself with sums received, on the one side, and on the other side shewed how he had disposed of the moneys: they were entire and indivisible, and clearly admissible, according to the rule laid down by Parke, B., in *Davies* v. *Humphreys* (6 M. & W. 153), where that learned judge says that "the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it." Here, the whole account is one simultaneous entry: and there is a direct connexion between the receipt of the lord's money and the application of that money. In *Musgrave* v. *Em-***[501]***-merson* (16 Law Journ., N. S., Q. B., 174), a paper, signed by a deceased steward, charged him with the receipt of a gross sum: in the same box was found an antient rental, in the same handwriting, but unsigned, containing an account of the items which, added together, made up the gross sum with which the deceased steward so debited himself; and it was held admissible. [V. Williams, J. The aggregate of the items on the unsigned paper being the same as that in the account which was signed by the steward, it was held to be

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(*a*) Quære, by a distinct entry of discharge?

sufficiently authenticated. That is all that case amounts to.] In Viner's Abridgment (title Evidence (A. b. 66), vol. 12, p. 131), is an original case to the following effect:—"Bill in chancery by trustees of a charity, to subject an estate to a rent of 3l. 13s. 7d. against the owners of the land, one whereof was lately purchaser, but had reserved money in his hands on account of this rent, though not certain out of what lands it was issuing. Several court-rolls were read, where this rent was mentioned, but not said out of what lands; others mentioned lands in such a place. They read also papers (copies of rentals given to bailiffs to collect by), and read evidence that these bailiffs charged themselves with the sums there mentioned; for, the charge of the bailiff's receipt, that makes these rentals evidence: so the bailiff's accounts. Decree for plaintiff against all defendants, they joining in defence, and it not appearing out of what particular lands the rent was issuing, so no remedy at law. Pasch. 11 G., in Canc." [Maule, J. There is no doubt that entries by bailiffs, charging themselves, are evidence.] In none of the cases is the rule laid down so narrowly as is now suggested. And the doctrine of the court of Exchequer, in *Bullen* v. *Michel*, goes the full length of sustaining the argument. The **[502]** only distinction between the present case and *Higham* v. *Ridgway*, appears to be this:—There, the item favourable to the accountant was received in evidence, because, in the same account, he admitted that the item had been discharged by direct payment by the employer. Here, it was sought to support the favourable item, by shewing that the accountant had admitted that it was discharged by indirect payment, viz. by the receipt of the amount from the employer's debtors,—a distinction which *Rowe* v. *Brenton* (supra, 497, 498) and the other cases cited shew to be a distinction in form only—a distinction without a difference. If this had been a proceeding to which the reeve was a party, it might have been fairly said that an entry made by the reeve in his own discharge could not, except under special circumstances, be evidence for him. But the argument on the other side is, that there are here no special circumstances to make the entry evidence for the reeve. If so, he could have no motive for making the statement, unless that statement were warranted by the fact. It is the very case adverted to by Lord Ellenborough (supra, 499), of absence of interest to pervert, with competency to know, the fact. The disposition of the courts, as well as of the legislature, has been, of late, to widen the door for the admissibility of evidence,—trusting to the discretion of judges and juries in using due caution with regard to the circumstances which may affect the weight of the evidence. Here, the court is invited to take a backward step, and to reject evidence the cogency of which cannot be doubted.

The entries in question were admissible on another ground, viz. that they were accounts kept by a servant in the ordinary course of his employment: *Price* v. *The Earl of Torrington* (1 Salk. 285. 1 Smith's Leading Cases, 139); *Doe d. Patteshall* v. *Turford* (3 B. & Ad. 890). **[503]** [Maule, J. In all those cases, the entry was part of the transaction it purported to record. Of the same order is the presumption that a letter has been posted, where the ordinary course of business in an office would be so to do.] *Poole* v. *Dicas* (1 N. C. 649, 1 Scott, 600) is a case of the same description. There, a bill became due, and was left with a notary to demand payment; M., the notary's clerk, went out, returned, and, in one of the notary's books, into which the bill had been previously copied, wrote in the margin "no effects;" another clerk made a similar entry in another book, from M.'s dictation: all this was done in the regular course of business: the court held, that, after the death of M., the entry made by him was admissible to prove the dishonor of the bill. And Tindal, C. J., said: "We think it admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to misstate what had occurred. [Maule, J. Your argument would make every banker's or tradesman's ledger evidence to prove every entry contained in it. The true ground upon which the cases you cite proceeded, was, that the entry and the act recorded by it were contemporaneous.] Here, the entry of the charge and the entry of the discharge are contemporaneous acts.

The accounts are admissible upon another ground, viz. that almost all of those which were rejected have a quietus attached, which operates as an admission by the lord, charging himself, and discharging the reeve. This was discovered since the trial, by comparing the faint traces remaining, with the rolls of other hundreds, in which the quietus was more perfect. [Cresswell, J. You can hardly have a new trial upon that ground.]

It is further submitted that these rolls possess a public character, which makes them evidence.

[504] The learned judge was clearly wrong in leaving the construction of the antient grants to the jury. And, if there be any variation introduced by the change of language in the evidences of title, they must be construed with reference to the lord's duty, to admit to the immemorial customary tenement.

The lord is not estopped by the form of the last entry, in passing which he acted ministerially only.

The lord claims the subsoil, subject to the right of the customary tenant of the pastura, in the surface. He claims also the trees and a sufficient portion of the surface, as well as of the subsoil, for their nourishment. If he is entitled to either of these, there should have been a verdict, pro tanto, for his lessee, the plaintiff.

COLTMAN, J. The first question in this case turns upon the meaning of the words "pastura bosci et subbosci de Haidwood," in the antient documents that were given in evidence. The defendant starts with this circumstance in his favour, viz. that the enjoyment of the land, as far back as living memory goes, has, under this description, been of the nature and to the extent which he now claims. The modern usage is uniform, that the tenants, on admittance by the description of the "pasture, wood, and underwood of Haidwood," since the statutes requiring records, &c., to be written in the English language, have claimed and enjoyed the land itself, and not the pasturage only. It is impossible to suppose that the parties $(a)^1$ did not at this time know what was the nature and extent of the enjoyment intended to pass by that description. And, if the modern entries are capable of being so construed, I think the terms of the antient entries may admit of the same construction. Contemporaneous usage may be resorted to for the purpose of explaining any uncer-[505]-tainty or ambiguity in antient grants. I entirely agree with my brother Manning, that the words of the old entries here,—pastura bosci et sub bosci,—might mean the pasture of the wood and underwood only. But I think they are clearly also susceptible of a construction that will carry the land itself. That being so, evidence was offered, and received, to shew, by contemporaneous $(a)^2$ and uniform usage, how those words had been understood and dealt with: and, that evidence being admitted, it then became a question for the jury. The evidence on the one side consisted of the reeves' accounts shewing the receipt, by the lord of the manor, of profits in the woods and underwoods in question: and, on the other side, there was evidence of user inconsistent with the lord's claim to the land, and with the construction now sought to be put upon the antient entries, by the lessor of the plaintiff. The documents having been admitted, it seems to me that the whole might properly be submitted to the jury, in order to lead them to the right construction of those words "pastura bosci et subbosci," in the antient grant: and considering the long and uninterrupted enjoyment of the land by those claiming under that grant, I think the jury would have come to an unreasonable conclusion, if they had found any other verdict than that which they did.

The next question is, whether the pipe-rolls of the manor which were offered in evidence on the part of [506] the lessor of the plaintiff, and which were rejected, were properly admissible. It has been contended, that, not only the charging part, but also the discharging part of the reeves' accounts which these rolls contained, were admissible: and for this the case of *Bullen* v. *Michel* is mainly relied upon,—where Gibbs, C. B., is reported to have said $(a)^3$ that "one side of the account,—the charging side,—will be evidence, because the reeve charges himself; and the discharging side

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$(a)^1$ At Taunton, not at Winchester.

$(a)^2$ Quære, the period to which this term is applied,—to the time when the lord converted the soil into bricks, and, by the agency of antient customary officers of the manor, called woodwards, receiving an immemorial customary fee, cut the wood and underwood (in this manor all timber, as well as underwood, belonging to the customary tenant of the land,)—or to the later period when the sub-officer appointed by the patentee for life of the predecessor of the absent bishop, and acting as attorney of the customary tenant, had fraudulently, or carelessly, enlarged the customary estate by a mistranslation?

$(a)^3$ It was the long-considered, written judgment of the court of Exchequer (Gibbs, C. B., Wood, B., Thompson, B., and Graham, B.), expressly recognised afterwards will be evidence, not only because it is part of the same account, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself, and, in the other case, it is against the bailiff to allow his discharge." It is clear that what the lord chief baron (*a*)[1] there mainly relies on is, the fact of the bailiff's admitting the correctness of the account. He did not sufficiently advert to the distinction between the production of the accounts in an action against the party himself, and using them as evidence against a third person (*b*). In the latter case, the ground of admissibility is a special one; the reeve has no interest in speaking falsely, when he is charging himself; but it is obviously his interest to falsify the account quoad the discharging part of it (*c*). This matter was considered in **[507]** *Knight* v. *The Marquess of Waterford*, where Alderson, B., observes, with respect to *Bullen* v. *Michel*, that "the decision was right, without taking into consideration all the reasons given for it." In that case, the learned baron expressly decided (*a*)[2] that the charging part of the account might be read, but not the discharging part: and I think that decision was right. Where the charging part of the account refers to the discharging part, it may be necessary to read the whole. So, where the latter contains any thing explanatory of the former, that may render the whole account admissible. But that is not the case here.

A further ground upon which it was suggested that the accounts were admissible was, that the entries purported to be made by the party in the course of his duty. That, however, was disposed of in the course of the argument, because the entries did not appear to have been made contemporaneously with the payments.

The next ground upon which the documents were contended to be receivable was, that they contained admissions by the lord against his own interest, coming, as they did, from the lord's muniment-room. But it was not with that view that the documents were tendered at the trial: they were tendered simply as the reeve's accounts, in which the reeve charged himself. If it had been put at the trial on the ground of an admission by the lord, adverse to his own interest, that would have led to a totally different inquiry.

There is no ground for saying that these rolls were admissible as public documents. **[508]** For these reasons, it seems to me that this rule ought to be discharged.

MAULE, J. I am of the same opinion. The alleged misdirection arises from the learned judge having left it to the jury to say, whether, taking the usage into consideration, the words "pastura bosci et sub-bosci de Haidwood," in the original grant, were intended to pass the land. There was evidence, that, as far back as living memory could reach, the land had been claimed and enjoyed under that description (*a*)[3]. The words used in old copyhold admissions, which are usually the same age after age, have in the course of time become simply names, like the names of persons or of places. It was quite competent to the parties originally to designate this interest which the evidence shewed had been immemorially enjoyed, "pastura bosci et sub-bosci." And I think the learned judge was quite right in leaving it to the jury as he did; and that their conclusion was just.

As to the rejection of evidence, the case stands thus: The documents in question were offered as accounts rendered by a reeve to his lord, in which the reeve charged

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by Thompson when C. B., and by Richards, B., and affirmed by the House of Lords. It is true that the affirmance in Dom. Proc. did not, like the recognition by Thompson, C. B., and Richards, B., refer to the written, and then printed, judgment: but no disapprobation of any part of that judgment was expressed.

(*a*)[1] See note (*a*)[3], supra, page 201.

(*b*) There is nothing in the report to shew that the court took into its consideration the effect of the production of the account as against the accountant,—an inquiry wholly foreign to the question there argued.

(*c*) See the observation of Littledale, J., supra, 498. The decision on the trial at bar in *Rowe* v. *Brenton* was not noticed in the judgment in the principal case.

(*a*)[2] The decision, in which the learned baron, without hearing any argument on the point, summarily disposed of the deliberate judgment of the court of Exchequer in *Bullen* v. *Michel*, took place in a short conversation which occurred in the course of the argument, and had probably been forgotten long before the written judgment of the same learned judge, in which the point is not noticed, came to be prepared.

(*a*)[3] The last entry with that description was in 1715.

himself. There was no suggestion at the trial that the account was admissible on the ground that the lord, by admitting the propriety of the account so rendered, had charged himself: and it would be manifestly unjust to allow that ground to be taken now, seeing that, if it had been so put then, it might have been explained. The question, then, is, whether items in that account, in which the reeve charges the lord, and not himself, are to be admitted as evidence, merely because there are items on the other side of the account that are admitted. The principle upon which entries and declarations by deceased persons are held admissible, is **[509]** this:—As a general rule, declarations not upon oath, are not received: but an exception is made in favour of admissions, which, being against the interest of the party making them, it could not have been supposed would have been made, if contrary to the truth. That exception applies to the case of entries whereby a party charges himself with the receipt of money for which he has to account; but it manifestly does not apply to entries in discharge of the party making them. It may be that a person, in charging himself, makes a declaration which is not intelligible without looking at the other side of the account; and, in that case, recourse must necessarily be had to both sides. Such was the case of *Higham* v. *Ridgway*,—where an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had entered a charge for his attendance, which was marked "paid," was held to be evidence upon an issue as to the age of such child at the time of its afterwards suffering a recovery. It could not be supposed that the accoucheur would have acknowledged the receipt of his fee, unless the thing had really happened; and he clearly had no interest in falsifying the fact. I entirely concur in the remark made by Alderson, B., in *Knight* v. *The Marquess of Waterford*, upon the judgment of Gibbs, C. B. (vide supra, 506 (*a*)), in *Bullen* v. *Michel*. There (in *Bullen* v. *Michel*), the question was as to the admissibility of certain items in accounts stated by the reeve of the abbey of Glastonbury, and allowed by the bailiff or steward. Those accounts were receivable upon a perfectly unquestionable ground, viz. the admission of the bailiff. The other ground adverted to by the chief baron (vide supra, 506 (*a*)),—that the items of discharge formed part of the same account **[510]** with those by which the reeve charged himself is, to say the least of it, extremely doubtful. I think, therefore, that the items of discharge in the accounts in question, which were not referred to in, or necessary to explain, the items of charge, which were admitted and read, were properly rejected. The presumption that these entries are false, is at least as strong as the presumption that the others are true.

As to the suggestion that these accounts were admissible as part of the res gestæ, I do not feel it to be necessary to make any remark. Nor do I think they were receivable on the ground which makes public documents receivable. Upon the whole, the conclusion I have arrived at is, that the rejection of them was perfectly right.

The result of the evidence properly admitted, was, that, as far back as can now be inquired into, the land in question has passed by the same terms as it now passes by,—or by other terms less favourable to the possessor. I do not think that the circumstance that the lord might, at some very distant period, have enjoyed some small profit out of the woods of Haidwood, is at all inconsistent with the right of the copyholder to the soil (*a*), or that it ought to be permitted to outweigh all the other evidence in the cause. I think the verdict would clearly have been wrong, if found the other way.

[511] Cresswell, J. I am entirely of the same opinion. I understand my brother Manning to found his claim to a new trial on this,—that the land in question was copyhold of the manor of Taunton Deane, and that by the admission of

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(*a*) It is not necessary to the purity of a customary estate that it should have been always customarily demised. It is sufficient if it has been always customarily demisable. The mere possession and perception of profits by the lord for ever so long a period, might not, therefore, of itself be very material, and, at all events, would not be conclusive, in the absence of any evidence that, at the time of the exercise of those acts of ownership on the part of the lord, the pastura bosci et sub-bosci de Haidwood was in the actual tenure of a customary tenant. But the existence of immemorial woodwards, receiving an immemorial customary fee for the superintendence of this wood, on behalf of the lord, is hardly reconcileable with the perpetual customary demisability of the wood.

the tenant thereto a limited interest only was granted, viz. the pasturage, and not the land itself. He insists, that, although the language of the admission may seem to include the land, in truth it was not so intended; and that the lord had no power to make a new grant. A great many entries were read from the court-rolls of the manor, for the purpose of explaining what was meant by the words "pastura bosci et subbosci de Haidwood;" and contemporaneous evidence of the mode of enjoyment was also given. It has been insisted that the learned judge was wrong in putting this to the jury. But I apprehend the antient grant was fairly susceptible of the construction now put upon it on the part of the defendant: the words might have been intended to describe the land itself, or the interest meant to be conveyed. And there is abundant authority to shew that evidence of contemporaneous (*a*)¹ usage may be received for the purpose of explaining ambiguous terms in a grant. Thus, in *Wadley* v. *Bayliss* (5 Taunt. 752), it was held that evidence of contemporaneous acts of the occupiers of the land, might be received to explain an ambiguous award of a road under an inclosure act. So, here, evidence of the course of enjoyment of the land under subsequent admissions in the same form (*c*), was clearly admissible, to explain what was meant by the original grant. The evidence shewed, that, as far back as living memory extended, the customary tenants admitted to the tenements in question, enjoyed the land itself: and we must presume that they so enjoyed it at the time of the passing of the statutes **[512]** changing the language of records. There is every reason for believing that the enjoyment was the same in antient as in more modern times.

But it is said that the learned judge should not have left it to the jury to say what was the meaning of the terms used in the original grant, but should have taken upon himself to construe it,—inasmuch as that course deprived the plaintiff of the opportunity of tendering a bill of exceptions (*a*)². In substance, the learned judge directed the jury to find for the defendant if they thought that the original grant, explained by the evidence of usage, was intended to convey the land. If the counsel for the plaintiff meant to insist that evidence of usage was not admissible, there was nothing to prevent them from tendering a bill of exceptions.

With respect to the question of evidence, I entirely agree with what has fallen from my brother Coltman and my brother Maule. The principle upon which entries made by deceased stewards and other persons are held to be admissible is, that they are admissions against the interest of the parties making them, and are therefore to be presumed to be true (*b*). Here, the reeve's accounts were admitted to the extent to which he purported to charge himself. But then it was said, that, the reeve's admissions of the receipt of money having been received, the accounts were also to be looked at for the purpose of seeing how he had disposed of the money. That, however, is a totally different matter. The statements on the one side and on the other may be so blended together that the one cannot be read without the other: but it does not follow, that, in all cases, the entire account must be read. If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it **[513]** may be evidence. The manner in which the reeve disposed of money that had come to his hands, clearly was not necessary to explain his admission of its receipt. The circumstance of the expenditure being said to have been made in respect of the same wood of Haidwood, and so part of the res gestæ, clearly makes no difference in principle.

With respect to the custody from which these documents came,—it is enough to say that that was not a ground urged at the trial, and therefore it cannot avail now.

It has also been said, that, inasmuch as some of these accounts contain a quietus,—a fact that had not been discovered at the time of the trial,—they were admissible as declarations by the lord against his own interest. If that had been proved at the trial, and their admissibility had been put upon that ground, possibly they would not have been objected to. At the best, the plaintiff is now in the situation of having discovered new evidence; as to which there are two inflexible rules,—first, that the

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(*a*)¹ Supra, 505 (*a*).

(*c*) No objection could have been taken to such evidence, if it had been offered, which was not done.

(*a*)² If the objection had taken this form, it would have been met by the fact that a bill of exceptions was tendered.

(*b*) Vide infra, 497, 498.

evidence so discovered be material evidence,—secondly, that it be of such a nature as that the party could not with reasonable diligence have obtained it before. Now, here, the rolls were in the possession of the plaintiff himself (*a*)[1]. He is, therefore, not entitled to any indulgence.

As to these documents being admissible on the ground of their possessing a public character, there is neither principle nor authority for that.

Upon the whole, I think that the direction was right, **[514]** that the rejected evidence was properly rejected, and that the jury came to a right conclusion.

V. Williams, J. I am of the same opinion. As to the misdirection,—I understand the jury to have found that "pastura bosci et sub-bosci de Haidwood" was, in effect, the name by which the land itself was designated in the original grant (*a*)[2]. It was the same as if they had found that it was known and described as "Haidwood-Grove pasture." And I think that the case was properly left to the jury, and that they were fully warranted in coming to that conclusion.

As to the rejection of evidence, I am of opinion that the ruling (*b*) in *Knight* v. *The Marquess of Waterford*, ought to govern this case. It seems to me that the doctrine laid down by the court of Exchequer, in *Davies* v. *Humphries*, upon the authority of *Higham* v. *Ridgway* and *Doe* v. *Robson*,—that "the entry of a payment against the interest of the party making it, is to have the effect of proving the truth of other statements contained in the same entry, and connected with it,"—has gone quite far enough. I, for one, do not feel inclined to carry it any further.

For these reasons, I concur with the rest of the court in thinking that this rule ought to be discharged.

Rule discharged.

[515] Robert Smith, Secretary to the New British Iron Company, v. William Kenrick. Feb. 14, 1849.

[S. C. 18 L. J. C. P. 172; 13 Jur. 362. Distinguished, *Humphries* v. *Brogden*, 1850, 12 Q. B. 754. Approved, *Baird* v. *Williamson*, 1863, 15 C. B. (N. S.) 392; *Rylands* v. *Fletcher*, 1868, L. R. 3 H. L. 330. See *Smith* v. *Fletcher*, 1872, L. R. 7 Ex. 311; L. R. 9 Ex. 64. Discussed, *Crompton* v. *Lea*, 1874, L. R. 19 Eq. 126. Distinguished, *Humphreys* v. *Cousins*, 1877, 2 C. P. D. 243. Referred to, *Angus* v. *Dalton*, 1878-81, 4 Q. B. D. 196; 6 App. Cas. 740; *West Cumberland Iron and Steel Company* v. *Kenyon*, 1879, 11 Ch. D. 785. Distinguished *Attorney-General* v. *Tomline*, 1879-80. 12 Ch. D. 227; 14 Ch. D. 63. Not applied, *Whalley* v. *Lancashire and Yorkshire Railway Company*, 1884, 13 Q. B. D. 140. Discussed, *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*, [1899] 2 Ch. 254. Referred to, *Salt Union* v. *Brunner*, [1906] 2 K. B. 832. Discussed, *Greyvensteyn* v. *Hattingh*, [1911] A. C. 359.]

Semble, that it is the right of each of the owners of adjoining mines,—where neither mine is subject to any servitude to the other,—to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour.—The plaintiff was possessed of a colliery, called A., and the defendant of a colliery adjoining, called B., which was upon a higher level than A. Before the defendant became possessed of colliery B., one Jones, who then held it,—but between whom and the defendant it was found, as a fact, that there was not any privity, either of contract or of estate,—made three large holes, called thyrlings, in and through a vertical seam of coal, part of colliery A., and

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(*a*)[1] The rolls were, in fact, in the possession of the lessor of the plaintiff, he happening to be grantee for life of the office of clerk of the castle of Taunton, although no evidence to that effect was given. What appeared at the trial was, that the lessor of the plaintiff was the alienee in fee of that part of the manor of Taunton Deane which was situate within the hundred of Holway.

(*a*)[2] The objection made, was, that such partial views of the evidence had been presented to the jury, as necessarily led them to that conclusion, whether warranted by the entire evidence or not.

(*b*) Vide supra, 507.

forming a barrier between the chambers in colliery A. and those in colliery B. At the time the defendant first became the occupier of B., there was a large subterranean body of water therein, which communicated with, and was fed by, springs in the neighbourhood. This water was on a higher level than the chambers of B., and separated from them by a thick horizontal bar of coal which was part of colliery B. The chambers of B. were on a higher level than the thyrlings above mentioned, and the thyrlings were on a higher level than the chambers of A.; and, consequently, the effect of removing the horizontal bar of coal in B. necessarily was, that the water above mentioned would, of itself, flow into the chambers of B., and that a large portion thereof would also flow on of itself from the chambers of B., through the thyrlings, into the chambers of A. The defendant, knowing that the thyrlings were then open, and that the effect of removing the horizontal bar of coal in B. would be as above stated, nevertheless did remove the same, for the purpose of obtaining the coal, and so working his mine in the manner most advantageous to himself. In consequence of the removal of this horizontal bar of coal in B., the water flowed into the chambers of B., and thence, through the thyrlings, into the chambers of A., and inundated the same:—Held, that the defendant was not responsible for the injury so occasioned.

This was an action on the case, in which the New British Iron Company,—who are incorporated by act of parliament (7 & 8 Vict. c. xxx.), and sue by their secretary and registered public officer, were the real plaintiffs,—to recover damages against the defendant for wrongfully **[516]** omitting to prevent water from flowing through his mine into the mine of the company; and also for wrongfully causing water to flow from his mine into the mine of the company.

The first count of the declaration stated, that, on the 1st of January, 1840, there were, and thence during all the time in that count mentioned, there had been, and still were, two collieries, with the appurtenances, respectively situate under ground, and adjoining one another, at the parish of Ruabon, in the county of Denbigh,—one of the said collieries being a colliery called the Plas Bennion Colliery, and the other of the said collieries being a colliery called the Avon Eitha Colliery, and the said colliery called the Avon Eitha Colliery, being a colliery situate on a higher level than the said colliery called Plas Bennion, and both the collieries being collieries which, during all that time, contained mines of coal and other minerals, and the said colliery called the Plas Bennion Colliery being a colliery which, during all that time, contained divers and very many chambers, which had been theretofore formed under ground in the said colliery called Plas Bennion, by excavations made therein for the purpose of extracting coal and other minerals, from the said mines therein, and divers and very many of the said chambers in the said colliery called Plas Bennion being during all that time bounded, at the eastern extremity of the said colliery called Plas Bennion, by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of, the said colliery called Plas Bennion, and the said part of the said vein or seam of coal so forming and being the eastern extremity of the said colliery called Plas Bennion, being a part of the said colliery called Plas Bennion which during all that time separated the said chambers so formed under ground in the said colliery called Plas Bennion from, and formed a wall or **[517]** barrier between them and certain other chambers which during all that time were in the said colliery called Avon Eitha,—the last-mentioned chambers, so being in the said colliery called Avon Eitha, being chambers which theretofore had been formed in the said colliery called Avon Eitha by excavations theretofore made therein for the purpose of extracting coal from the veins or seams of coal in the said colliery called Avon Eitha: That, on the day and year last aforesaid, the said company became and were, and thence always before and up to and at the times of the committing of the grievances, and of the happening of the damage, thereinafter in that count mentioned, and at and during all the times thereinafter in that count mentioned, continued to be and were, and still remained, possessed of the said colliery called Plas Bennion: That, while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1840, certain persons, to wit, Evan Jones and divers and very many other persons, were, and thence up to a certain other day, to wit, the 2nd of December, 1844, continued to be, and were, possessed of the said colliery called Avon Eitha: That, while the said Evan Jones and the said other persons were so possessed of the said colliery called Avon Eitha, and while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1844, and on divers and very many other days and times between that day and the time when the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha, the said Evan Jones and the said other persons so possessed of the said colliery called Avon Eitha, with force and arms, and against the peace of our lady the Queen, unlawfully and injuriously broke and entered the said colliery called Plas Bennion, and made divers, to wit, three large holes, called thyrlings, in the said **[518]** vein or seam of coal, so being part of the said colliery called Plas Bennion, and forming the eastern extremity thereof, and also extracted and detached from the said seam or vein of coal, so forming the eastern extremity of the said colliery called Plas Bennion, divers and very many large quantities of the coal thereof, and whereof the same consisted: That, after the making of the said holes, to wit, on the day and year last aforesaid, the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha; and thereupon, afterwards, to wit, on the day and year last aforesaid, the defendant became, and thence always before and up to and at the time of the committing of the grievances and of the happening of the damage thereinafter in that count mentioned, and at all the times and during all the time thereinafter in that count mentioned, continued to be and was, and still remained, possessed of the said colliery called Avon Eitha: That, at the said time when the defendant so became possessed of the said colliery called Avon Eitha, and thence continually up to and at all the times and during all the time thereinafter in that count mentioned, the said quantities of coal so extracted and detached from the said part of the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion, remained and were so extracted and detached therefrom, and the said holes so made in the said part of the said vein or seam of coal of and belonging to the said colliery called Plas Bennion, and forming the eastern extremity thereof, remained and were so made in the said colliery called Avon Eitha, and were not in any manner stopped up or filled up: * That a long time before and at the respective times of the said company, and the said Evan Jones and the said other persons, and of the defendant's, becoming respectively possessed of the said collieries respectively as **[519]** aforesaid, and thence up to and at the time of the committing of the grievances and of the happening of the damage thereinafter in that count mentioned, and at the times and during all the time thereinafter in that count mentioned, there was a large subterranean body or accumulation of water, of great depth and extent, lying and being on a higher level than the said collieries respectively called Plas Bennion and Avon Eitha, and being nearer to the said colliery called Avon Eitha than to the said colliery called Plas Bennion,—the said colliery called Avon Eitha lying between the said body or accumulation of water and the said colliery called Plas Bennion,—the said body or accumulation of water having at all times before and up to and at the time when a passage for the same into the said colliery called Avon Eitha was opened and formed in the manner thereinafter in that count mentioned, been separated from and kept out of the said colliery called Avon Eitha, by part of a vein or seam of coal, and by other substances interposed and lying and being between the said colliery called Avon Eitha and the said body or accumulation of water: That, at all times after the committing of the said acts by the said Evan Jones and the said other persons so possessed of the said colliery called Avon Eitha, and before and at the time when the defendant cut and removed, in the manner thereinafter in that count mentioned, from the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time when a passage for the said water into the said colliery called Avon Eitha was opened and formed, in the manner thereinafter in that count mentioned, the said colliery called Plas Bennion, and the chambers thereof, were, by reason of the said acts so committed by the **[520]** said Evan Jones and the said other persons, and by reason of the position of the said body or accumulation of water in relation to the said collieries called Avon Eitha and Plas Bennion respectively, and by reason of the position of the said colliery called Avon Eitha in relation to the said colliery called Plas Bennion, liable and likely to be inundated, in the event of a passage for the said body or accumulation of water, being opened or formed in the said part of the said vein or seam of coal and the said other substances so separating the same from the said colliery called Avon Eitha, by the said water descending and pouring down through such passage into the said colliery called Avon Eitha, and thence flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers thereof: That, but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, as it was before the making of the said holes, and before the detaching and extracting the said coal therefrom, would at all times after a passage was opened and formed for the said water into the said colliery called Avon Eitha, in the manner thereinafter in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water,—which was thereinafter in that count mentioned to have run and flowed into the said colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal **[521]** so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the chambers thereof,—from so flowing through the said holes, and from so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Avon Eitha: That, of all the premises the defendant,—before and at the times when the defendant cut and removed, in the manner thereinafter in that count mentioned, the coal and other substances from the said part of the said vein or seam of coal so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and at all the times, and during all the time, thereinafter in that count mentioned, and always,—had notice and knowledge: That, by reason of the premises thereinbefore in that count mentioned, the defendant of right ought to have refrained from committing the grievances thereinafter in that count mentioned: Yet that the defendant, well knowing the premises, but, contriving and intending to injure the said company, afterwards, and after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coals had been so extracted and detached therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company were possessed of the said colliery called Plas Bennion, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times between that day and the commencement of this suit, while the said holes remained and were in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coal had **[522]** been so detached and extracted therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company was possessed of the said colliery called Plas Bennion, wrongfully, unlawfully, improperly, and injuriously cut and removed away from the said part of the said vein or seam of coal and the said other substances so separating the said body or accumulation of water from the said colliery called Avon Eitha, and forming a barrier between the same and the said body or accumulation of water, divers and very many large quantities, to wit, 100,000 tons, of the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water; whereby, afterwards, to wit, on the day and year last aforesaid, a passage for the said water was opened and formed, and thence continually for a long space of time, to wit, thence to the time of this suit, continued open, through the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, into the said colliery called Avon Eitha: That the defendant, well knowing the premises, and contriving and intending to injure the said company, at the said time of the cutting and removing of the said coal and other substances from the said part of the said vein or seam of coal and other substances so separating the colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time of the said passage for the said water being opened and formed through the said last-mentioned vein or seam of coal and other substances.

and thence continually up to and at the several times thereinafter in that count mentioned, wrongfully, carelessly, un-[523]lawfully, negligently, injuriously, and improperly worked, managed, and kept the said colliery called Avon Eitha, and wrongfully, unlawfully, and improperly, carelessly, and injuriously neglected to take reasonable and proper means to prevent, and wrongfully and improperly, unlawfully, and injuriously neglected to prevent, and did not prevent, the said water which was thereinafter in that count mentioned to have flowed from the said colliery called Avon Eitha, into the said colliery called Plas Bennion, through the said holes, and which was thereinafter in that count mentioned to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, in the manner thereinafter in that count mentioned, from so flowing through the said holes, and so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, as thereinbefore mentioned: That, by means of the several premises, afterwards, to wit, on the day and year last aforesaid, and on divers and very many other days between that day and the commencement of this suit, divers large quantities of the said body or accumulation of water ran and flowed into the said colliery called Avon Eitha, through the said passage so opened and formed in the said part of the said vein or seam of coal and other substances which so, before the forming and opening of the said passage, separated the said colliery called Avon Eitha from, and formed a barrier between it and the said body or accumulation of water; and divers large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, ran and flowed from the said colliery called Avon Eitha into the said colliery called Plas Bennion, through the said holes so being in the said [524] part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion; and divers other large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers therein; by reason and means whereof * * the said colliery called Plas Bennion, and the chambers thereof, were, afterwards, to wit, on the days and times last aforesaid, inundated and filled by and with the said water which so flowed through the said holes, and penetrated and permeated through the said part of the said vein or seam of coal so forming the easterm extremity of the said colliery called Plas Bennion; and by reason thereof the said company, afterwards, and before the commencement of this suit, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion, and from enjoying and working the said colliery called Plas Bennion, in so extensive, complete, beneficial, and convenient a manner as they otherwise might and would have done; and, by reason of the premises, afterwards, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times after the said colliery called Plas Bennion, and the chambers thereof, had been so inundated and filled with water, and before the commencement of this suit, to wit, at the several days and times last aforesaid, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Bennion, and the said chambers thereof, the [525] said water wherewith the same had been so inundated, and, in so doing, were put to great expense, to wit, to the amount of 2000l.

The second count was similar to the first, as far as the asterisk in p. 518: it then proceeded to state—That, by reason of the committing of the said acts by the said Evan Jones, and the said other persons so possessed of the said colliery called Avon Eitha in that count mentioned, the said colliery called Plas Bennion in that count mentioned, and the said chambers so formed therein, were at all times after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, and had at all times after the committing of the said acts been liable to be, and still by reason of the said acts were liable to be, inundated, on occasions of water being introduced into or being in the said colliery called Avon Eitha in that count mentioned, by such water flowing through the said holes, and penetrating and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned: That, but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, as it was before the making of the holes, and before the detaching and extracting of the said coal therefrom, would, at the times when water was introduced into the said colliery called Avon Eitha in that count mentioned, as thereinafter in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water which was thereinafter mentioned to have been introduced into the **[526]** said colliery called Avon Eitha in that count mentioned, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, from so flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned: That, by reason of the defendant's possession of the said colliery called Avon Eitha in that count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion in that count mentioned, and by reason of the matters and things in that count mentioned, the defendant, during all the time while he was possessed of the said colliery called Avon Eitha in that count mentioned, of right ought to have prevented, and still of right ought to prevent, the water from time to time introduced by the defendant into, and caused by the defendant to be in, the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, during the defendant's possession thereof, from flowing through the said holes into the said colliery called Plas Bennion in that count mentioned, and the said chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and the chambers thereof: That, of all the premises, the defendant always had notice and knowledge: Yet that the defendant, well knowing the premises, but contriving and intending to injure the said company, after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called **[527]** Plas Bennion in that count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the said company were possessed of the said colliery called Plas Bennion in that count mentioned, to wit, always from the said time of the defendant's so becoming possessed of the said colliery called Avon Eitha in that count mentioned, to the time of the commencement of this suit, wrongfully, maliciously, unlawfully, and injuriously introduced into, and caused to be in, the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, divers and very many large quantities of water: and the defendant, further contriving, and wrongfully and maliciously intending to injure the said company, afterwards, and after the said holes had been so made, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company were so possessed of the said colliery called Plas Bennion in that count mentioned, and while the said holes so remained and were continued by the defendant, and before the same had been stopped up, and after the said water had been so introduced into, and while it was in, the said colliery called Avon Eitha in that count mentioned, and the chambers so formed in the said colliery called Avon Eitha in that count mentioned, to wit, on the said several days and times when the said water was so introduced into, and while it was in, the same chambers, and from those times respectively to the time of the commencement of this suit, wrongfully, unlawfully, maliciously, and in-**[528]**-juriously omitted to prevent the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the said chambers so formed therein, from flowing from the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, through the said holes, into the said colliery called Plas Bennion in that count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the chambers thereof; and that, by means and in consequence of the premises in that count mentioned, to wit, on the several days and times when the said water had been so introduced into, and was in, the said colliery called Avon Eitha in that count nentioned, and the said chambers so formed therein, and on divers and very many other days and times after those days and times respectively, and before the commencement of this suit, divers large quantities of the water so introduced into, and being in, the said colliery called Avon Eitha in that count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha in that count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and into the said chambers so made in the said colliery called Plas Bennion in that count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, penetrated and permeated through the said part of the same vein [529] or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the chambers so formed therein; and that the defendant, further contriving, and wrongfully and maliciously intending to injure the said company, afterwards and after the said holes had been so made as aforesaid, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company was possessed of the said colliery called Plas Bennion in that count mentioned, and before the commencement of this suit, to wit, on the several days and times last aforesaid, wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other very large quantities of the said water so introduced into, and being in, the said colliery called Avon Eitha in that count mentioned, and the chambers thereof as aforesaid, to flow, and the said last-mentioned quantities of the said water, at those times were, on those days and times, thereby made to flow, and, on those days and times, did flow, through the said holes into the said colliery called Plas Bennion in that count mentioned, and the said chambers thereof; and wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last-mentioned quantities of water, at the said last-mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity of the said colliery called [530] Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the said chambers so formed therein: That, by means thereof, &c., as in the first count from the double asterisk in p. 524 to the end.

The defendant pleaded,—first, not guilty, to the whole declaration.

Secondly, thirdly, fourthly, fifthly, sixthly, seventhly, and eighthly, pleas respectively putting in issue the several allegations in the first count.

Ninthly, that the said chambers in the said colliery called Plas Bennion in the second count mentioned, were not bounded at the eastern extremity of the said colliery by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of, the said last-mentioned colliery called Plas Bennion, nor was the said part of the said vein or seam of coal a part of the said last-mentioned colliery called Plas Bennion which separated the said chambers so formed under ground in the last-mentioned colliery called Plas Bennion from, or formed a barrier between them and the said other chambers which were in the said colliery called Avon Eitha, in manner and form as in the said second count alleged, &c.

Tenthly, that, while the said Evan Jones and the said other persons were so possessed of the said last-mentioned colliery called Avon Eitha, and while the said company were so possessed of the said last-mentioned colliery called Plas Bennion, the said Evan Jones and the said other persons so possessed of the said last-mentioned colliery called Avon Eitha, did not break or enter the said last-mentioned colliery called Plas Bennion, or make therein the said holes called thyrlings, or any of them, in the said vein or seam of coal so being part of the said last-mentioned colliery called Plas Bennion, and forming the eastern extremity thereof, nor **[531]** extract or detach from the said vein or seam of coal so being a part, and forming the eastern extremity of the said colliery called Plas Bennion, and forming the said wall or barrier, the said large quantities, or any part, of the coal thereof, and whereof the same consisted, in manner and form as in the said second count is alleged, &c.

Eleventhly,—except as to so much of the second count as charged the defendant with having wrongfully, unlawfully, maliciously, and injuriously caused and procured the said quantities of water so introduced into and being in the said colliery called Avon Eitha in the said second count mentioned, and the chambers thereof, to flow, and with having thereby made the same to flow, through the said holes into the said colliery called Plas Bennion in the same count mentioned, and the chambers thereof, and with having wrongfully, maliciously, and injuriously caused and procured the said other quantities of the said water so introduced into and being in the last-mentioned colliery called Avon Eitha, and the said chambers thereof, to penetrate and permeate through the said vein or seam of coal into the last-mentioned colliery called Plas Bennion, and the said chambers so formed therein, as in the second count alleged, —that, by reason of the committing of the said acts by the said Evan Jones and the said other persons so possessed of the said last-mentioned colliery called Avon Eitha, the said colliery called Plas Bennion in the second count mentioned, and the said chambers so formed therein, were not, after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, nor were they by reason of the said acts liable to be, inundated on occasions of water being introduced into or being in the said colliery called Avon Eitha in the said second count mentioned, by such water flowing through the said holes, and penetrating **[532]** and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the said second count mentioned, in manner and form as in the said second count was alleged, &c.

Twelfthly,—except as in the introductory part of the eleventh plea,—that, but for the said holes, and but for the detaching and extracting of the said coal from the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion in the said second count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery, as it was before the making of the said holes, and before the detaching and extracting of the said coal therefrom, would not, at the times when water was introduced into the said colliery called Avon Eitha in the said second count mentioned, as therein mentioned, or at any or either of such times, have formed a barrier sufficient to prevent, nor would the same have prevented, the water, or any part thereof, in the said second count mentioned to have been introduced into the said last-mentioned colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion, into the same colliery, from so flowing through the said holes, or penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the same colliery, in manner and form as therein alleged, &c.

Thirteenthly,—except as in the introductory part of the eleventh plea,—that the defendant, by reason of his possession of the said colliery called Avon Eitha **[533]** in the said second count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion in the same count mentioned, and by reason of the matters and things in that count mentioned, or by reason of any or either of the said matters, ought not of right, during all the time, or any of the time, while he was possessed of the said last-mentioned colliery called Avon Eitha, to have prevented the water from time to time introduced by him, the defendant, into, or caused by him to be in, the said last-mentioned colliery called Avon Eitha, or the said chambers thereof, during his, the defendant's, possession thereof, from flowing through the said holes, into the said last-mentioned colliery called Plas Bennion, or the said chambers thereof, or from penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion, or the chambers thereof, in manner and form as in the said second count alleged, &c.

Fourteenthly, that the defendant had not notice or knowledge of all or any of the premises in the said second count in that behalf mentioned, in manner and form as therein alleged, &c.

Fifteenthly (to both counts), that, before the commencement of this suit, to wit, on the 4th of June, 1845, the plaintiff, being then the secretary of the said New British Iron Company, the said company did, in the name of the now plaintiff, as such secretary, and for and on behalf of the said company, bring and commence a former action on the case against the now defendant, in this court here, before, &c.; and, the defendant having duly appeared in this court to the said action, the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, afterwards, on the 24th of October, 1845, duly, declared in the said former action in this court against [534] the now defendant, for the committing of so much of the same grievances mentioned and complained of by the plaintiff, as such secretary as aforesaid, in his declaration in this present suit, and laid the damages of the said company in the said declaration in the said former action, by reason of the said grievances therein mentioned, at 5000l.; that, after the said company, in the name of the plaintiff, declared in the said former action as aforesaid, that is to say, on the 30th of January, 1846, the now defendant duly pleaded in this court in and to the said former action [payment into court of 70l.]; that the plaintiff, as such secretary as aforesaid, took the said 70l. out of court, &c.; and that the defendant afterwards, to wit, on, &c., paid to the said company 22l. 17s. for costs, &c.

The plaintiff joined issue on the first fourteen pleas, and replied to the last, so far as the same related to the second count (*a*), that, by reason of anything in the said last plea alleged, he ought not to be barred from having or maintaining his aforesaid action thereof, for and on behalf of the said company, against the defendant, in respect of the grievances in the second count mentioned, because he said that the plaintiff, for and on behalf of the said company, issued his writ in this suit, so far as it related to the grievances in the second count mentioned, and declared thereupon, not for the grievances for the committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action,—and in satisfaction and discharge of the damages sustained by the said company in respect of which last-mentioned grievances up to the time when the said plea in the said former [535] action was pleaded, he, the plaintiff, so accepted and took out of court the said sum of 70l.,—but for that the defendant, contriving and intending to injure the company, after the said holes in the second count mentioned had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the second count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal in the second count mentioned, forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was possessed of the said colliery called Avon Eitha, in the said second count mentioned, and while the said company were possessed of the said colliery called Plas Bennion, in the second count mentioned, and after the pleading of the said plea in the said former action, and at the said time when, &c. in the second count in that behalf mentioned, to wit, always from the said time of the defendant's so becoming possessed of the said colliery called Avon Eitha, in the second count mentioned, to the time of the commencement of this suit, wrongfully, maliciously, unlawfully, and injuriously introduced into, and caused to be introduced in, the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, divers and very many large quantities of water: That the defendant further contriving, and wrongfully and maliciously intending to injure the said company, afterwards, and after the said holes in the second count mentioned had been so made, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was so possessed of the said colliery called

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(*a*) There was a similar new assignment to the last plea so far as it related to the first count, re-asserting the cause of complaint in that count.

Avon Eitha, in the second count [536] mentioned, and while the said company were so possessed of the said colliery called Plas Bennion, in the second count mentioned, and while the said last-mentioned holes so remained and were continued by the defendant, and before the same had been stopped up, and after the said water had been so introduced into, and while it was in, the said colliery called Avon Eitha, in the second count mentioned, and the chambers so formed in the said colliery called Avon Eitha, in the second count mentioned, and after the pleading of the said plea in the said former action, and at the said times when, &c. in the second count in that behalf mentioned, to wit, on the said several days and times when the said water was so introduced into, and while it was in, the same chambers, as thereinbefore mentioned, and from those times respectively to the time of the commencement of this suit wrongfully, unlawfully, maliciously, and injuriously omitted to prevent the said water so introduced and being in the said colliery called Avon Eitha in the second count mentioned, and the said chambers so formed therein, from flowing from the said colliery called Avon Eitha in the second count mentioned, and the chambers thereof, through the said holes, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof: That, by means and in consequence of the premises thereinbefore, and in the second count mentioned, after the pleading of the said plea in the said former action, and at the said times when, &c. in the second count in that behalf mentioned, to wit, on the several days and times when the said water had [537] been so introduced into and was in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so formed therein, and on divers and very many other days and times after those days and times respectively, and before the commencement of this suit, divers large quantities of the water, so introduced into, and being in, the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha, in the second count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and into the chambers so made in the said colliery called Plas Bennion, in the second count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers so formed therein: That the defendant, further contriving, and wickedly and maliciously intending to injure the said company, afterwards, and after the said holes had been so made as aforesaid, and in the second count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha, in the second count mentioned, and while the said company [538] were possessed of the said colliery called Plas Bennion, in the second count mentioned, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, &c. in the second count in that behalf mentioned, to wit, on the several days and times last aforesaid, wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other large quantities of the said water, so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof as aforesaid, to flow, and the said last-mentioned quantities of the said water at those times were in those days and times thereby made to flow, and on those days and times did flow, through the said holes, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers thereof, and wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in the second count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last-mentioned quantities of water, at the said last-mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers so formed therein: That, by means thereof, the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, afterwards, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, &c. in the second count in that behalf mentioned, to wit, on the day and year last aforesaid, were inundated and filled by the said water which by means of the pre-**[539]**-mises so flowed through the said holes, and penetrated and permeated through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and into the said chambers thereof: That, by reason of the premises, the said company afterwards, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, &c. in the second count mentioned, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion in the second count mentioned, and from enjoying and working the said colliery called Plas Bennion in the second count mentioned, in so extensive, complete, beneficial, and convenient a manner as they otherwise might and would have done; and that, by reason of the premises, afterwards, and before the commencement of this suit, and after the pleading of the said plea "in the second count mentioned" (*a*), and at the said times when, &c. in the second count in that behalf mentioned, to wit, on the 1st of January, 1846, and on divers and very many other days and times after the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, had been so inundated, and before the commencement of this suit, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Bennion, in the second count mentioned, and the said chambers thereof, the said water wherewith the same had been so inundated and filled, and in so doing were put to great expense, to wit, to the amount of 1000l.; and which said grievances above newly-assigned in respect of the grievances in the **[540]** second count mentioned, were other and different grievances from the grievances in the last plea mentioned, for the committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action, and in satisfaction and discharge of the damage sustained by the said company in respect of which last-mentioned grievances up to the time when the said plea in the said former action was pleaded, he the plaintiff so accepted and took out of court the said sum of 70l.: And this the plaintiff was ready to verify; wherefore, inasmuch as the defendant had not answered the grievances above newly-assigned in respect of the grievances in the second count mentioned, the plaintiff, as such secretary as aforesaid, for and on behalf of the said company, prayed judgment, and the damages by the said company sustained on occasion thereof, to be adjudged to him for and on behalf of the said company.

The defendant pleaded not guilty to the new assignment.

The cause came on for trial at the Chester summer assises in the year 1846, when, by order of nisi prius, a verdict was found for the plaintiff, "subject to the award and determination of a special case, to be stated for the opinion of this court by a barrister to whom, after the court should have given judgment on the special case, all matters in difference between the said parties were by the said order referred."

The pleadings in this action, and the order of nisi prius, were to form part of the special case. The plaintiffs had abandoned the first count of their declaration.

In obedience to the said order of nisi prius, the following case was submitted to the judgment of the court:—

The plaintiffs, for many years then last past, and up to **[541]** the time of the commencing of this action, were in possession of a colliery called Plas Bennion, in the parish of Ruabon, in the county of Denbigh.

In the year 1846, and while the plaintiffs were in the possession of Plas Bennion,

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(*a*) Q. d. "in the said former action."

as aforesaid, one Evan Jones, and others, his partners, became possessed of an adjoining colliery called the Avon Eitha colliery, in the same parish.

Evan Jones and his partners continued to be possessed of the last-mentioned colliery until the month of December, 1844. At this time they quitted possession, and were succeeded by the defendant, who has remained in possession ever since.

The Avon Eitha Colliery is on a higher level than the Plas Bennion Colliery.

At the time when Evan Jones and his partners commenced their occupation of the Avon Eitha Colliery, both that colliery and the Plas Bennion Colliery had been worked to a great extent; and they each contained several chambers, made by the removal of large quantities of coal.

At the time last mentioned, the colliery of Plas Bennion was bounded on the east by a vertical seam or vein or coal, the property of the plaintiffs, and part of their colliery; and this seam or vein of coal formed a barrier between the chambers in Plas Bennion and the chambers in Avon Eitha.

In the beginning of the year 1844, Evan Jones and partners made three large holes, called "thyrlings," in and through the barrier above mentioned, for the purpose of giving air to the Avon Eitha Colliery.

The defendant became the occupier of Avon Eitha, without any privity, either of contract or of estate, between him and his predecessors, Evan Jones and partners.

At the time when the defendant became such occu-**[542]**-pier, there was a large subterranean body of water in Avon Eitha, which communicated with, and was fed by, springs in the neighbourhood. This body of water was on a higher level than the chambers of Avon Eitha, and separated from them by a thick horizontal bar of coal, which was part of Avon Eitha Colliery.

The chambers of Avon Eitha were on a higher level than the thyrlings above mentioned; and the thyrlings were on a higher level than the chambers of Plas Bennion.

The effect of removing the horizontal bar of coal in Avon Eitha, would be, that the water above mentioned would of itself flow into the chambers of Avon Eitha; and that a large portion of such water would also flow on, of itself, from the chambers of Avon Eitha, through the thyrlings, into the chambers of Plas Bennion.

The defendant, during his occupation, and before the month of June, 1845, knowing that these thyrlings were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal in Avon Eitha would be as above stated, nevertheless did remove the said bar of coal, for the purpose of obtaining the said coal, and so working his mine in the manner most advantageous to himself.

In consequence of the removal of this horizontal bar of coal in Avon Eitha, the water of itself flowed from the said subterranean body of water into the chambers of Avon Eitha. One portion of the water which had so flowed into the chambers of Avon Eitha, flowed on of itself through the thyrlings into the chambers of Plas Bennion. Another portion of the water which had so flowed into the chambers of Avon Eitha, and which, if not obstructed in its natural course, would have flowed down to the bottom of Avon Eitha, and below the thyrlings, was obstructed in its natural course by a dam which the defendant had placed in Avon Eitha, **[543]** and near to the thyrlings, and was thereby thrown through the thyrlings into the chambers of Plas Bennion. This dam was removed, before the commencement of the action next mentioned by some of the workmen of the Plas Bennion Colliery.

The vertical seam of coal above mentioned as forming the eastern boundary of Plas Bennion, would have been sufficient to prevent the said flow of water in Plas Bennion, if the thyrlings had not been made as aforesaid in the said seam of coal, by Evan Jones and his partners.

On the 4th of June, 1845, the plaintiff brought an action on the case against the defendant, for the injury caused to Plas Bennion by the flow of water as aforesaid.

On the 30th of January, 1846, the defendant paid 70l. into court, and pleaded the payment in the usual form: and, on the 28th of March, in the same year, the plaintiffs replied, accepting the said payment in satisfaction. The record in that action was to form part of the present case.

The present action was brought on the 30th of April, 1846.

Since the commencement of the first action, and up to the time of the commencement of the present action, water has, in consequence of the removal of the said horizontal bar of coal in Avon Eitha as aforesaid, occasionally flowed of itself, in the manner already stated, from the said subterranean body of water in Avon Eitha into the chambers of Avon Eitha, and so also flowed on of itself, through the thyrlings, into the chambers of Plas Bennion, in the same manner as has been before stated; and the colliery of Plas Bennion has been thereby injured.

With respect to the sufficiency of the said vertical seam of coal, forming the eastern boundary of Plas [544] Bennion, as a subsisting barrier to prevent the last-mentioned flow of water, if the thyrlings had not been made in the said barrier, and with respect to the defendant's knowledge that the thyrlings continued open, the facts were the same as before stated, with reference to the former action.

The defendant contends,—first, that this action is not maintainable, as the defendant, in getting the coal from his own mine, in the manner stated, has not done any act which it was his duty to refrain from,—secondly, that, at all events, as he has done no fresh act whatever since the commencement of the first action, to cause a continuance of the flow of water into Plas Bennion, the damage now complained of might have been compensated for in that action, and therefore that the former recovery is a bar to this action.

The plaintiff contends,—first, that it was the duty of the defendant to refrain from cutting through the bar of coal in his own mine, under all the circumstances of the case,—secondly, that, at all events, by paying money into court in the former action, the defendant has estopped himself from disputing the alleged duty,—thirdly, that the recovery in the former action is no bar.

The question for the opinion of the court is, whether the present action is maintainable.

Townsend (with whom were Egerton and T. Jones), for the plaintiff. It is submitted, that, under the circumstances stated in this special case, this action is maintainable. The maxims "Prohibetur ne quis faciat in suo quod nocere possit alieno," and "Sic utere suo ut alienum non lædas," are distinctly applicable. It was the duty of the defendant to prevent the damage which has accrued to the plaintiff from the flowing of the water through the thyrlings into his mine, in conse-[545]-quence of the removal by the defendant of the horizontal bar of coal in Avon Eitha. "Qui non prohibet quod prohibere potest, assentire videtur" (2 Inst. 305). The true test is given in Mr. Smith's note to *Ashby* v. *White* (2 Lord Raym. 938, 1 Smith's Leading Cases, 131 d.):—"The mode of determining whether damage have or have not been occasioned by what the law esteems an injury, is, to consider whether any right existing in the party damnified, have been infringed upon; for, if so, the infringement thereof is an injury: and, if an injury be shewn, the law will presume that some damage resulted from it." The law does not permit a man to transmit fire, or water, or impure air, or to allow his cattle to stray, beyond his own boundaries, so as to injure or annoy his neighbours. In *Lambert* v. *Bessey* (Sir T. Raym. 421) it is said, that, "In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and, therefore (M. 6 E. 4, fo. 7 a., pl. 18), in trespass quare vi et armis clausum fregit, et herbam suam, pedibus conculcando, consumpsit, in six acres, the defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they ipso invito, fell upon the plaintiff's land, which is the same trespass: and the plaintiff demurred; and adjudged for the plaintiff; for, though a man doth a lawful thing, yet, if any damage do thereby befal another, he shall answer it, if he could have avoided it. As, if a man lop a tree, and the boughs fall upon another, ipso invito, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the sallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am [546] building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person; and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed." The case in the Year-Book presents an illustration which is not noticed in *Lambert* v. *Bessey*: Pigot, J., says: "So, if a man hath a pond in his manor, and lets off the water, in order to catch the fish therein, and the water inundates my land, I shall have an action, though the doing so by him was lawful." [Cresswell, J. If the barrier had still existed, the defendant would have done no wrong: the injury of which the plaintiff complains, is the result of the act of the defendant's predecessor, with whom he is in no privity, and for whose acts he is not responsible. Maule, J. The law upon the subject of subterranean rights was very much discussed in the recent case of *Acton* v. *Blundell* (12 M. & W. 324). The distinction between subterranean and surface rights seems to be this:—As to surface flows, parties acquire rights to them because there is the acquiescence of everybody who has any interest in the matter. But, as to underground percolations, no rights are gained, because nobody knows anything about them.] In *Haward* v. *Bankes* (2 Burr. 1113),—where the circumstances were precisely like those of the present case,—it was assumed that the action would lie; the only question raised, being one of misjoinder. In *Aldred's case* (9 Co. Rep. 57 a.), it was held that an action on the case lies for erecting a hog-stye so near the house of the plaintiff that the air thereof was corrupted: so, of a lime-kiln, if the smoke enters the plaintiff's house, so that he cannot dwell there: so **[547]** of a dye-house, &c., if the filth runs into his fish-pond, &c. In *Tenant* v. *Goldwin* (1 Salk. 360), in an action on the case, the plaintiff declared that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, beer, &c., that the cellar joined to the defendant's messuage, and by a wall, which the defendant debuit reparare, was separated and defended from the defendant's privy, and that, for want of repairing this wall, fœditates et sordida suricæ prædict. in cellarium ipsius quer. fluebant, &c. Upon a motion in arrest of judgment, Holt, C. J., gave judgment for the plaintiff,—"because it was the defendant's wall and the defendant's filth, and he was bound, of common right, to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's." In *Tubervil* v. *Stamp* (1 Salk. 13, 1 Ld. Raym. 264, 1 Comyns's Rep. 32),—which was an action on the case upon the custom of the realm, "quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada quer. in quodam clauso ipsius quer. combusta fuerunt,—after verdict pro quer., it was objected that the custom extended only to fire in his house or curtilage (like goods of guests), which were in his power. Non alloc. for, the fire in his field was his fire (ante, vol. i. p. 586 (*a*)), as well as that in his house; he made it, and must see that it does no harm, and answer the damage, if it does. Every man must use his own so as not to hurt another: but, if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have shewed it. And Holt, Rokesby, and Eyre, against the opinion of Turton, who went upon the difference between fire in **[548]** an house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three." In *Vaughan* v. *Menlove* (3 N. C. 468, 4 Scott, 244), it was held that an action lies against a party for so negligently constructing a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house is burned down. Although that case has been somewhat questioned, it has received the sanction and support of the court of Queen's Bench in the recent case of *Filliter* v. *Phippard* (11 Q. B. 347). In that case, it was held, that the 86th section of the building act, 14 G. 3, c. 78, which enacts that no action shall be maintained against any person in whose house or on whose estate any fire shall "accidentally begin," does not apply where a fire is produced by negligence,—in which case, by the common law, an action lies against the party by whose negligence, or by that of whose servants, a fire arises on his premises, and damages the property of another: nor does it apply where the fire is lighted intentionally, and mischief happens to result. In *Sutton* v. *Clarke* (6 Taunt. 29), it was held that one who, in the exercise of a public function, without emolument, which he is compellable to execute, acting without malice, and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damage to a subject, is not liable to an action for such damage. The facts of that case were these:—The trustees of a turnpike-road, impowered to make watercourses to prevent the road from being overflowed, directed their surveyor to present a plan for carrying off the water of an ad-**[549]**-jacent brook: he recommended, and on that recommendation they adopted, and caused him to make, a wide channel from the road, gradually narrowing, and conducting the water into the ordinary fence-ditches of the plaintiff's land, which were insufficient to discharge it, and his land was consequently overflowed. In giving the judgment of the court, Gibbs, C. J., said: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour: if he thereby unwittingly injure his neighbour, he is answerable. The resemblance fails in the most important point of comparison, that his act is not done for a public purpose, but for private emolument. Here, the defendant is not a volunteer: he executes a duty imposed on him by the legislature, which he is bound to execute. He exercises his best skill, diligence, and caution in the execution of it; and we are of opinion that he is not liable for an injury which he not only did not foresee, but could not foresee. He has done all that was incumbent on him, having used his best skill and diligence." [Maule, J. Suppose a man so improves his own land by thorough drainage, that it no longer forms, as it did before, a sort of natural reservoir for the supply of his neighbour's mill, will an action lie?] That must depend upon the precise circumstances and position of the land, and the nature of the supposed right. In Gale on Easements, the author, after adverting to the cases already mentioned, says (2nd edit., p. 248): "The further question now remains to be considered, whether a man acting in the exercise of his undoubted rights of property, and doing damage to his neighbour, which, under some circumstances, might be justifiable, **[550]** is liable to an action if the damage might have been prevented by the use of reasonable care and precaution on his part. This question also turns upon the application of the maxim 'sic utere tuo ut alienum non lædas;' and, as it is not contested, that, in the interpretation of this maxim, 'alienum,' must be taken to mean 'the rights of the neighbouring owner,' and that therefore no action can be maintained 'unless both injury and damage are sustained (*a*): the real point to be decided is—whether, in the absence of any easement restricting the neighbouring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent. 'If a man sustains damage,' says Bayley, J., 'by the wrongful act of another, he is entitled to a remedy; but, to give him that title, these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage, is not of itself sufficient:' *The King* v. *The Commissioners of Pagham Level*" (8 B. & C. 355, 2 M. & R. 468). [Maule, J. Suppose there had been no subterranean body of water in Avon Eitha, but that, the thyrlings being open, heavy rain flooded that colliery, and flowed thence into Plas Bennion, would the owner of the former be responsible?] There, the proximate cause of the injury would be the act of God. Although a man may not be under any legal obligation to repair the fences between his own and his neighbour's closes, he is nevertheless bound to take care that his cattle do not wander from his own land and trespass upon the lands of others: per Bayley, J., in *Boyle* v. *Tamlyn* (6 B. & C. 329, 9 D. & R. 430). [Cresswell, J. You put it as if the defend-**[551]**-ant himself had made the thyrlings?] Yes. In *Firmstone* v. *Wheeley* (2 D. & L. 203), the declaration stated that the plaintiffs and defendants were owners of adjacent mines; that the defendants had trespassed on the plaintiffs' mine, and had carried away a quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the defendants, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet that the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: and it was held, on general demurrer, that this was a good count in case. Pollock, C. B., said: "The substance of the complaint is, that the defendants have removed the only barrier between the mines; and that, therefore, it became their duty so to deal with the water accumulating in their mine, as to prevent it flowing into the mine of the plaintiffs. There may, perhaps, be a difference, as regards the law, between the barrier of a mine and a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damage. But here the plaintiffs say, that the removal of the barrier is irreparable, and therefore the duty alleged in this declaration may well arise." In *Acton* v. *Blundell* (12 M. & W. 324), it was held that the owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land, in the usual

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(*a*) I.e. "unless both wrong is done and damage sustained."

manner, drains away the water from the land of the first-mentioned owner, and lays his **[552]** well dry. In *Arkwright* v. *Gell* (5 M. & W. 203, 225), where a question arose as to the right to a stream of water flowing from a mine, Lord Abinger, C. B., in answer to an observation of the defendants' counsel, that "their act was a perfectly lawful act of ownership," observed—"If the plaintiffs have established that they have a right as against you to keep the water, it is no answer that you are doing an act in your own land. All water was at first subterraneous." [Maule, J. The Taff, in Glamorganshire, is not so.] It is a clear and universal intendment of law, that every man contemplates the necessary consequences of his own acts. This case finds that the chambers of Avon Eitha were on a higher level than the thyrlings, and that the thyrlings were on a higher level than the chambers of Plas Bennion; and that the necessary consequence of the removal of the horizontal bar of coal in Avon Eitha would be, that the water in Avon Eitha would of itself flow into the chambers of Avon Eitha, and that a large portion of it would flow on of itself through the thyrlings into the chambers of Plas Bennion. [Maule, J. The court, in *Acton* v. *Blundell*, seem to have adopted the doctrine there cited from Marcellus (Dig. lib. 39, tit. iii. § 12),—"Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.] That cannot be held to be the principle of the English law, without overruling the doctrine of Gibbs, C. J., in *Sutton* v. *Clarke*. The owner of a mine is bound to work it in a reasonable manner, and so as not to injure property adjoining: *Harris* v. *Ryding* (5 M. & W. 60). The fair result of the cases seems to be, that a man is responsible for an injury to the owner of an adjoining mine or land, which necessarily results from acts done by him, though upon his own **[553]** land: *Wilde* v. *Minsterley* (2 Roll. Abr. 564, tit. Trespass, Justification (J.), pl. 1); *Brown* v. *Windsor* (1 C. & J. 20); *Jones* v. *Bird* (5 B. & Ald. 837, 1 D. & R. 497); *Walters* v. *Pfeil* (M. & M. 362); *Wyatt* v. *Harrison* (3 B. & Ad. 871); *Dodd* v. *Holme* (1 Ad. & E. 493, 3 N. & M. 739); *Trower* v. *Chadwick* (6 N. C. 1, 8 Scott, 1); *Davis* v. *The London and Blackwall Railway Company* (1 M. & G. 799, 2 Scott, N. R. 74).

The recovery in the former action is no bar to the present action, which is brought to recover damages for the continued omission, on the part of the defendant, to prevent water from flowing into the plaintiff's mine. The plaintiff could not for this have recovered prospective damages in the former action: *Sutton* v. *Clarke*: *Roberts* v. *Read* (16 East, 215); *Howell* v. *Young* (5 B. & C. 259, 8 D. & R. 14). Every new flow of water is a new nuisance, according to the doctrine of Lord Holt, in *Fetter* v. *Beale* (1 Salk. 11). In *Thompson* v. *Gibson* (7 M. & W. 456), which was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held, it appeared that the building was erected in October, 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October, 1838; and, in February, 1839, he demised it to the plaintiff; and, the market being afterwards obstructed by the building, this action was brought: and it was held that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable. Parke, B., in delivering the judgment of the **[554]** court, says: "That the defendants were responsible for some consequences of the original erection of the building, to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable, just as the servant of an individual is, if he is actually concerned in erecting a nuisance,—*Wilson* v. *Peto* (6 J. B. Moore, 47); and, as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market? or, what other limit can be assigned to their responsibility, otherwise than the continuance of the injury itself? Is he who originally erects a wall by which antient lights are obstructed, to pay damage for the loss of the light for the first day only? or, does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And, if the then owner of the market might have maintained an action against the defendants for the injury to his franchise, for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for, it is clearly established that he has a right of action for every continuing nuisance: and to that effect is the authority of 2 Roll. Abr. Nuisance, K. 2 (translated, 16 Vin. Abr. p. 32),—'If one is seised of land near a river, and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is overflowed (surround), the lessee shall have an action on the case against him; for, though the stop-[555]-page was in the time of his lessor, the continuance was a wrongful damage to the lessee, for, his land was overflowed.' That is the case of *Westburne* v. *Mordant*" (*a*). In *Holmes* v. *Wilson* (10 Ad. & E. 503), where the trustees of a turnpike-road built buttresses to support it, on the land of the plaintiff, and the plaintiff thereupon sued them and their workmen, in trespass, for such erection, and accepted money paid into court in full satisfaction of the trespass,—it was held, that, after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land; to which the former recovery was no bar. In *Hodsoll* v. *Stallebrass* (11 Ad. & E. 301, 3 P. & D. 200), the entire damage to the master arose from the injury,—found by the jury to be permanent,—done at the time specified in the declaration: and Littledale, J., said that no fresh action could be brought from time to time—"the action being founded, not upon the damage only, but upon the unlawful act and the damage." The authorities are collected in the notes to *Hambleton* v. *Veere* (2 Wms. Saund. 169 c. n. (1), and n. (*f*)).

May 5.—Welsby (with whom were J. Evans and J. Brown), contrà. Under the circumstances stated in this case, the law imposed no duty upon the defendant to prevent the water in his mine from flowing into that of the plaintiff. No act of commission is charged against the defendant: and the case does not even state that the making the thyrlings or holes in the seam of coal in Plas Bennion, was done by Evan Jones without licence; and the court will not assume that it was an act of trespass. At all events, the defendant is not responsible for the act of Jones, between whom and himself it is [556] expressly stated that there was no privity either of contract or of estate. This being the state of facts, what duty was there in the defendant to abstain from working his mine in the manner most beneficial to himself, or to take precautions to prevent the water from his mine passing into the plaintiff's mine? No servitude, no right of easement is alleged: the plaintiff's claim rests upon the mere fact of the contiguity of the two mines. In truth, this is damnum absque injuriâ. The defendant's knowledge that the result of his working his mine in the way he did would cause inconvenience to the plaintiff, is no legitimate part of the case. All the authorities cited on the other side are distinguishable, on the ground, that, in each of them, there has either been a trespass committed by the defendant, or he has been guilty of some act of negligence in dealing with his own property. Thus, in *Lambert* v. *Bessey* (Sir T. Raym. 421. See 3 M. & G. 519), the plaintiffs in error had been guilty of a wrongful act. So, in the case there cited from the Year Book of 6 E. 4, fo. 7, pl. 18,—the instance put by Pigot, J., of a man letting off the water from a fish-pond,—it was unnecessary to adopt that course for the purpose of taking the fish. In *Haward* v. *Bankes*,—which seems most of any to resemble this case,—it is consistent with what appears in the case that the injury complained of was the result of a direct act of commission by the defendant; as in the former action here. *Firmstone* v. *Wheeley* was also the case of an act of commission. *Aldred's case* (9 Co. Rep. 57 a.) is also distinguishable, on the same ground. *Tenant* v. *Goldwin* was a case of trespass. *Tuberril* v. *Stamp* and *Vaughan* v. *Menlove* were cases of negligence. So also was *Filliter* v. *Phippard*. The dictum of Gibbs, C. J., in *Sutton* v. *Clarke*, is to be taken with reference to the facts of that case. The pre-[557]-sent case is more analogous to those where it has been held that a man who builds upon the extremity of his land, thereby gains no right to support from the adjoining land for such additional weight. The authorities upon that point are collected in Gale on Easements, 218, et seq. In *Partridge* v. *Scott* (3 M. & W. 220), the doctrine was applied to the working of mines. The maxim "Sic utere tuo ut alienum non lædas," does not go to forbid damna generally, but damna injuriosa. To constitute a violation of that maxim, there must be injuria as well as damnum. There are many cases in which a man may lawfully

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(*a*) Which is also reported, Cro. Eliz. 191.

use his own property so as to cause damage to his neighbour, provided the damnum be not injuriosum. He may build a wall on his own ground, so as to obstruct the lights of his neighbour, where no right to them has been acquired by grant or adverse user. He may build a mill near the mill of his neighbour, to the grievous damage of the latter, by loss of custom; and so in other cases. In Bracton (lib. 4, fo. 221), there is the following passage:—"Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum, ubi quis fecerit aliquid in suo injustè contra legem vel contra constitutionem, prohibitus a jure. Si autem prohiberi a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum; licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino; ut si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum, subtrahat vicino, facit vicino damnum et non injuriam: cum a lege vel a constitutione prohibitus non sit, ne molendinum habeat vel construat." To derive, therefore, any aid from the maxim sic utere tuo ut alienum non lædas, the plaintiff must shew that he has sustained injuriam; which is the whole question. Suppose a man, by an improved system of drainage, causes an **[558]** excess of water to flow upon the lands of his neighbour upon a lower level; would he be liable to an action? Clearly not. Even that is supposing a case much less favourable to the defendant than the facts of this case warrant; for, it supposes all things to be in their natural state. Take the case of a belt of trees near the sea-shore, the removal of which might be injurious to the adjacent land, by admitting thereon a saline deposit. Would an action lie for that? [Maule, J. If, for a belt of trees, you substituted an antient wall, there might be a difficulty in the cases you put.] In *The King* v. *The Commissioners of Sewers of Pagham Level* (8 B. & C. 355, 2 M. & R. 468), Lord Tenterden says (8 B. & C. 359):—"I am of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the case requires; leaving it to others, in like manner, to protect themselves against the common enemy." The rights and liabilities of parties to erect defences on the sea-shore, are considered in *Keighley's case* (10 Co. Rep. 139 a.), and in *The Mayor, &c., of Lyme Regis* v. *Henley* (3 B. & Ad. 77), and Callis on Sewers, (pp. 74, et seq.).

Townsend, in reply. The plaintiff had an undoubted right to the enjoyment of his mine without having water intruded into it from the defendant's mine. The charge against the defendant is, that he wrongfully abstained from doing what he knew to be necessary to prevent the water in his mine from flowing down to, and injuring the plaintiff's mine. There is a right of the plaintiff's infringed upon, and a breach of duty committed by the defendant. *Haward* v. *Bankes* is **[559]** precisely this case. [Maule, J. Nobody suggests that an action will not lie for wrongfully turning water into another man's mine.] In Kent's Commentaries (vol. iii. p. 436, note (*b*)). it is said:—"The law of vicinage rests on just foundations. Any act or default of the possessor of a tenement, to the injury of a party interested in the neighbouring tenement, becomes a nuisance." And, after referring to *Vaughan* v. *Menlove*, *Tubervil* v. *Stamp*, and *Barnard* v. *Poor* (21 Pick. Rep. 378), the learned commentator adds:—"The principle is, that every man is bound so to deal with his property as not to injure the property of others." [Maule, J. A man may very well justify the consequences resulting from the legitimate use of his own land. But, if he acts negligently, or capriciously, and injury results, no doubt he is liable.] Many instances of nuisances that are actionable, though resulting from acts in themselves lawful, are given in Fitzherbert's Natura Brevium (page 184), and in Blackstone's Commentaries (*d*). The cases as to easements are not applicable: nor is there any distinction between surface rights and rights under ground, except that suggested in *Acton* v. *Blundell*. The defendant was clearly bound to prevent the water in his mine from escaping into the plaintiff's mine, in the same manner that a man is bound to keep his cattle from straying into his neighbour's field. [Maule, J. The owner of cattle is in possession of a thing that is beneficial to him. The case of water in a mine is very different: it is the man's misfortune to have it there.] That does not justify him in making his neighbour share the misfortune with him.

Cur. adv. vult.

[560] Cresswell, J., now delivered the judgment of the court.

(*d*) Vol. iii. p. 217, et seq. And see *Fay* v. *Prentice*, ante, vol. i. p. 828.

After stating the pleadings and the principal facts, ut ante, the learned judge proceeded as follows:—

The claim of the plaintiff to compensation in this case is advanced on two grounds:—first, on a supposed duty in the defendant, arising out of the act of Evan Jones in removing the plaintiff's barrier of coal, when he occupied Avon Eitha, and the subsequent occupation of the same colliery by the defendant; secondly, on a general liability said to be imposed by law upon the defendant, to be responsible for the injury done to an adjoining colliery by water casually introduced into his own, in the course of working it.

As to the first point, it is to be observed that there was no privity of any kind between Evan Jones and the defendant. The act done by Jones, of which complaint is made, was done, not upon the premises now occupied by the defendant, but upon those of the plaintiff. Nor does the defendant derive his title to the premises which he occupies, in any way from Jones. Indeed, in the special case, it is expressly stated that there was no privity, either of estate or contract, between Jones and the defendant. In *Roswell* v. *Prior* (2 Salk. 460), the defendant, tenant for years, erected, on his own premises, that which was a nuisance to the plaintiff's house, and then made an underlease: and it was held that the plaintiff might sue either the defendant or his sub-lessee. Upon the same principle, if Jones had done any thing in Avon Eitha colliery which made his premises, in their then state, a nuisance to the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in that state, as for upholding the nuisance (*b*). But this is a very different **[561]** case. The premises occupied by the defendant are not a nuisance. The act done by Jones, to the injury of the plaintiff's mine, was on the plaintiff's soil, where the defendant would have no right to go, even if he wished it, for the purpose of remedying the evil that Jones had previously done. We think, therefore, that no special duty to protect the plaintiff's mine against water in the defendant's mine attached to the latter, in consequence of Jones having removed the plaintiff's barrier of coal when he occupied Avon Eitha, and of his, the defendant's, having succeeded him in such occupation.

The next ground upon which it was contended that the defendant was liable in this action, is much broader, viz. that he was, of common right, bound to prevent the water coming into his own mine, from flowing into his neighbour's. In considering this question, it is material to remember, that, in the special case, it is stated that the defendant worked out the coal which protected his own mine from the subterranean body of water, for the purpose of obtaining the coal, and so working his mine in the manner most beneficial to himself. There is nothing from which we can infer that it was an unusual or a negligent mode of proceeding, or that it was done with any design to injure his neighbour's mine. In order to establish the proposition, that the defendant was bound to prevent the flow of water from his own mine into the plaintiff's, the case of *Tenant* v. *Goldwin* (1 Salk. 360) was relied on. That was an action on the case, in which the plaintiff declared, that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, &c.; that the cellar joined the defendant's messuage, and by a wall which the defendant debuit reparare, was separated and de-**[562]**-fended from the defendant's privy, and that, for want of repairing the wall, the filth flowed through into the plaintiff's cellar. There was judgment by default, and damages were assessed upon a writ of inquiry; and then there was a motion in arrest of judgment. The declaration was held sufficient; and Lord Holt said that "it was the defendant's wall, and the defendant's filth; and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's." It was, therefore, a very different case from the present. There, there was no barrier between the plaintiff's mine and the defendant's which the latter could repair; and the flow of water into the plaintiff's mine cannot be considered as a trespass. Again, the declaration in that case was held good on account of the words debuit reparare, which are inapplicable to the present case. But for the removal of part of the barrier of coal at the eastern side of the plaintiff's mine, the water in the defendant's mine would have done no harm; and for that removal the defendant is not responsible.

(*b*) Vide ante, vol. i. p. 586 (*a*).

But a great many cases were referred to in the argument, to shew, that, independently of all questions about the removal of the barrier in the plaintiff's mine, the defendant was bound, at all events, to take care that the water which flowed into his own mine should not pass into the plaintiff's. *Tuberville* v. *Stamp*, *Vaughan* v. *Menlove*, *Sutton* v. *Clarke*, *Boyle* v. *Hamlyn*, *Brown* v. *Windsor*, *Dodd* v. *Holmes*, and others of that class, were referred to; but, in each of those, negligence was imputed to the defendant in doing the act upon his own premises, which proved injurious to his neighbour: whereas here, there is nothing to shew that there was **[563]** any negligence on the part of the defendant in working his colliery.

A case quoted from the Year Book, 6 E. 4 (M. 6 E. 4, fo. 7, pl. 18), in *Lambert* v. *Bessey*, was relied on as an authority for the plaintiff, where negligence was not imputed to the defendant: but, upon an examination of the original report, it hardly supports that statement. It was an action for trespass to the plaintiff's close, and damaging the grass by walking, &c. The defendant justified, for that he had a close separated from it by a thorn hedge, and, when he was cutting the thorns, they fell, ipso invito, into the plaintiff's close; wherefore, he entered to take them away. After much discussion, it was held (*b*), that, to make the plea good, the defendant should have said, not only that the thorns fell, ipso invito, but that he could not have cut them in any other way, and that he did all in his power to prevent them from falling upon the plaintiff's land.

Then, the case of *Haward* v. *Bankes* was said to be a direct authority for the plaintiff: but it is not so. The decision of the court was simply, that a count charging the defendant with having caused water to flow through divers other collieries into the plaintiff's, was a count in case. It is true, that the plaintiff recovered in that action; but there can be no doubt that a man may cause water to flow from his own premises into his neighbour's, so as to make himself liable to an action,—for instance, by erecting a mound, or other work, to give it that direction; as appears to have been done by the present defendant before a former action was commenced, and in which he paid money into court as a compensation. In this case, it ought not to be said that he caused, but that he permitted, the water to flow into the plaintiff's mine.

[564] Another case relied on by the plaintiff, *Firmstone* v. *Wheeley*, also differs from this case in a very material particular,—viz. that the defendant there had removed from the plaintiff's mine, by a trespass, a barrier of coal, which, had it existed, would have prevented the water from flowing from the defendant's mine into the plaintiff's: and, although it is hardly to be treated as a decision, the court of Exchequer appears to have thought, that, having wrongfully removed that barrier, the defendant was bound to protect the plaintiff's mine against the flow of water: and, if this action had been against Jones when he occupied Avon Eitha, it might have been urged as an authority against him. But, if Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage done to the plaintiff's mine, by the water flowing into it from Avon Eitha (*a*). If no such action could have been maintained against him, it would be singular if it could be maintained against a party not in any way connected with him, for the consequential damage arising from his act of trespass.

Treating the question as a new one, not governed by the authority of any decided case,—for, all those referred to are distinguishable,—it would seem to be the natural right of each of the owners of two adjoining coal-mines,—neither being subject to any servitude to the other,—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.

In the present case, it could not be disputed, that, **[565]** but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal: for, if the space which it had occupied became afterwards filled with water, that would have done no harm to the plaintiff, if his coal also had not been excavated: and, if he afterwards excavated his own, and the water flowed in from the defendant's workings, he would not, on that account, have any right of action for the damage done by it. His position would be very similar to that suggested by Lord Holt, in *Tenant* v. *Goldwin*, where he says: "The case might, indeed, possibly be such, that the defen-

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(*b*) By Choke, C. J. of C. P.

(*a*) See *Clegg* v. *Dearden*, 17 Law Journ., N. S., Q. B. 233.

dant might not be bound to repair; as, if the plaintiff made a new celler under the defendant's old privy, or in a vacant piece of ground which lay next to the old privy before; in such case, the plaintiff must defend himself." Here, however, the working of the two mines has been simultaneous: but, the defendant's mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, could alter or abridge the defendant's right to work his own? Surely, the reasonable thing is, that the plaintiff should leave part of his own coal, to protect his own workings against the influx of water. The plaintiff, it appears, took that view of the matter, and left the barrier, which would have been sufficient for the purpose, but was broken through by a wrongdoer, for whose act the defendant is not responsible.

There are many cases in which the principle has been recognised, that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, [566] the adjoining land has become subject to a right analogous to what in the Roman law was called a servitude. So, also, in *Acton* v. *Blundell*,—where the subject was very much discussed,—the court held that one landowner, having dug a well on his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood, which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner, for the purpose of winning his own coal.

We think that the same principle is applicable to the present case. The water is a sort of common enemy,—as was said by Lord Tenterden, in *Rex* v. *The Commissioners of Sewers for Pagham Level*,—against which each man must defend himself. And this is in accordance with the civil law, by which it was considered that land on a lower level, owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it (Dig. lib. 39, tit. 3).

There was another point submitted to the court by the special case, but upon which very little was said in argument, viz. that the defendant, by paying money into court in the former action, had precluded himself from saying that he was not liable to be sued. But, upon looking at the declaration in that case, it appears that he was charged with erecting a dam, and thereby turning the water into the plaintiff's mine; for which he was of course responsible; and the admission of that cause of action can have no bearing on this.

Upon the whole, then, we are of opinion, that, upon the facts stated in this special case, the plaintiff is not entitled to recover, and that the postea must be delivered to the defendant.

Postea to the defendant (*b*).

[567] ROBERT PARGITER HUMFREY, a Lunatic, by EDWARD COOPER, HIS COMMITTEE, AND THE SAID EDWARD COOPER AS SUCH COMMITTEE, v. WILLAIM HUGH WADE GERY. Feb. 14, 1849.

The 42nd section of the 3 & 4 W. 4, c. 27, is not repealed by the 3 & 4 W. 4, c. 42, s. 3.—A. was, from the 2nd of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B., his committee, had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20l. 5s. per annum, payable on the 29th of September and 25th of March, created by letters-patent of the 29 H. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto:—Held, that the case was governed by the 42nd section of the 3 & 4 W. 4, c. 27, and, consequently, that neither the lunatic nor his committee was entitled to recover any arrears of the rent after the expiration of six years from the 29th of September, 1831.

The following case was sent by Vice-Chancellor Knight Bruce,—pursuant to a decree dated the 1st of March, 1847,—for the opinion of the judges of this court:—

Robert Pargiter Humfrey was, on or before the 2nd of July, 1805, and thence-

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(*b*) See *Wood* v. *Waud*, 3 Exch. 748.

forth to the 10th of July, 1841, continued to be, and he, and Edward Cooper, as committee of his estate, and in his right, or one of them, ever since that time, has or have been, and still are or is, seised, as of fee, of two third parts of a certain rent-charge (*a*), or fee-farm rent of 20l. 5s. yearly issuing, and payable on the 29th of September and 25th of March in each year, out of certain lands called Bushmead Priory; which rent-charge or fee-farm rent was created by letters-patent of King Henry the Eighth, under the great seal of England, bearing date the 26th **[568]** of September, in the 29th year of his reign; of which the following is a copy:—

"First Part. 29 Hen. 8.—The King, to all to whom, &c., greeting: Whereas, by a certain indenture made under Our great seal of the court of Augmentations of the revenues of Our crown, bearing date at Westminster, the 2nd of May, in the twenty-ninth year of Our reign, We, by the advice and consent of the council of Our court aforesaid, demised, granted, and to farm leased to John St. John, knight, the house and site of the late priory of Buoshemeyd, in our county of Bedford, by the authority of parliament suppressed and dissolved, together with all houses, buildings, barns, orchards, gardens, lands, and ground within the pale and circuit of the said late priory, and all the underwritten lands, meadows, and pastures to the same late priory belonging and appertaining, viz. [setting out the parcels]; except, nevertheless, and to Us, Our heirs and successors altogether reserved, all timber-trees and woods growing and being of, in, and upon the premises, and all such buildings of every kind within the site and precinct of the said late priory, which We might order to be there afterwards provided for and set up,—To have and to hold the site aforesaid, and all the aforesaid lands, meadows, pastures, mill, and other the premises, with the appurtenances, except as before excepted, to the before-named John and his assigns, from the feast of the Annunciation of the Blessed Virgin Mary last past, until the end of the term, and for the term of twenty-one years from thence next following, and fully to be completed; yielding therefore annually to Us, Our heirs and successors, 20l. and 16d. of lawful English money, at the feast of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, or within one month after either of those feasts, to be paid by **[569]** equal portions, at the court aforesaid, during the aforesaid term,—as, in Our court of Augmentations aforesaid, among other things, more fully appeared of record; the reversion of the premises in form aforesaid leased, belonging, after the term aforesaid is fully determined, to Us, Our heirs and successors: Know ye, that We, as well in consideration of the good, true, and faithful service to Us by Our beloved servant William Gascoigne, knight, before this done, as in consideration of the manor of Dame Elynsbury, with the appurtenances, and of other the lands and tenements in Dame Elynsbury and Bedford Haughton, in Our county of Bedford, by the same William to Us, Our heirs and successors, for ever given and granted, have, of Our special grace, and upon our certain knowledge and mere motion, given and granted, and by these presents do give and grant, to the before-named William Gascoigne, and Elizabeth, his wife, and the heirs and assigns of the same William, the reversion and reversions of the aforesaid site, and of all and singular other the premises to the before-named John St. John by Us in form aforesaid leased, with the end of the term aforesaid, or in whatever other manner it shall happen: and all the aforesaid rent of 20l. and 16d.; also the church, belfry, and cemetery of the said late priory; and also our messuages, ranges, dove-cotes, houses, and buildings, as well within as without the site and precinct of the said late priory; and also all and every kind of timber trees, woods, and underwoods growing and being in and upon the premises, to the before-named John St. John, as above recited, leased; and also all and singular manors, &c., and hereditaments whatsoever, with the appurtenances, situate, lying, and being in the vills, fields, parishes, places, and hamlets of Bushmede, Eyton, otherwise Eton Staple, otherwise Staplehow, Horneydon, Delhowe, otherwise Denehowe, Wiboston, otherwise Wyboldeston, Little Stokton, Blass-**[570]**-worth, Colnorth, Barford, Charlston, otherwise Chalmerston, Cayshoo, Bedford, Mogerhanger, and Peternall, in Our said county of Bedford, and in Great Stokton and Blasseworth, in Our county of Huntingdon, to the said late priory of Bushmede in any manner belonging or appertaining, and in the hamlets of the said counties, which by reason

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(*a*) The letters-patent clearly shewing a reservation of that species of rent-service which constitutes a fee-farm, or, as it is, somewhat redundantly, called, a fee-farm rent, it is difficult to see what caused the introduction of the term "rent-charge."

and pretext of the dissolution and suppression of the same late priory to Our hands have come, or ought to have come, and in Our hands now are, or ought to be, as fully and entirely as Robert Burre, the late prior of the said late priory, or his predecessors, priors of the same late priory, in right of the same, on the 4th day of February, in the 27th year of Our reign, or theretofore, had, held, or enjoyed, or ought to have had, held, or enjoyed all and singular the premises above expressed and specified, or any parcel of the same, with the appurtenances,—except, nevertheless, thereout, and to Us, Our heirs and successors, altogether reserved, the advowsons, donations, and rights of patronage of the churches, vicarages, chantries, chapels, and prebends whatsoever; which same reversion, rent, church, belfry, cemetery, messuages, lands, tenements, manors, and all and singular other the premises above by these presents granted, with the appurtenances, are of the clear value of 60l. 14s. 10d.. and not beyond, by the year,—To have, hold, and enjoy all and singular the premises above expressed and specified, with all and singular their rights, appurtenances, and commodities whatsoever, to the before-named William Gascoigne, and Elizabeth, his wife, and the heirs and assigns of the said William Gascoigne, for ever; to be held of Us, Our heirs and successors, in capite, by knights' service, viz. by the tenth part of the service of one knight's fee, and by the yearly rent of 20l. 5s., to be paid to Us, Our heirs and successors, at the court of Augmentations of the revenue of Our Crown, at the feast of St. Michael **[571]** the Archangel, in full for all other services, exactions, demands, &c.: so that express mention of the true value by the year, &c. Witness, &c.

"By writ of privy seal."

On or before the 2nd of July, 1805, the said Robert Pargiter Humfrey became of unsound mind; and he has ever since been, and still is, a lunatic, and wholly incapable of managing his affairs.

The Rev. Nathaniel Humfrey, the next eldest brother of the said lunatic (and his presumptive heir-at-law), in the month of March, 1831, contracted with Hugh Wade Gery, who was then the owner in fee of the said lands out of which the said rent-charge or fee-farm rent was payable, and also owner in fee of the remaining one third part (if subsisting) of the said rent-charge or fee-farm rent, for the sale to him of the said two third parts of the said rent-charge or fee-farm rent, to take effect in possession upon the death of the said lunatic, for the sum of 250l.; and certain deeds relating to the title to the said two third parts of the said rent-charge or fee-farm rent, were then delivered up to the said Hugh Wade Gery; and thereupon an agreement was entered into and signed by and between the said Nathaniel Humfrey and Hugh Wade Gery, of which the following is a copy:—

"Agreement made the 31st day of March, 1831, between the Rev. Nathaniel Humfrey, of Thorpe Mandeville, in the county of Northampton, of the one part, and the Rev. Hugh Wade Gery, of Bushmede Priory, in the county of Bedford, clerk, of the other part:

"Whereas, Robert Humfrey, Esq., a lunatic, the eldest brother of the said Nathaniel Humfrey, is seised, as of fee, of two third parts of a yearly rent-charge or fee-farm rent of 20l. 5s., issuing and payable out of certain hereditaments formerly belonging to the dissolved priory of **[572]** Bushmead, in the county of Bedford: And whereas, the said Nathaniel Humfrey is the presumptive heir of the said Robert Humfrey: And whereas, the said Hugh Wade Gery has contracted for the purchase, at or for the price or sum of 250l., of the said two third parts of the said rent of 20l. 5s.: And whereas the said two third parts of the said rent of 20l. 5s. will necessarily continue payable to the said Robert Humfrey, or the committee of his estate, during his life: And whereas, in pursuance of the said contract, the said Hugh Wade Gery has, on the day of the date of these presents, paid to the said Nathaniel Humfrey the sum of 250l. purchase-money; and the said Nathaniel Humfrey has executed a bond, bearing even date with these presents, for securing the payment to the said Hugh Wade Gery, his executors, administrators, or assigns of the sum of 250l., with interest after the rate of 5l. per cent. per annum: Now, these presents witness that the said Nathaniel Humfrey doth hereby agree with the said Hugh Wade Gery that the person or persons upon whom the said two third parts of the said rent of 20l. 5s. shall devolve upon the death of the said Robert Humfrey, shall and will, within the space of six calendar months from his death, at the expense of the said Nathaniel Humfrey, or of his estate, deduce a marketable title to the said two third parts of the said rent of 20l. 5s., and that all necessary parties shall and will, at the expense of the said Hugh Wade Gery, or his estate, convey the said two third parts of the said rent to the said Hugh Wade Gery, and his heirs, or as he or they may direct: And it is hereby agreed that the said Hugh Wade Gery and his heirs shall be entitled to all such payments as shall accrue in respect of the said two third parts of the said rent of 20l. 5s., from and after the decease of the said Robert Humfrey: And it is hereby agreed and declared that the said bond has been **[573]** so given by the said Nathaniel Humfrey to the said Hugh Wade Gery, for the purpose of securing interest for the said sum of 250l., after the rate aforesaid, from the day of the date of these presents up to the time from which the said two third parts of the said rent shall begin to accrue to the said Hugh Wade Gery, or his heirs, according to the intent of these presents; and also the repayment of the said sum of 250l., in case default shall be made in deducing a good title to the two third parts of the said rent, or in procuring the concurrence of all necessary parties in the conveyance of the said two third parts of the said rent to the said Hugh Wade Gery and his heirs, according to the stipulations aforesaid, together with such costs as may be incurred by the said Hugh Wade Gery, or his estate, in or about the intended sale of the said two third parts of the said rent: And it is therefore agreed that the said bond shall not be put in suit during the joint lives of the said Robert Humfrey and Nathaniel Humfrey, unless one year's interest for the said sum of 250l. shall be in arrear for the space of two calendar months: Provided always, that, in case such arrear of interest should accrue, or in case the said Nathaniel Humfrey should depart this life in the life-time of the said Robert Humfrey, it shall be lawful for the said Hugh Wade Gery, his executors or administrators, to enforce payment of the said principal sum of 250l., together with such interest as may be due for the same; and, upon the re-payment of the said principal sum, with such interest as aforesaid, this present contract for sale shall be determined: Provided always, that, in the event of the completion of the said purchase, and after all interest in respect of the said principal sum of 250l. shall have been paid, the said bond shall be delivered up by the said Hugh Wade Gery, his executors or administrators, to be cancelled. As witness, &c.

[574] A bond was also executed by the said Nathaniel Humfrey, of which the following is a copy:—

[Here followed a bond, in the penal sum of 500l., conditioned for payment of 250l. and interest.]

The said two third parts of the said rent-charge or fee-farm rent, so far as the same accrued due before and until the end of March, 1831, were, from time to time, before the end of that month, paid by the owner of the said lands for the time being to the owner of the said two third parts for the time being, or to some person claiming the same on his behalf, for his use.

The said Hugh Wade Gery died on the 12th of January, 1831, intestate, leaving the said William Hugh Wade Gery, his heir-at-law, who then became, and has ever since been, and is now, entitled to the said lands out of which the said rent-charge or fee-farm rent is payable, and seised in fee of such lands.

On the 11th of January, 1841, a commission in the nature of a writ de lunatico inquirendo was duly issued by the lord high chancellor of Great Britain, to inquire of the lunacy of the said Robert Pargiter Humfrey; and, by the inquisition duly taken thereunder, on the 2nd of February, 1841, it was duly found, as the truth is, that he was then a lunatic and of unsound mind, and incapable for the management of himself and his affairs, and had been so continually from the 2nd of July, 1805.

By an order of the lord high chancellor of Great Britain, afterwards, in the same year 1841, duly made in the matter of the said lunacy, the said Edward Cooper was appointed the committee of the person and estate of the said lunatic; and all his estate, effects, and property whatsoever, including his estate and interest in the two third parts of the said rent-charge or fee-farm rent, became, on the 10th of July, 1841, and are, duly vested in the said Edward Cooper, as such committee of the said lunatic's estate.

[575] Neither any payment of, or on account of, the said rent-charge or fee-farm rent, or any part thereof, nor any satisfaction for the same, has been made at any time since the end of March, 1831; nor, since that time, has there been any written acknowledgment relating thereto.

The said lands are, and during all the time aforesaid have been, worth much more than 50l. per annum: and have ever since the said William Hugh Wade Gery became the owner thereof, yielded and produced to him more than 50l. per annum, clear of all deductions.

The said William Hugh Wade Gery claims the benefit of the 42nd section of the statute hereinafter mentioned, in respect of the arrears hereinafter mentioned, which are claimed from him by the said Edward Cooper, as the committee of the said lunatic's estate.

The question for the opinion of the court is—whether the said Edward Cooper and Robert Pargiter Humfrey, or either of them, are or is, in the present year, 1847, or were or was in the year 1844, entitled to recover the arrears of the said two third parts of the said rent-charge or fee-farm rent of 20l. 5s., which accrued due from the 29th of September, 1831, to the 29th of September, 1837, inclusive, or any, and what part, of such arrears, notwithstanding s. 42 of the statute 3 & 4 W. 4, c. 27, intituled "An act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto;" and whether by distress or action, or in each mode.

The case was argued in Trinity term last, before Wilde, C. J., Coltman, J., Maule, J., and Cresswell, J.

Talfourd, Serjt., for the plaintiffs. Two questions arise in this case,—first, whether the limitation in the 42nd section of the 3 & 4 W. 4, c. 27, applies to the fee-farm rent created by the grant of King Henry the **[576]** Eighth,—secondly, whether the statute has repealed the protection given to every kind of disability. But for that section, it is quite clear the lunatic would be entitled to recover the arrears claimed in this action. The 2nd section of the statute enacts, "that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." In *James* v. *Salter* (3 N. C. 544, 4 Scott, 168, 5 Dowl. P. C. 496), Tindal, C. J., expressed an opinion that this clause did not apply to arrears of rent, but to an action to recover the rent itself. It certainly is difficult to say that the 2nd section can apply to arrears of rent, regard being had to the 42nd, which enacts, "that, after the said 31st of December, 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that, where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before **[577]** an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." It would be strange if the exceptions and disabilities in the earlier sections were not to be imported into that section. It is submitted that the present case falls within the 3rd section of the 3 & 4 W. 4, c. 42, which enacts, "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or scire facias, upon any recognizance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after, that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt, or scire facias, upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six **[578]** years after the cause of such actions or suits, but not after: Provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited." In *Paget* v. *Foley* (*a*), this court held that the limitation in actions of covenant for arrears of rent under indenture, is governed by the 3 & 4 W. 4, c. 42, s. 3,—that being virtually a repeal pro tanto of the 3 & 4 W. 4, c. 27, s. 42. Tindal, C. J., there says: "In giving judgment for the plaintiffs in this case, I am disposed to rest the opinion I am about to pronounce, solely on the construction of the 3 & 4 W. 4, c. 42, s. 3. But, at the same time, I must observe, that, if called upon to decide whether or not the present case fell within the prior enactment, 3 & 4 W. 4, c. 27, s. 42, I should feel disposed to hold the case not to be within that section. That act was passed 'for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto:' and it contains enactments much more pertinent to charges on land, than to mere conventional rents; for, by the 1st section, it is enacted that 'the word *rent* shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.' This seems to shew that the act intended to deal with a subject-matter having no affinity to rent reserved upon an indenture. The 2nd section provides that 'no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall **[579]** have first accrued to some person through whom he claims.' It is clear, that, in that section, the word '*rent*' is used with reference to charges on land, fee-farm rents, &c., for which an assise would lie. The 36th section abolishes all real and mixed actions, except writs of right of dower, or writs of dower unde nihil habet, or quare impedit, or ejectment: and the act then proceeds to make regulations to govern the amount of damages. Section 40 enacts 'that no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same, unless,' &c. Section 41, which relates to dower, enacts 'that no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit.' When, therefore, the clause that immediately follows provides 'that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent,' I should rather feel inclined to refer it to arrears of rent of the description before mentioned in the act. It is, however, unnecessary, on the present occasion, to give a definitive opinion upon the point; for, it seems to me to **[580]** be perfectly clear, that, if rent accruing under an indenture was intended to be embraced by the 3 & 4 W. 4, c. 27, s. 42, the subsequent enactment in the 3 & 4 W. 4, c. 42, s. 3, expressly takes it out of the operation of the former." Bosanquet, J., however, said, that, if the case had rested upon the 42nd section of the 3 & 4 W. 4, c. 27, he should have entertained a strong opinion in support of the application of the six years' limitation to that case. If this be an action for rent reserved by a specialty, *Paget* v. *Foley*,—which is adopted by the court of Queen's Bench

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(*a*) 2 N. C. 679, 3 Scott, 120. And see *Du Vigier* v. *Lee*, 2 Hare, 326; *Dearman* v. *Wyche*, 9 Simons, 570.

in *Strachan* v. *Thomas* (12 Ad. & E. 536, 4 P. & D. 229),—is a distinct authority in favour of the plaintiffs. [Maule, J. Distresses are not limited by the 3 & 4 W. 4, c. 42; but they are, by the 3 & 4 W. 4, c. 27.] Exactly so. The 3 & 4 W. 4, c. 27, contains certain provisions with regard to persons under disability. Section 16 enacts, "that, if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died, which shall have first happened." And the 17th section provides and enacts, "that no entry, distress, or action shall be made or brought by any person who, at the time at which his **[581]** right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." It would be extraordinary, indeed, if these words were to be held to repeal all previous statutes of limitations. The language of the 21 Jac. 1, c. 16, s. 1, is not merely exceptive: that section enacts "that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and, in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary, notwithstanding." And section 2 provides, "that, if any person or persons that is or shall be entitled to such writ or writs [of formedon], or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond seas, that then such person and **[582]** persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years." All these statutes are to be read as one code. Upon the authority of *Paget* v. *Foley*, therefore, it is submitted that this is a rent within the meaning of the 3 & 4 W. 4, c. 42, s. 3, and, consequently, is excepted out of the operation of the 3 & 4 W. 4, c. 27, s. 42.

Manning, Serjt., contrà. The 16th and 17th sections of the 3 & 4 W. 4, c. 27, shew that the attention of the legislature was drawn to the necessity of excepting the disability of lunacy, &c.: but they expressly confine it to the twenty years' claim. The 21 Jac. 1, c. 16, has no analogy to the subject-matter of this statute: and the court will not extend it by equity. It is a rule of the civil law, that "contra non valentem agere non currit præscriptio." But it has been decided over and over again, that, in our law, it is exactly the reverse. This case does not fall within the 3 & 4 W. 4, c. 42, but is expressly governed by the 42nd section of the 3 & 4 W. 4, c. 27. This view is fortified by two decisions of Sir E. Sugden upon the 3 & 4 Vict. c. 105 (Irish). The 32nd section of that statute is in precisely the same words as the 3rd section of the 3 & 4 W. 4, c. 42: and the 33rd enacts, "that, if any person or persons that is or are or shall be entitled to any such action or suit, or to such scire facias, is or are or shall be at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, or [583] beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that, if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited, after the return of such person or persons from beyond the seas." In *Harrisson* v. *Duignan* (2 Drury & Warren, 295, 1 Con. & L. 376), A. granted an annuity to a trustee for B. for his life, and in the conveyance entered into a personal covenant with B. for payment of the same: A. subsequently sold, subject to the annuity: and it was held,—on a bill filed by B. against the purchasers to raise the arrears thereof (A. or his personal representative not being a party to the cause,)—that, though there was an obligation imposed on the purchaser to indemify A., yet that the court would not thus indirectly enforce this obligation, and thereby, in effect, evade the operation of the statute of limitations; and, accordingly, the account was limited to a period of six years prior to the filing of the bill. And in *Hughes* v. *Kelly* (3 Drury & Warren, 482, 2 Con. & L. 223), by deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons: and it was held, that, notwithstanding the covenant, only six years' arrears of interest could be recovered; and that the statute 3 & 4 W. 4, c. 27, s. 42, is not repealed by the 3 & 4 Vict. c. 105, s. 32. The [584] lord chancellor (Sir Edward Sugden), in giving judgment, said: "I have to consider the operation of the statute 3 & 4 W. 4, c. 27, and the clause of the statute 3 & 4 Vict. c. 105 (s. 32), as to the limitation of the right to bring actions upon specialties. By the 40th section of the 3 & 4 W. 4, c. 27, it was enacted 'that no action or suit shall be brought to recover any sum of money secured by any mortgage, &c., but within twenty years after a present right to recover the same.' That section, therefore, provides that the principal shall not be recoverable after twenty years, except in the several cases enumerated therein; then follows the 42nd section, which embraces only the interest of the sums provided for in the 40th section. If, therefore, the law rested upon that act alone, it is plain that a distinct remedy was intended to be provided for these two subjects; that is to say, that, though the principal sum itself might be recoverable within twenty years, yet only six years' arrears of interest could be recovered upon that principal sum. Therefore, that which was supposed at the bar to have been so anomalous and inconsistent, was not so considered by the legislature. Then came the statute 3 & 4 W. 4, c. 42, only in force in England, but the 3rd section of which has been recently introduced into this country by the 3 & 4 Vict. c. 105; and this confines the period of bringing an action for rent or (sic) on a specialty to twenty years. Now, a great deal of the difficulty which has arisen upon the construction of these statutes, in England, sprung from this circumstance,—that the later act, 3 & 4 W. 4, c. 42, was not framed by the persons who prepared the former act. If the later act had not passed, money secured on land, although also secured by bond or covenant, could not have been recovered after twenty [585] years, nor could more than six years' arrears of interest have been recovered. The first act provides for both cases. In *Doe d. Jones* v. *Williams* (5 Ad. & E. 291, 296, 6 N. & M. 816), Mr. Justice Littledale said: 'The 40th section relates to actions brought to recover the money; and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it.' It never occurred to that very learned judge that the 40th section did not apply to specialties. In *Paget* v. *Foley*, the court of Common Pleas held that rent reserved upon an indenture of demise was not within the operation of 3 & 4 W. 4, c. 27, but fell within the 3 & 4 W. 4, c. 42. Mr. Justice Bosanquet, to some extent, differed from the rest of the court: he seemed to think, that, if the case had rested on the 3 & 4 W. 4, c. 27, and the 3 & 4 W. 4, c. 42, had never passed, the right to recover in that case would have been confined to six years, within the meaning of the 3 & 4 W. 4, c. 27: but he agreed with the rest of the court on the point upon which they decided the case, that the 3 & 4 W. 4, c. 27, was, in fact, removed or repleaded by the 3 & 4 W. 4, c. 42. It is a singular circumstance, that the 3 & 4 W. 4, c. 42, had, in fact, a prior operation to the 3 & 4 W. 4, c. 27, although passed subsequently to it; and this statute (3 & 4 W. 4, c. 27), when it came into force, found the 3 & 4 W. 4, c. 42, in full operation. In Ireland, however, the law stands on a different footing; for, the provision in the 3 & 4 W. 4, c. 42, to which I have been adverting, was not introduced into this country, until it was embodied in the recent statute of Victoria; and it is to be regretted that it was thus introduced without some modification. The statute of Victoria found the 3 & 4 W. 4, c. 27, in full operation in this country. **[586]** My clear opinion upon the effect of the 3 & 4 W. 4, c. 27, is, that it expressly applies, in a case like the present, both to the principal and interest, although the money is also secured by a bond or covenant. In *Strachan* v. *Thomas*, there was a little more difficulty than in *Paget* v. *Foley*. That was the case of an annuity, which fell directly within the terms of the 3 & 4 W. 4, c. 27; for, in the first section, which is the glossary of the act, the word 'rent' is defined to extend to all annuities and periodical payments. The learned chief justice, however, in delivering judgment, merely said,—'The present is not the usual case of reservation of rent upon a lease, and, so far, it is not properly an indenture of demise; it is a rent-charge, and, as such, falls within the 42nd section of the 3 & 4 W. 4, c. 27: but, notwithstanding that, we are of opinion that it falls within the 3rd section of the 3 & 4 W. 4, c. 42, as being an action of covenant on a specialty.' Now, this case went far beyond *Paget* v. *Foley*, which was held to fall within the provisions of the 3 & 4 W. 4, c. 42; whereas, in the later case, the court held that the case was within the 3 & 4 W. 4, c. 27, and also within the 3 & 4 W. 4, c. 42, by reason of the action being one upon a specialty. It appears to me that the two statutes, being in pari materia, should be construed together, and, if possible, reconciled. There is this important distinction between the case which I have to consider, and both *Paget* v. *Foley* and *Strachan* v. *Thomas*; in both of these cases there was but one subject,—the rent in the one, and the rent-charge in the other: it was, therefore, impossible to say that there could be a recovery of the same subject both within twenty years and within six years. But, in the present case, I have to deal with two subjects, the principal sum secured, which is clearly within the 40th section of the 3 & 4 W. 4, c. 27, and the interest upon that principal sum, which falls within the **[587]** 42nd section. It is singular that the court of Exchequer in this country (Ireland) came to a different conclusion from the court of Common Pleas in *Paget* v. *Foley*; for, in *Bruen* v. *Nowlan* (1 Jebb & S. 346, n.), they held that the 3 & 4 W. 4, c. 27, did extend to rent reserved upon an indenture of demise. There was then no conflict of statutes; for, at that time, there was no other statute in force than the 3 & 4 W. 4, c. 27; the statute of Victoria had not passed, and the 3 & 4 W. 4, c. 42, did not extend to this country (Ireland). I think the court of Exchequer decided in that case rightly; and it agrees with the opinion of Mr. Justice Bosanquet, to which I have already adverted. But the passing of the later act opens to a different view. . . . The question then is, does this act of Victoria, in the particular case of a charge, or a mortgage, with a covenant for payment, enlarge the remedy of the creditor as to interest? I am of opinion that it does not. I think the case falls within the 3 & 4 W. 4, c. 27, and that the right to arrears of interest must be confined to six years. I do no violence to the statute of Victoria by that construction. That act was not intended to repeal the former one. There are many cases in which the remedy provided by the statute of Victoria may come into operation, without breaking in upon the former statute. Both may, and ought to, be construed together. The period of limitation is twenty years in each: and, though there are savings in the one act which are not to be found in the other, yet it does not appear to me that these provisions prevent me from holding that this case falls, as to interest, within the 3 & 4 W. 4, c. 27." [Maule, J. The ordinary form of expression in statutes of limitation,—in the 21 Jac. 1, c. 16, for instance,—is, that all actions, &c., shall be commenced within a certain limited period, and not after. The phraseology **[588]** of the 3 & 4 W. 4, c. 27, s. 42, is different: it is, that no arrears of rent, &c., shall be recovered, &c., but within six years next after the same respectively shall have become due, &c.: not that you must bring your action within six years; but that you must recover the arrears within six years, or not at all. The 41st section,—which, without any exception or limitation, enacts, "that, after the said 31st of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit,"—tends to throw a little light upon the subject.] This case is not within the

3 & 4 W. 4, c. 27, s. 3. [Maule, J. Can debt be maintained for a rent in fee?] The remedy for the owner of the rent is by distress (*a*)[1]. [Maule, J. May not effect be given to the 3 & 4 W. 4, c. 27, s. 42, and the 3 & 4 W. 4, c. 42, s. 3, in this way,—by holding the right to recover the rent to be limited to six years, provided twenty years have not elapsed since the title first accrued, and, after that period has elapsed, to be gone altogether?] We admit the plaintiffs' right to recover six years' arrears. If the case had rested on the 3 & 4 W. 4, c. 27, s. 42, it is clear that the plaintiffs' claim would have been barred at the end of six years. That provision is modified by the 3rd section of the 3 & 4 W. 4, c. 42, in the manner just suggested. A party who has slept on his rights for a period short of twenty years, is not barred of his remedy, but is allowed to recover six years' arrears only: but, if he has slept for a period exceeding twenty years, he is altogether barred. [Maule, J. Like an action of ejectment: the plaintiff has twenty years to bring his action; but he can only recover the mesne profits for six years.] **[589]** Precisely so. No action of debt or covenant would lie on these letters-patent: the grantee does not covenant (*a*)[2]. There being no provision in the later act extending the disability of lunacy to a case of this sort and the court having no power to extend it by analogy, the plaintiffs are not entitled to recover the arrears in question.

Edward Cooper, as committee of the estate of the lunatic, had an office in relation to the real property of the lunatic, but had no estate or interest: *Knipe* v. *Palmer* (2 Wils. 130); *Tyrell* v. *Jenner* (6 Bingh. 283, 3 M. & P. 648).

Talfourd, Serjt., in reply. In *Grant* v. *Ellis* (9 M. & W. 113), a question arose whether the statute 3 & 4 W. 4, c. 27, applied to rent reserved on an indenture of demise; and it was held, that such a rent was not within that statute, for, that it only applied to freehold rents. Upon the converse of that case, therefore, it can scarcely be contended here that this is not a rent coming within the statute. [Maule, J. The 36th section of the 3 & 4 W. 4, c. 27, abolishes real actions, with a single exception. The succeeding sections, down to 39, inclusive, relate to the realty. The 40th section enacts, "that, after the said 31st of December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknow-**[590]**-ledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." Then comes section 42, which applies to arrears of rent,—the recovery of the rent itself having already been provided for by section 2.] The words of the 3rd section of the 3 & 4 W. 4, c. 42, are precise and positive. The decision in *Paget* v. *Foley* proceeded upon that section: and the main question is, whether that case governs the present, or whether the court will adopt the view taken in the two Irish cases—*Harrisson* v. *Duignan* and *Hughes* v. *Kelly*. [Maule, J. You clearly cannot sue in covenant. You are, therefore, driven to rely on your capacity to sue the terretenant in an action of debt.] Undoubtedly that is so.

The following certificate was afterwards sent to Vice-Chancellor Knight Bruce:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that Edward Cooper and Robert Pargiter Humphrey were not, nor was either of them, in the year 1847, or the year 1844, entitled to recover the arrears of the two third parts of the rent-charge or fee-farm rent of 20l. 5s. which accrued due from the 29th of September, 1831, to the 29th of September, 1837, inclusive, or any part of such arrears. "THOS. WILDE. "W. H. MAULE.
"T. COLTMAN. C. CRESSWELL."

9th December, 1848.

(*a*)[1] But, by 32 H. 8, c. 37, debt lies for his executor, &c.

(*a*)[2] By accepting letters-patent, the grantee becomes bound by any covenants contained therein: *Brett* v. *Cumberland*, 1 Roll. Rep. 359, Cro. Jac. 355, 521.

[591] IN THE EXCHEQUER CHAMBER.

WAKLEY v. HEALEY, IN ERROR. Feb. 9, 1849.

[S. C. 18 L. J. C. P. 241.]

In case for a libel, the declaration stated, by way of inducement, that the plaintiff was a barrister and the editor and proprietor of a weekly publication called the *Medical Times*, and also secretary to the committee of "Poor Law Medical Officers," and to the "Convention of Poor Law Medical Officers;" that there existed an association called "The National Institute of Medicine;" that certain medical poor law union officers were endeavouring to bring about an amelioration of the then existing system of poor law medical relief; and that "The National Institute of Medicine" was willing to lend its assistance to the medical poor law union officers, and to allow that body the use of certain rooms held by them.—The declaration then, in the first count, alleged that the defendant, in a weekly publication called the *Lancet*, published, "of and concerning the plaintiff," the following:—"In our last, we advised the medical officers of the poor law unions to adopt an independent course, to trust to the justice of their cause, and to their own legitimate exertions, for an amendment of the grievances of which they so justly complain:" and, after cautioning those persons not to suffer "The National Institute of Medicine," or "The Committee of Poor Law Medical Officers," to meddle with their affairs, the libel proceeded—"We would exhort the medical officers to avoid the traps set for them by desperate adventurers (thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute."—The second count stated that the defendant further published "of and concerning the plaintiff," the following,—"We need not here dwell upon the impolicy of the connection between the present agitation and 'The National Institute,'—a body which has disgusted the government,—and with other persons not belonging to the profession (thereby meaning the plaintiff, as such barrister as aforesaid), and whose weekly vocation it is to bring every thing belonging to the profession into disrepute and contempt" (thereby meaning that the plaintiff was in the habit, as editor of the said weekly publication called the *Medical Times* as aforesaid, of bringing the medical profession into disrepute and contempt).—The third count described the plaintiff as "a quack lawyer and mountebank," and an "impostor"; and the fourth set out matter tending to hold the plaintiff up to ridicule.—After verdict for the plaintiff upon all these counts, with entire damages:—Held, by the court of error,—that the words charged in the first count were libellous:—Held also, that the words charged in the second count were libellous, without the aid of the innuendo: and—Held also, that the count was not objectionable, by reason of the want of an averment that the libel was published of and concerning the plaintiff as editor of the weekly publication referred to,—that being sufficiently shewn by the libel itself.—Semble, that this count would have been good without any special averment.

Case, for a libel. The first count of the declaration stated, that Healey, the plaintiff (below), before and at the time of the committing of the grievances by Wakley, [592] the defendant (below) thereinafter mentioned, was a barrister, and the editor and proprietor of a certain weekly publication called the *Medical Times;* that the plaintiff (below), before the committing of the grievances by the defendant (below) thereinafter mentioned, was the secretary to the committee of "Poor Law Medical Officers," and to the "Convention of Poor Law Medical Officers;" that, also, before the committing of the said grievances, a certain association, consisting of medical men and others, existed, which association was called by the name of, and known as, "The National Institute of Medicine;" that the said association so called as aforesaid, was, before the committing of the grievances by the defendant (below) thereinafter mentioned, possessed of certain vacant rooms and apartments; that a certain large number of medical poor law union officers were, before the committing of the grievances by the defendant (below) thereinafter mentioned, interested in, and endeavouring to bring about, an amelioration of, the then existing system of poor law medical relief; that the said association so called "The National Institute of Medicine" as aforesaid, was then willing to lend their assistance to, and co-operate with, the said medical poor law union officers who were so as aforesaid interested in, and endeavouring to bring about, such an amelioration of the then existing system of poor law medical relief, and the said association was willing to allow the said medical poor law union officers to use gratuitously the said rooms and apartments of **[593]** the said association, for the purpose aforesaid, and the plaintiff (below), before the committing by the defendant (below) of the grievances next thereinafter mentioned, had recommended the said rooms and apartments to the said medical poor law union officers, for the said purpose; that the plaintiff (below) always had been, and then still was, a good and faithful subject of this realm, and as such had always behaved and conducted himself, and, until the time of the committing by the defendant (below) of the grievances thereinafter mentioned, was always reputed, esteemed, and accepted such, by and amongst his neighbours and other worthy subjects of this realm, and had never been guilty of, nor up to the time of the committing of the several grievances by the defendant (below) thereinafter mentioned, been suspected of being guilty of, any improper or immoral conduct, or of the offences or misconduct thereinafter mentioned to have been charged upon, or imputed to, him by the defendant (below), or of any other offences or misconduct; and that, by means of the said several premises, the plaintiff (below), before the committing of the grievances thereinafter mentioned, had deservedly obtained the good opinion of, and credit with, all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known: Yet that the defendant (below), well knowing the premises, but greatly envying the happy state and condition of the plaintiff (below), and contriving, and wickedly and maliciously intending to injure him in his good name, credit, and reputation, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff (below) had been and was guilty of the mis-**[594]**-conduct and offences thereinafter mentioned to have been falsely and maliciously charged upon the plaintiff (below), and to vex, harass, and oppress the plaintiff, did theretofore, to wit, on the 9th of October, 1847, in a certain number of a certain weekly publication, called the *Lancet*, falsely and maliciously and wickedly compose and publish, and cause and procure to be published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, one part of which said libel contained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff (below), that is to say—"In our last, we advised the medical officers of the poor law unions to adopt an independent course, to trust to the justice of their cause, and to their own legitimate exertions, for an amendment of the grievances of which they so justly complain. This advice is doubly necessary at the present time. When we wrote, there was only one party of a suspicious character, attempting to obtain the management of the poor law medical agitation, for selfish purposes. Now, there are two quacks in the field; the one recommending Charing Cross; the other, the rooms of the National Institute (meaning the vacant rooms and apartments of the said association called the National Institute of Medicine, so recommended by the plaintiff below as aforesaid); the one (thereby meaning the plaintiff below), offering house-room gratis; the other, attempting to levy contributions on the poor law medical purse. If the poor law union suffer either of these parties to intermeddle with their affairs, their cause will be inevitably ruined:" (*a*) and another **[595]** part of which libel contained the false, scandalous, malicious, and defamatory matter following, of and concerning the plaintiff (below), that is to say, "As a mode of strengthening their cause, the poor law officers should, in every union, obtain the co-operation of their professional brethren as much as possible. We have already urged upon the latter the duty, and, indeed, the self-interest, of making common cause with them. Above all, we would exhort the medical officers to avoid the traps set for them by desperate adventurers (thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute."

The second count stated, that the defendant (below), further contriving, and wickedly and maliciously intending as aforesaid, theretofore, to wit, on the 16th of October, 1847, did, in a certain other number of the said weekly publication called

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(*a*) As to this portion of the alleged libel, a verdict was found for the defendant (below), on the plea of not guilty.

the *Lancet*, falsely and maliciously compose and publish, and cause to be published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the plaintiff (below), that is to say—"We need not here dwell upon the impolicy of the connection between the present agitation and the National Institute (meaning thereby the said association called the National Institute of Medicine),—a body which has disgusted the government,—and with other persons not belonging to the profession (thereby meaning the plaintiff below, as such barrister as aforesaid), and whose weekly vocation it is to bring everything belonging to the profession into dispute and contempt" (thereby meaning that the plaintiff, below, was in the habit, as editor of the said weekly publication called the *Medical Times* as aforesaid, of bringing the medical profession into disrepute and contempt).

[596] The third count stated that the defendant (below), further contriving and intending as aforesaid, did, on the 23rd of October, 1847, in a certain other number of the said weekly publication called the *Lancet*, of which the defendant (below) was so as aforesaid proprietor (*a*), falsely, wickedly, and maliciously publish, and cause and procure to be published (*b*), a certain other false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff (below), that is to say—"We trust the meeting on the 27th will be united, numerous, and powerful. If it be what it ought to be, it will, no doubt, receive the support of the entire daily press; and thus, an immense impetus will be given to the good cause. No where should the press be neglected. Daily or weekly, metropolitan or provincial,—wherever poor-law medical men have interest, a shot should be fired, and publicity given to their exertions. One indication has given us sincere satisfaction, viz. the omission in the recent advertisements of the name of the quack lawyer and mountebank (thereby meaning the plaintiff, below, as such barrister as aforesaid), who intruded himself upon the poor-law medical men, and whose intrusion, if permitted to continue, must have tended to damage the question materially with all those who know the character of the impostor (thereby meaning the plaintiff below). We trust this is an indication on the part of the union surgeons, of their resolve to cast off all excrescences that might hinder the adhesion, and slacken the enthusiasm, of their supporters. There **[597]** must be no rump in the matter; no discreditable alliances."

The fourth count stated, that, just before the committing of the grievances next thereinafter mentioned, to wit, on the 27th of October, 1847, a certain meeting of the said medical poor law officers had been held, and the same meeting had been and was convened under the auspices of the plaintiff (below), amongst others, and at such meeting the plaintiff (below) acted as, and was, the secretary, as the defendant (below), at the time of the committing of the said grievances, well knew: Yet that the defendant, further contriving and intending as aforesaid, did, on the 30th of October, 1847, in a certain other number of the said weekly publication called the *Lancet*, falsely, wickedly, and maliciously publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff,—"Every part of the three kingdoms,—England, Ireland, and Scotland,—is furnishing its quota of resistance to the unjust system of medical poor law relief which universally prevails. The meeting of English poor law surgeons on Wednesday, was not, as it might and should have been. There were present about one hundred and fifty, including lookers on. We firmly believe, that, but for the sinister influences we have before referred to, there would have been a thousand medical men at the meeting,—one third, instead of one twentieth, of the medical poor law officers of England and Wales! But it would be as wise to convene a meeting of the merchants of London, in the present panic, under the superintendence of Joseph **[598]** Ady and Ikey Solomons, as it was to convene a medical meeting under the auspices of Healey (thereby meaning the plaintiff below) and Ross. At the commencement of the meeting (thereby meaning the said meeting so convened as aforesaid), the self-appointed secretary (thereby meaning the plaintiff below,) would have taken up the whole day, by reading a confused list of meetings and resolutions which

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(*a*) This is the first time he is so described.

(*b*) Not saying "of and concerning the plaintiff."

have been held and already reported, some of them weeks ago. However, the restlessness of the meeting warned the able chairman Dr. Burton, of Walsall; and the briefless quack secretary (thereby meaning the plaintiff below,) was unceremoniously snuffed out."

There was a fifth count, on which the jury found for the defendant.

The declaration then concluded—"By means of the committing of which said several grievances by the defendant (below) as aforesaid, the plaintiff (below) hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on account of the committing of the said grievances by the defendant (below), from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff (below) to have been and to be a person guilty of the said improper conduct so charged upon him by the defendant, and have, by means of the committing by the defendant of the grievances hereinbefore mentioned as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the **[599]** plaintiff, as they were used and accustomed to have, and would otherwise have had; and the plaintiff hath been and is, by means of the premises, otherwise greatly injured," &c.

The defendant pleaded,—first, not guilty; secondly, "as to so much of the declaration as relates thereto," that the plaintiff was not a barrister and the editor and proprietor of the said weekly publication called the *Medical Times*, in manner and form as in the declaration mentioned,—thirdly, "as to so much of the declaration as relates thereto," that the plaintiff was not the secretary to the committee of poor-law medical officers, nor to the convention of poor-law medical officers, in manner and form as in the declaration mentioned. Issue thereon.

At the trial before Maule, J., at the sittings in Middlesex after last Easter term, the jury returned a verdict for the defendant, on not guilty, as to the first portion of the libel set out in the first count, as also on the issue on not guilty to the last count; and, as to the residue of the first count, as well as upon all the other issues, they found for the plaintiff; and they assessed "the damages of the plaintiff on occasion of the committing of the grievances whereof the defendant has been convicted as aforesaid, at 40s. over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges 40s."

Judgment having been signed, a writ of error was brought.

The errors assigned were, amongst others,—that the latter portion of the alleged libel in the first count was not the subject of an action, and was not sufficiently explained by proper introductory statements or averments, nor was the same properly or sufficiently shewn, **[600]** by proper and sufficient innuendos, or otherwise, to relate or apply to the plaintiff (below);—that the second count did not state or set forth any cause of action against the defendant (below), and that none of the innuendos in that count contained, were warranted by any proper inducement or introductory statement, and that, without the aid of those innuendos, it did not appear from or by the said second count to what the supposed libel therein mentioned related, nor did it appear how or in what manner that libel related or applied to the plaintiff (below,) or that it did apply to him;—and that the second count did not contain a sufficient or proper averment or statement that the words and matter which followed the words "that is to say," were contained in the supposed libel in that count mentioned, &c.

The case was argued on the 30th of November last, before Parke, B., Alderson, B., Patteson, J., Coleridge, J., Wightman, J., Erle, J., Platt, B., and Rolfe, B.

Bramwell (with whom was Talfourd, Serjt.), for the plaintiff in error. The first count is bad: there is no introductory averment, and no innuendo, to shew who are the poor law medical officers alluded to. The only innuendo to point the latter part of the libel, is that in which the plaintiff thinks proper to apply the term "desperate adventurer" to himself. The words are not actionable by themselves, and the plaintiff below had no right thus to enlarge their application for the purpose of making them so. [Parke, B. The jury have found that the words were intended to apply to the plaintiff. We are all of opinion that the first count is good. There can be no doubt, that, to say of a man that he is a "desperate adventurer" and sets traps for others, is libellous. Pass on to the next count.]

[601] There is no colloquium in the second count, averring the alleged libel to have been published of and concerning the plaintiff as a barrister, or as the editor of the *Medical Times*; and, therefore, there is nothing to warrant the innuendos,—apart from which, there is nothing to shew to what profession the alleged libel refers; and, if there is, for anything that appears, it may be a laudable thing to shew it to be disreputable and contemptible. [Parke, B. The substance of the charge is, that the plaintiff is a weekly libeller.] That might be so, if there were any prefatory averments to warrant the conclusion. In *Day* v. *Robinson, in Error* (1 Ad. & E. 554, 4 N. & M. 884), a count in a declaration for slander laid the words as follows,—"You have robbed me of 1s. tan-money;" and the innuendo explained the meaning to be, that the plaintiff had fraudulently taken, and applied to his own use, 1s. received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for, and as servant to, the defendant: but, inasmuch as the facts stated in this innuendo, were not warranted by any independent introductory averment, it was held to be bad, and the words not in themselves actionable. [Alderson, B. Would it have been a libel on Molière, to write of him that his object was,—as suggested by the medical men of his day,—to bring the medical profession into ridicule and contempt?] Possibly, by the aid of apt averments, even that might have been established. Here, there is nothing to apply the imputation to the plaintiff; and, as he himself has given a particular meaning to the statement, the court cannot reject it. "An innuendo is only explanatory of some matter already expressed: it serves to point out, where **[602]** there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add, or enlarge, or change the sense of the previous words"(*a*). Again, in 2 Wms. Saund., 307, n. (1), it is said "There seems to be no doubt that words which are not actionable in themselves, but are only so because they are spoken of a person in his profession, office, or trade, must be alleged in the declaration to have been spoken of him in relation to such his profession, office, or trade; otherwise, the declaration contains no cause of action, and judgment will be arrested:" *Harvey* v. *Martin* (Sir T. Raym. 75); *Walmsley* v. *Russell* (6 Mod. 202, per Powell, J., 2 Salk. 696). The same principle applies to libel. [Parke, B. In *Harvey* v. *French* (1 C. & M. 11), a count for a libel stated that the defendant published a false libel of and concerning the plaintiff, containing, amongst other things, the false, &c. matter of and concerning the plaintiff, that is to say—"Threatening letters. The Middlesex grand jury have returned a true bill against a gentleman of some property, named French" (meaning the plaintiff); "with this, that the said plaintiff will verify, that the said defendant thereby then and there meant to insinuate and have it understood that the plaintiff had been suspected to have been, and had been, guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one ——— Trotter, threatening to kill and murder the said ——— Trotter, a subject of this realm, with a view and intent to extort:" and it was held,—first, that the innuendo at the conclusion of the count was bad,—secondly, that the matter was libellous **[603]** without such innuendo, which might be rejected as surplusage.]

Parke, B. We are all clearly of opinion that all the counts are good, except the second. As to that, we entertain some little doubt.

Dearsley, for the defendant in error. If the libel in the second count be read, as it ought to be, in immediate connection with the inducement at the commencement of the declaration, it is clearly shewn to have reference to the plaintiff in his profession of a barrister, and in his capacity of editor of the *Medical Times*. To write of a man, that he is in the weekly habit of publishing libels on a particular profession, is undoubtedly libellous: and the prefatory averments shew that the *Medical Times* is a weekly publication. The innuendo, therefore, is wholly superfluous: the words are libellous in themselves. [Parke, B. The only question is, whether the words,—"whose weekly vocation it is to bring every thing belonging to the profession into disrepute and contempt,"—are susceptible of the meaning ascribed to them, and which the jury have found was intended to be conveyed.] There can be no doubt that the medical profession was intended. The publication in which the libel is found, shews that. [Platt, B. We cannot take judical notice that the *Lancet* is a medical publication.]

(*a*) 1 Wms. Saund. 243, n. (4); citing *Rex* v. *Greepe*, 2 Salk. 513, 1 Ld. Raym. 256, 12 Mod. 139.

Bramwell, in reply. [Parke, B. If the words are ambiguous, they are to be understood in a sense that will support the verdict, provided they are fairly susceptible of that meaning. Platt, B. Upon what principle do you reject the innuendo? It does not enlarge the sense of the words.] If the innuendo stands, it **[604]** must be confessed that there is a diffculty in saying that the publication is not libellous. Rejecting it, the count is clearly too vague.

Cur. adv. vult.

Parke, B., now delivered the judgment of the court.

The writ of error in this case was argued at the sitting after last Michaelmas term.

The plaintiff had obtained a verdict, with general damages 40s., on a declaration containing several counts for libels; and judgment was given in the court of Common Pleas for the plaintiff.

On the argument of the writ of error, Mr. Bramwell took objections to several of the counts; but they were of no weight as to any count except the second, as to which the court took time to consider.

The inducement at the commencement of the declaration, and which was applicable to all the counts, stated the plaintiff to be a barrister, and the editor and proprietor of a weekly publication, called the *Medical Times*, and other matters, not necessary to be now referred to.

The second count,—the only one the objections to which are to be considered, was as follows:—[His lordship read it.]

The objection to this count was, that the innuendo at the conclusion of it was bad, because the libel was not averred to have been published of and concerning the plaintiff, as the editor of the said weekly publication; and that, to make the count good, there should have been, not merely an inducement stating the fact that he was so, but an averment that the libel was published of him in that character.

Supposing this objection to be well founded, the only consequence is, that the innuendo is to be re-**[605]**-jected: *Harvey* v. *French* (1 C. & M. 11): *Roberts* v. *Camden* (9 East, 93): and the question, then, is, whether the words themselves, without an innuendo, are actionable. After verdict, it must be taken that the jury found that they have been published without lawful excuse, and are such as to be injurious to the plaintiff's character; as it has been the practice, in modern times, to leave the latter point also to them. And if, in their ordinary acceptation, and without the aid of extrinsic circumstances, the words may be reasonably understood as derogatory to the plaintiff's character, the judgment cannot be arrested: *Roberts* v. *Camden.* Here, the imputation is, that it is the vocation, that is, the habitual employment, of the plaintiff, to bring every thing belonging to the profession (that is, every thing, whether worthy of it or not,) into disrepute and contempt: and this imputation tends to discredit the plaintiff, and is injurious to his character, whatever means he uses for that purpose. And the jury have found that the words used have that effect. The amount of injury by such an imputation, they had also to estimate: and they have not given large damages.

It may be a question in this case, whether any special averment was necessary, that the libel was of and concerning the plaintiff as editor of the weekly journal; as the contents of the libel itself sufficiently shew that reference: and the cases of *Sir Miles Fleetwood* v. *Curle* (Cro. Jac. 557), and *Sir John Isham* v. *York* (Cro. Car. 15), and other cases referred to in Mr. Starkie's valuable book on Slander (page 414), may apply to this: but it is unnecessary to give any opinion on this question. The **[606]** innuendo, on that supposition, would be proper: and thus there would be no doubt that the imputation was, that the plaintiff in his vocation of editor, was a libeller; and so no question as to the publication being actionable.

Judgment affirmed (*a*).

End of Hilary Vacation.

(*a*) Though defamatory matter may appear only to apply to a class of individuals, yet, if the descriptions in such matter are capable of being, by innuendo, shewn to be directly applicable to any one individual of that class, an action may be maintained by such individual. In such a case, the innuendo does not extend the sense of the defamatory matter, but merely points out the particular individual to whom the

[607] Cases Argued and Determined in the Court of Common Pleas, in Easter Term, in the Twelfth Year of the Reign of Victoria.

The judges who usually sat in banco in this term, were—Wilde, C. J., Coltman, J., Cresswell, J., V. Williams, J.

Memorandum.

In the course of the last vacation, Mr. Serjt. Kinglake received a patent of precedence, to take rank next after Mr. Rolt.

The following gentlemen were also appointed Her Majesty's counsel learned in the law:—Edward John Lloyd, Esq., of Lincoln's Inn; John Greenwood, Esq., of the Middle Temple; Richard Malins, Esq., of the Inner Temple; Frederick Calvert, Esq., of the Inner Temple; Henry Singer Keating, Esq., of the Inner Temple; Roundell Palmer, Esq., of Lincoln's Inn; James Robert Hope, Esq., of the Inner Temple.

[608] Towne *v.* Lewis. April 16, 1849.

[Discussed, and head-note corrected, *Pillot* v. *Wilkinson*, 1864, 3 H. & C. 348.]

A., the indorser of a dishonoured bill, having paid the amount to B., the holder, demands the bill from B., who refers him to his (B.'s) attorney. A. refusing to go to the attorney, B. says, "Then call on Saturday, and in the mean time I will get it for you." A. calls on Saturday, but does not obtain the bill:—This is not evidence of a conversion.

Trover, for a bill of exchange. Pleas, not guilty, and not possessed.

The cause was tried before Wilde, C. J., at the sittings at Westminster after the last term. The facts were as follows:—The plaintiff, as indorser of a bill of exchange, had been sued by the defendant in the Lord Mayor's court, and had paid the amount under an order of that court. He afterwards sent a person to the defendant, to demand the bill, when the defendant told him it was not in his possession, and referred him to his attorney, to whom he had handed it for the purpose of suing upon it. The plaintiff's messenger declining to go to the attorney, the defendant said:—"Then, call on Saturday, and in the meantime I will get it for you." The messenger accordingly called again, on the following Saturday, but did not obtain the bill: whereupon the plaintiff immediately brought this action.

His lordship left it to the jury to say whether, when the demand was made, the defendant meant to dispute the plaintiff's right to the bill, or whether he really meant to send it to him when he could obtain it; at the same time intimating a pretty strong opinion that there was no conversion.

A verdict having been found for the defendant,

Humfrey now moved for a new trial, on the ground of misdirection, and that the verdict was against evi-[609]-dence. The plaintiff was unquestionably entitled to the possession of the bill, and the defendant's neglect to restore it amounted to a conversion. [Cresswell, J. Did the defendant convert the bill, by putting it into the hands of his attorney?] Certainly not: he had at that time dominion over it, and a right to sue upon it. [Cresswell, J. Then, was he guilty of a conversion, by not immediately taking it out of his attorney's hands when his claim was satisfied?] Having fixed his own time for the re-delivery of the bill, his neglect to do so was evidence of a conversion. The question which ought to have been left to the jury is, whether the defendant prevented or delayed the plaintiff in obtaining possession of his property, without any justifiable excuse. [Wilde, C. J. Can that be said to amount to a conversion by the defendant, which is neither an assertion of title in

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matter, in itself defamatory, does in fact apply. Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him, and of the said factory, a libel, imputing that, "in some of the Irish factories (meaning thereby the plaintiff's factory)," cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good. *Le Fanu* v. *Malcolmson*, 1 House of Lords Cases, 637.

himself, nor a denial of the title of the plaintiff, nor evidences an intention on the defendant's part to withhold the chattel from him?] In *M'Combie* v. *Davies* (6 East, 538), it was held, that, taking the property of another by assignment from one who had no authority to dispose of it; as, taking an assignment of tobacco in the King's warehouse, by way of pledge, from a broker who had purchased it there in his own name for his principal, and refusing to deliver it to the principal, after notice and demand by him,—none other than the person in whose name it is warehoused being able to take it out,—is a conversion. [Wilde, C. J. That was, in effect, a denial of title.] In *Catterall* v. *Kenyon* (6 Jurist, 507), goods of the plaintiff had been taken in execution upon process against the goods of B., and placed upon the premises of the defendant, who was an innkeeper; upon a demand of them by the plaintiff, **[610]** in the absence of the defendant, the wife of the defendant said that she would consult the attorney who had issued the execution, and, after having done so, refused, saying that she was not to deliver them up, and that he would save her harmless: and it was held that this was sufficient evidence of conversion. Lord Denman there said: "The case of *Verrall* v. *Robinson* (*a*)[1] induced us to grant the rule; but I think that case does not apply: in that case, Lord Abinger, and Alderson, B. considered that the chaise was in the custody of the law, and that the party with whom it was placed at livery was not at liberty to deliver it up after it had been attached by process out of the sheriff's court; after the attachment, the holder was passive, and no more than, as it were, an officer of the court, and was not justified in parting with it. Here, the goods of one party are by mistake taken by virtue of process against another, and, being placed on the premises of the defendant, the wife takes upon herself to inquire into the ownership of them, and, after inquiry, refuses to give them up. I think that the party's so depriving the owner of the possession of his goods, is sufficient evidence of a conversion."

At all events, the plaintiff is entitled to a verdict on the issue upon not possessed.

Wilde, C. J. As to the issue last adverted to, **[611]** the plaintiff is of course entitled to a verdict on that. Indeed, the whole strength of the defendant's case, upon not guilty, depends upon the plaintiff's right to a verdict upon not possessed. The verdict may be so entered from my notes.

As to the rest, the case appears to me to be quite free from difficulty. No doubt, the conduct of the defendant was evidence whence the jury might infer whether or not he had been guilty of a conversion. But here there was no evidence that the defendant had any intention to deny the plaintiff's title to the bill, or to withhold the possession of it from him: nor was there any such unreasonable delay on the defendant's part as would warrant the jury in inferring a conversion; on the contrary, the whole conduct of the defendant was consistent only with a bonâ fide intention on his part to deliver up the bill as soon as he could conveniently obtain it. Authorities are not wanting, to shew that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control (*a*)[2]. It seems to me that the evidence was properly submitted to the jury, and that their conclusion was the correct one.

Coltman, J. The authorities cited by Mr. Humfrey seem to me conclusively to dispose of his argument. Here, there was a full and complete admission of the **[612]** plaintiff's title to the bill, and a promise to deliver it to him. There was nothing more than evidence from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on

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(*a*)[1] 2 C. M. & R. 495. In an action of trover for a chaise, it appeared that one B. had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that, whilst it was in the defendant's possession, in the city of London, it was attached by process out of the sheriff's court: the plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it: it was held that there was no evidence of a conversion by the defendant, the chaise being, at the time of the demand, in the custody of the law, and not of the defendant.

(*a*)[2] See *Canot* v. *Hughes*, 2 Scott, 663. There, certain wine warrants coming to the possession of the defendant as the personal representative of her deceased husband, who died insolvent, she placed them in the hands of her attorney: the warrants being demanded on behalf of the assignees of the husband, the defendant referred the applicant to the attorney: and it was held that this was not evidence of a conversion the defendant's part in complying with the plaintiff's demand. I think the matter was properly left to the jury, and properly disposed of by them.

Cresswell, J. I am entirely of the same opinion.

V. Williams, J. I also think there is no ground for finding fault with the summing up in this case, or with the conclusion the jury came to.

Rule refused.

Barber v. Thomas. May 1, 1849.

To induce the court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration-money, the fact of such returning or retaining must be distinctly and unequivocally sworn to.—At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration money, 170l., and immediately paid thereout 8l. 6s. 6d. for the costs of preparing the securities and inrolling the memorial, and 20l. to the grantee's agent, in satisfaction of a liability to him (the agent) upon a bill of exchange drawn by the grantor upon and accepted by his father, and which was within a week of maturity:—Held, that this was not such a transaction as would warrant the court in setting aside the securities eleven years after the date of the grant.

On the 3rd of October, 1838, an annuity of 31l. 13s. was granted by Thomas Thomas, an attorney, for his life, to Elizabeth Barber, in consideration of the **[613]** sum of 170l.; Alfred Thomas the elder joining as surety. The annuity was further secured by a warrant of attorney of the same date, whereby Alfred Thomas the elder and Thomas Thomas authorised certain attornies of this court to appear for them, and to confess the action and suffer judgment to pass against them, or either of them, for 340l., in case default should be made in payment of the annuity, or any half-yearly payment thereof.

In the memorial inrolled in chancery, the witnesses to the execution of the deed were described as "P. Tait and E. Morris, clerks to W. Waller, of, &c.," the name of the person by whom the annuity or rent-charge was to be beneficially received, was stated to be "Elizabeth Barber," and, under the head "consideration, and how paid," the entry was, "one hundred and seventy pounds, paid in Bank of England notes."

Default having been made in payment of the annuity, and Alfred Thomas, the surety, being dead, judgment was entered up on the warrant of attorney against Thomas Thomas on the 2nd of October, 1848, and execution was issued thereon on the 13th of April, 1849, under which his goods were seized, to satisfy 274l. 5s. 6d., for eight and a half years' arrears of the annuity, and 5l. 5s. for costs.

Upon an affidavit of the grantor, setting forth the above facts, and suggesting that P. Tait (now an attorney), and not Elizabeth Barber, was, in reality, the person beneficially interested in the annuity; and further stating that the draft annuity-deed and warrant of attorney were prepared by the deponent, and delivered to Tait, who acted as the agent of Mrs. Barber, who caused them to be engrossed and stamped; that, after the execution thereof (which took place at the office of one Waller, an attorney to whom Tait was at that time under articles), and after the departure of Alfred **[614]** Thomas and the attesting witnesses (except Tait), Tait gave the deponent, as the purchase or consideration-money for the annuity, the sum of 141l. 13s. 6d., and no more, "inasmuch as the said P. Tait did retain, and keep back, out of the said sum of 170l., the said purchase-money, the following sums, that is to say, the sum of 20l. secured to the said P. Tait by a bill of exchange drawn by the deponent upon, and accepted by, the said Alfred Thomas, and indorsed by the deponent to the said P. Tait, falling due and payable on the 10th of October, 1838," and the said P. Tait did also retain the further sum of 8l. 6s. 6d. for certain costs which the said P. Tait alleged were due to him in respect of such grant of annuity and warrant of attorney, and of the memorial to be registered thereof, but that, although it is declared by the said grant of annuity, that the deponent was to pay the costs of preparing the said grant of annuity and warrant of attorney, out of the purchase-money, yet, that such retention of 8l. 6s. 6d., or any sum beyond the actual expenditure occasioned for stamps, parchment, and engrossing, was a colourable charge and fraudulent retention by the said P. Tait, inasmuch as no sum whatever was disbursed by Waller, or charged by him to the deponent in respect of the said deed of annuity and warrant of attorney and memorial, nor did Waller ask for, or receive, any sum of money whatever in respect thereof, nor did the deponent ever treat with Waller respecting the said annuity, nor was Waller the attorney or solicitor of Mrs. Barber, nor was he in any wise concerned in the negotiation thereof, or in the preparation of the said securities, save by his taking the drafts to a conveyancer to be settled, which he voluntarily performed (at the request of Tait) without fee or reward, nor was Tait an attorney or conveyancer, nor did he incur any further charge beyond paying for the stamps and parchment and for **[615]** engrossing the deed and warrant of attorney, and for the said memorial; that no bill of costs or charges was delivered or offered to be delivered, shewn, or exhibited by Tait or by any other person whatever to this deponent, shewing how the said sum of 8l. 6s. 6d. was made up; and that the deponent had been informed by Waller, some time prior to his death, which took place on or about the 1st of October, 1848, and believed, that Tait had never accounted with him (Waller) for or in respect of any sum for or by reason of the said grant of annuity and warrant of attorney and memorial, that, save as aforesaid, he (Waller) did not superintend or interfere with the same, and had never been concerned as attorney or agent for Mrs. Barber, and that the purchase-money for the annuity was in reality Tait's own money,—

Byles, Serjt., on a former day in this term, obtained a rule calling upon Mrs. Barber to shew cause why the warrant of attorney, judgment, and execution, and all subsequent proceedings, should not be set aside, on the grounds "that the said warrant of attorney was given for securing the payment of a certain annuity, and that part of the consideration-money for such annuity was improperly retained; that the name or names of the person or persons by whom the said annuity is to be beneficially taken or received, is or are not set forth in the memorial of such annuity; that the name of the said Elizabeth Barber, the plaintiff, is colourably used and stated in the said memorial, as being the person by whom the said annuity is to be beneficially taken or received; and that the particulars of the said annuity are not properly set forth in the said memorial, pursuant to the statute 53 G. 3, c. 141, in respect of stating the consideration and how paid, and the name **[616]** or names of the person or persons by whom the annuity or rent-charge is to be beneficially received," &c.

Ogle now shewed cause, upon the affidavit of Mrs. Barber, who swore that the consideration-money paid for the purchase of the annuity was her own proper money, that she was and still is beneficially entitled to the annuity, and that Waller acted as her attorney in preparing the necessary documents for securing the annuity to her; and also upon an affidavit of Tait, who stated that he, at the solicitation of Thomas Thomas and Alfred Thomas (who was the father of Thomas Thomas, and one of the principal clerks at the treasury), procured Mrs. Barker to advance the former the sum of 170l., by way of annuity; that the draft of the annuity deed was made by Thomas Thomas, and indorsed in his own hand-writing with the name of Waller, as the grantee's attorney; that the grantor and Alfred Thomas, as surety, attended on the 3rd of October, 1838, at the office of Waller, to execute the annuity deed and warrant of attorney; that the deponent thereupon immediately paid over to the grantor the sum of 170l., in five notes of the governor and company of the Bank of England, namely, one note for 100l., one for 40l., and three for 10l. each; that, by the terms of the annuity deed, it was agreed that the grantee should pay the costs thereof, and of registering the memorial thereof, and of the warrant of attorney; that, after the said sum of 170l. had been so paid as aforesaid, the grantor paid to Waller who then acted, as he had repeatedly done before and since, as the solicitor of the grantee, the sum of 8l. 6s. 6d. for the costs to which he, Waller, was entitled, the account of which was as follows: "Instructions, 6s. 8d., drawing, 19s., ingrossing, 9s. 6d., stamp and parchment, 2l. 10s. warrant of attorney, **[617]** 6s. 8d., attesting execution, 13s. 4d., attending, &c. 6s. 8d., memorial, 1l. 1s., coach-hire, 7s," making together 8l. 6s. 6d., the receipt of which sum was entered in Waller's day-book and cash-book; that the deponent was, at the time of the grant of the annuity the holder of a bill of exchange for 20l., for money which Thomas Thomas had previously borrowed of him, and which bill was drawn by Thomas Thomas upon, and accepted by, Alfred Thomas, and was then either due or on the point of becoming due, and that the said Thomas Thomas then paid him the amount thereof; that the said sum of 170l., so paid by the deponent to Thomas Thomas, was the proper moneys of Mrs.

Barber, who always had been, and still continued, the person beneficially entitled to the said annuity ; that neither Thomas Thomas nor Alfred Thomas, nor any other person or persons on his, their, or either of their behalf, had paid, in respect of the said annuity, or on account thereof, any other sum of money except the sum of 30l. 13s., which sum had been duly accounted for by the deponent to Mrs. Barber.

The suggestion that the name of Mrs. Barber was colourably used, is clearly answered. [To this Byles, Serjt., assented.] The only question then is, whether or not any part of the consideration-money was retained by the grantee or by her agent. As to the 8l. 6s. 6d., the affidavit of Thomas, the grantor, is distinctly answered. And, with respect to the 20l., what was more natural than that the person for whose accommodation the bill had been accepted, should, in order to relieve his father from responsibility, when he had got possession of a large sum of money, appropriate a portion of it to the discharge of a bill that was within seven days of maturity? The case is entirely free from any of those circumstances of suspicion which have, on various occasions, induced the courts to interfere to relieve **[618]** parties from improvident bargains into which they had suffered themselves to be inveigled.

Byles, Serjt., in support of the rule. It appears from the affidavits, that part of the consideration-money was retained by Tait, who acted as the grantee's agent. This, it has repeatedly been held, is ground for setting aside the annuity. The 6th section of the 53 G. 3, c. 141, expressly provides, that, if any part of the consideration shall be returned to the person advancing the same, or retained, the court may order the deeds to be cancelled. And this has been done upon several occasions. In *Williamson* v. *Goold* (1 Bingh. 234, 8 J. B. Moore, 109), where, upon the grant of an annuity, the agent of the grantee, on paying the consideration-money, retained, or caused to be returned to him, a considerable sum for the expense of deeds, investigating title, journeys, &c. (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired), the court held this an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of, such retainer. "We must," says Dallas, C. J., "reduce the matter to the plain test and standard of common sense : when a man who negotiates, and profits by negotiating, an annuity, goes to a distance with two witnesses prepared for the purpose, who just see the signature of the grantor, and immediately retire, and then a large sum out of the consideration-money is taken back for the expense of deeds and journeys, is this such a payment as the statute requires? I think not : and we need not wander into the details of **[619]** the affidavits for other circumstances to impeach the fairness of the transaction." And Burrough, J., said : "Parliament has imposed upon us the duty of watching these proceedings most narrowly. If the principal will not look to his own business in an affair of such importance, he must suffer for his neglect : the agent stands in his place, and the principal must be responsible for the due payment of the consideration-money. The act says the money must be bonâ fide paid : was this so here? The witnesses retire, and Gibbs and Goold are left together ; Goold says that 450l. was retained, and Gibbs admits 350l. ; which, he says, was for the expense of deeds and investigating title ; but no bill of costs is produced, nor any thing to justify the charge. The impression on my mind is, that this money has been improperly retained ; and the annuity must, therefore, be set aside." So, in *Gorton* v. *Champneys* (*a*), a person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration-money to the grantor, having at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself (which is precisely this case), the court, on motion, set aside the annuity, on the grantor's paying principal and interest at 5 per cent., though the grantee never received any of the money so returned, and was ignorant of that part of the transaction. "It is true, indeed," says Park, J., in giving the judgment of the court, "that Gibbs swears that the whole of the consideration-money was really and bonâ fide paid into the proper hands of Sir Thomas Champneys, and the witnesses to the deed swear they saw the money paid, and none was returned in their presence. But, **[620]** can the court possibly wink so hard as not to see that all this is the machinery of these transactions? Witnesses to the deed are necessary, and to the receipt of the money :

(*a*) 1 Bingh. 287, 8 J. B. Moore, 302, per nom. *Coventry* v. *Champneys*.

but, as soon as they see the money laid down, and the deeds are executed, they leave the room. But, why did they not stay? Why did they not wait and see Sir Thomas Champneys put it in his pocket and go away with it? Because there was a great after-reckoning to take place, at which no human beings but Gibbs and Sir Thomas Champneys were to be present; when a secret transaction was to be arranged, which would not admit of any witness but the parties. Is it pretended that a moment's interval elapsed between the execution of the deeds and the payment or return of the money to Gibbs? The affidavit most guardedly swears, that, after he had so paid the money (into the proper hands of Sir Thomas Champneys), that is, immediately, the account was settled, and 5427l. were paid by Sir Thomas Champneys to this deponent. This, therefore, puts an end to all those supposed cases stated at the bar, of the defendant having gone off with the money, and settled at another time; and to which the general answer is, the court look to the circumstances of each particular case, as proved before them; and would ill discharge their duty, if, on the one side or the other, they were to act on supposition, and not on proofs." These cases were recognised and acted upon in *Calton* v. *Porter* (2 Bingh. 370, 9 J. B. Moore, 703). [Maule, J. In all these cases, the transaction was clearly fraudulent. In *Williamson* v. *Goold* a large sum was retained for procuration-money and expenses. In *Gorton* v. *Champneys*, 5400l. out of 6200l. was, as Park, J. observes, "on one pretence or other retained and kept back." So, in *Calton* v. *Porter*, the handing over the money was merely colourable. Here, **[621]** however, the charge for costs is fair and reasonable; and the 20l. was a sum that was voluntarily paid by the grantor of the annuity, in discharge of a bill which he would have had to pay at all events in a week. Wilde, C. J. The grantor does not say that there was any previous stipulation for the return or the retainer of any part of the money: if there had been any such previous agreement, no doubt he would have stated it. He says, on the contrary, that he never got the money at all. Maule, J. He does not say, simpliciter, that he received only 141l. 13s. 6d.: but he says "Tait gave him, as the purchase-money or consideration for the annuity, the sum of 141l. 13s. 6d. and no more, inasmuch as the said Tait did retain and keep back," &c.] The onus of shewing the fairness of the transaction lies on the grantee. The result of the affidavits clearly shews that the transaction is fraught with suspicion.

Wilde, C. J. I am of opinion that no ground has been shewn in this case to deprive the grantee of the benefit of any of the securities for this annuity which she stipulated to receive. The grantor has failed to bring himself within any of the authorities; nor has he succeeded in shewing that there was any unfairness in the transaction. It must be borne in mind that the grantor is himself an attorney,—a person well acquainted with matters of this kind, perfectly cognisant of his own rights, as well as of those of the parties he is dealing with, and not likely to be imposed upon. What are the facts? In consideration of an advance of 170l., Thomas contracts to pay Mrs. Barber an annuity of 31l. 13s.; he paying the costs incident to the preparing the necessary securities, as is usual in such cases. Nothing is said in the affidavit as to any agreement by the grantor to pay, or that the grantee's agent should **[622]** retain, any other sum; and, if there had been any such previous agreement, the grantor must have known the importance of stating it. The parties,—that is, Thomas, the grantor, and Tait, the agent of the grantee,—meet at the office of Waller, to whom Tait is under articles, and whose name appears as that of the attorney acting in the business. Thomas, in his affidavit, states that 141l. 13s. 6d. only was paid to him: but he does not so state it as the grantee, whose securities are sought to be impeached, is entitled to have it stated; the allegation is followed by words which make it equivocal—"inasmuch as the said P. Tait did retain and keep back out of the said sum of 170l., the said purchase-money, the following sums, that is to say, the sum of 20l. secured to the said P. Tait by a bill of exchange drawn by the deponent (the grantor) upon and accepted by the said Alfred Thomas (who was the grantor's father, and who was surety for the due payment of the annuity), and indorsed by the deponent to the said P. Tait, falling due and payable on the 10th of October, 1838" (just seven days later), and the 8l. 6s. 6d. for costs. How is that statement meant? By a positive affidavit by Tait, that he paid over to the grantor the full sum of 170l., in five Bank of England notes, the amounts of which he specifies; and he goes on to state, that, after the 170l. had been so paid, the grantor paid to Waller the 8l. 6s. 6d. for the costs, and to him the deponent 20l., the amount of a bill of exchange, then about to become due, which had been given to him by the grantor for money previously lent by him to the grantor. If he were put in peril of perjury for his statement, the grantor might very fairly argue that it was not inconsistent with the transaction deposed to by Tait. But it clearly is not a proper mode of stating a case, when **[623]** coming to the court to set aside securities on the ground of fraud. I cannot help thinking that the affidavit was thus cautiously worded, in order to prevent its being treated as a positive and distinct assertion that the grantor received 141l. 13s. 6d. only of the purchase-money. The impression conveyed to my mind by the two affidavits is, that the whole 170l. was paid over to Thomas, and that he then paid to Waller, or to Tait on Waller's behalf, 8l. 6s. 6d. for the costs, and 20l. to Tait in satisfaction of the bill held by him. And I see nothing unfair in that transaction. With respect to the 8l. 6s. 6d., it consists of fair professional charges, paid by an attorney, who was perfectly competent to judge of their propriety at the time, and which are not now impugned as being excessive. But it is said that these costs were not in reality paid to Waller, but to Tait, who was not then in a situation to be entitled to make such charges. As to this, the case rests upon the affidavits upon the one side and upon the other. Tait swears positively that this money was received by Waller, and was duly entered in his day-book and cash-book. It is to be observed, that this transaction took place eleven years ago; and that Waller was alive until last October. Have not the courts repeatedly said, that, if parties will forbear to come for redress, until those who could have explained the transaction are removed by the hand of death, they will act with extreme caution and wariness in these cases? I think every intendment ought to be made, so far as Waller's name is concerned, which is not inconsistent with what is positively sworn to on the one side, and uncontradicted by any distinct statement on the other. Then, as to the 20l., was that an improper retainer or return of part of the consideration-money? By no means. That sum, it appears, was due for money previously **[624]** lent by Tait to Thomas, upon the security of a bill, accepted by the father of the latter, and which was within seven days of arriving at maturity. This was a debt which Thomas had a strong interest in discharging, seeing that his father,—a gentleman holding a responsible situation in a government office,—was security for its due payment. Under these circumstances, it is by no means unlikely that the grantor would discharge this debt without any previous stipulation, when he had money in his hands. Upon the subject of such stipulation, he is entirely silent. He puts it upon a totally different ground. The court, in these cases, always looks at the general nature of the transaction, in order to see whether there has been any oppression exercised towards the grantor. Merely formally handing over the money is nothing, if a large portion of it is to be immediately taken back, as expenses of the investigation of title, or under any other pretence. Upon the whole, I am unable to discover anything in this case to assimilate it with those in which the court has interfered to set aside the securities on the grounds suggested, and therefore I think this rule must be discharged.

Coltman, J. This is an application to the discretion of the court: and we are no further bound to interfere than the justice of the particular case may seem to us to require. The simple facts of the present case are these:—The grantor, having stipulated to grant an annuity of 31l. 13s., in consideration of a sum of 170l., receives that sum, and then pays a small amount for expenses, and a debt which was really and properly due from him, and which he had a more than ordinary interest in paying. There is no pretence for saying that he was in any way oppressed or improperly dealt **[625]** with. It would be giving a most unjust operation to the statute, to set aside the securities taken under such circumstances.

Maule, J. I entirely agree with the lord chief justice and my brother Coltman in thinking that this case is not brought either within the words or within the spirit of the act.

Cresswell, J., concurred.

Rule discharged.

Pritchett *v.* Smart. April 24, 1849.

[S. C. 6 D. & L. 702; 18 L. J. C. P. 211.]

The court refused to entertain an application by a defendant in an action on a bill of exchange, to compel the plaintiff, a stock-broker, to produce his book, kept pursuant to the 7 G. 2, c. 8, s. 9, in order to enable the defendant to plead that the bill, which was an accommodation bill, had been indorsed over to the plaintiff by the drawer, for differences in stock-jobbing transactions,—on the ground that the defendant had no direct interest in the book.—Semble, that it is to the broker's principals that he is bound to produce the book.—Semble, that the court will not compel a party to produce a document, the production of which might subject him to penalties.

Assumpsit on a bill of exchange drawn by one Richard Williams upon, and accepted by, the defendant, and by Williams indorsed to the plaintiff, a sworn broker of the city of London. The bill was suggested to have been accepted for the accommodation of the drawer, and by him indorsed to the plaintiff for differences upon stock-jobbing transactions.

The defendant being called upon to plead, made an application to Maule, J., at chambers, to require the plaintiff to produce his broker's book; but that learned judge refused to make any order, expressing an opinion that the defendant's remedy, if any, was in equity.

[626] Byles, Serjt. now moved for a rule to shew cause why the plaintiff should not forthwith produce to the defendant his (the plaintiff's) book called the broker's book, pursuant to the provisions of the 7 G. 2, c. 8, s. 9, which contained the entries of the contracts, agreements, and bargains relating to the public stocks, made between the plaintiff and Richard Williams, the drawer of the bill of exchange mentioned in the declaration, and the days of making such contracts or agreements, so far as related to the sum or sums of money claimed thereon by the plaintiff from the said Williams when he indorsed the said bill to the plaintiff, and why the plaintiff should not shew to the defendant, &c., such parts of the said book or register as contained such entries, &c.

This application is grounded on the 7 G. 2, c. 8, s. 9 (*a*), which requires every broker to keep a book which he is to produce "when thereunto lawfully required." In the only case upon this statute, *Rawlings* **[627]** v. *Hall* (1 C. & P. 11), although it was held at nisi prius that a broker who had been served with a subpœna duces tecum was not bound to produce his book kept pursuant to this statute, a rule for a new trial was granted, the court in banc appearing to be of opinion that he would be compelled to produce it. That case seems to establish, that, in an action between third parties, a broker is obliged to produce his book. [Wilde, C. J. Is it quite clear that a broker is bound to produce a book in a court of law, and thereby subject himself to penalties?] Here, the broker is the plaintiff, and the defendant ought to be allowed to defend himself by having access to the plaintiff's book. It was suggested, on the application at chambers, that the defendant's remedy, if any, was in equity; but *Bullock* v. *Richardson* (11 Ves. 373) shews that the court of chancery will not interfere under this section, on the ground that it will not entertain an application for a bill of discovery, an answer to which might subject the party to penalties. [Wilde, C. J. What is the practice in this court on which you rely in applying for the present rule? V. Williams, J. The nearest cases to the present are where corporations or lords of the manor have been compelled to produce deeds and court-rolls; but, in those cases, the applicants

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(*a*) "That all and every broker or brokers, or other person or persons who shall negotiate or act as a broker, receiving brokerage, in the buying, selling, or otherwise disposing of any of the said public or joint stocks, or other public securities, shall respectively keep a book or register, which shall be called 'The Broker's Book,' in which said book he and they shall fairly, justly, and truly enter all contracts, agreements, and bargains that he or they shall from time to time make between any person or persons whatsoever, on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or brokers, and other person or persons acting or negotiating as such as aforesaid, shall, from time to time, produce such book or register when thereunto lawfully required; and, in case such broker or brokers, or any other who shall negotiate, or act as a broker as aforesaid in relation to any the said matters, shall not keep such book or register, or shall wilfully omit to enter therein fairly, justly, and truly, any such contract, bargain, or agreement as aforesaid, he or they shall, for every such offence or omission, forfeit and pay the sum of 50l., to be recovered," &c.

had an interest in the documents.] This may be considered as being in substance an application by the drawer of the bill, who was a customer of the stock-broker; for, if the latter recovers against the defendant, the defendant may recover over against the drawer, the bill being an accommodation bill. The defendant, therefore, cannot be considered as a stranger to the book. Moreover, as the statute does not say to whom the book is to be produced, it would seem that the intention was, to make it a public book.

[628] Wilde, C. J. In general, applications like the present are made to a supposed equitable jurisdiction of the court. This defendant, however, does not appeal to any such power in the court, but relies on the statute, which, he says, obliges the plaintiff to produce his broker's book, when required; and the defendant calls upon us to enforce its production. It is the opinion of the whole court that this application does not rest on any solid foundation. I know of only one class of cases in which the court interferes to compel a party to a suit to allow his adversary to inspect documents which the latter alleges are necessary to his defence; and that is where the applicant has an interest in the documents to be produced. My brother Williams has referred to cases where corporations or lords of manors are required to produce their books or court-rolls. So, where two parties sign a document, which is left in the possession of one of them, the other clearly has a right to its production, without having recourse to a court of equity. So, where a document is considered to be held by one party as a trustee for himself and another. But these applications are never granted, unless the person seeking to enforce the production has an interest in the document withheld. Here, the defendant, the acceptor of the bill, says, "I can impeach the consideration which the plaintiff gave for it, if you will only allow me to examine his book." And he asks for its production, whereby the plaintiff may not only be compelled to give evidence against himself in the action, but may subject himself to penalties. He grounds his applications on the 9th section of the 7 G. 2, c. 8, which requires a broker to keep a book of all contracts, agreements, and bargains made by him. The statute undoubtedly prohibits all bargains for stocks, assuming the appearance of a sale, but being, in reality, in the nature of a wager, and the book is to be produced, but **[629]** to whom? I apprehend to the broker's principals. It is clearly not the intention of the act to compel a broker to give evidence against himself, and thereby subject himself to penalties. This is shewn by the 2nd and 4th sections of the act; for, while the former allows him to be proceeded against in equity, by a bill of discovery, the latter indemnifies him against the consequences of answering. Were we to enforce the production of the plaintiff's book, we should have no power to discharge him from the penalties he might thereby incur. The defendant has no interest in the book; and it appears to me that it would be contrary to the spirit of the act, were we to require its production. The application, therefore, cannot be granted.

Coltman, J. It seems to me that we must reject this application, upon the same grounds on which a court of equity would refuse to call upon the party to answer a bill of discovery. According to the argument of my brother Byles, the filing of a bill of discovery would be just as lawful an occasion for the production of the book, as the present application. With respect to the words of the statute,—that the broker shall produce his book "when thereunto lawfully required,"—*Rawlings* v. *Hall* seems to shew, that, on a trial at law, the broker, having been served with a subpœna duces tecum, is compelled to produce it.

Cresswell, J. I am of the same opinion. The statute says, the broker is to produce his book when lawfully required; leaving it to the court to determine what is a lawful occasion. Here, the defendant is not a party to any of the transactions presumed to be entered in the book; neither is it held by the plaintiff as a trustee for him. The only ground suggested for the ap-**[630]**-plication is, that the book, when produced, might enable the defendant to frame a plea that would furnish a good defence to the action. Is this, therefore, a lawful occasion? I apprehend it is not. The case of *Bullock* v. *Richardson* shews that the court of chancery will not, under this section of the act, oblige a man to answer a bill of discovery, which might subject him to penalties.

V. Williams, J. It is difficult to say how the court acquired the equitable jurisdiction which they exercise in compelling the production of documents. According to a case in 1 Wms. Saund. p. 98, 9th ed. n. (*i*), this jurisdiction is as old as the time of Charles II. It is clear, however, that we ought not to interfere in a case in which a court of equity would decline to entertain a bill of discovery.

Rule refused.

REED *v.* SHRUBSOLE. April 25, 1849.

Where, in an action of tort, the plaintiff obtains a verdict for less than 5l. under a writ of inquiry, he is entitled to his costs, although the sheriff has no power to certify, and although the action might have been brought in one of the new county-courts: dissentiente, Cresswell, J.

Trespass for an assault, the damages being laid at 100l.

The defendant having allowed judgment to go by default, a writ of inquiry was executed before the sheriff of Kent, under which the damages were assessed at 40s. The defendant thereupon entered a suggestion on the roll to deprive the plaintiff of costs, under the **[631]** 129th section of the county-courts act, 9 & 10 Vict. c. 95 (*a*)[1], "for that the trespasses were committed at Sheerness, in the county of Kent, within the district of the county-court of Kent, held at Sheerness, and that a plaint might, at the time of the commencement of this suit, have been entered in the said court, &c.; and that neither the said sheriff nor any other judge hath ever certified that this action was fit to be brought in this court, &c.: wherefore he prays judgment if the plaintiff ought to recover any costs of suit in this behalf."

To this there was a demurrer and joinder (*b*).

Creasy, in support of the demurrer. The question is, whether the section in the county-court act applies where there is judgment by default, and the damages are assessed under a writ of inquiry. It is submitted **[632]** that it does not; for, the act clearly contemplates those cases only in which the judge can grant a certificate. Where the damages under a writ of inquiry are assessed below 40s., the sheriff has no power, by the 43 Eliz. c. 6, s. 2, to certify: *Wardroper* v. *Richardson* (*a*)[2] Littledale J., there says (1 A. & E. 76): "The words 'judges and justices,' in the statute of Elizabeth, cannot mean any but the judges and justices of the courts at Westminster." And Parke, J., says (1 A. & E. 76): "It certainly was not intended, by the 3 & 4 W. 4, c. 42, s. 17, to give the power of certifying, to sheriffs and other judges to whom causes were sent by writ of trial. There was once a clause in the bill to this effect; but it was struck out." So, such statutory restrictions do not extend to courts-baron: *Littlewood* v. *Smith* (1 Ld. Raym. 181). That was a case upon the 21 Jac. 1, c. 16, which directs, that, in actions for slanderous words, if the jury on the trial of the issue, or upon inquiry of damages, find or assess the damages under 40s., the plaintiff shall recover only so much costs as the damages given or assessed. That case is cited

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(*a*)[1] Which enacts, "that, if any action shall be commenced, after the passing of this act, in any of Her Majesty's superior courts of record, for any cause, other than those lastly hereinbefore specified (s. 128), for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20l., if the said action is founded on contract, or less than 5l., if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause, shall certify, on the back of the record, that the action was fit to be brought in such superior court."

(*b*) The following was the material point of demurrer stated by the plaintiff,—that the 129th section of 9 & 10 Vict. c. 95,—by which a plaintiff, upon a verdict found for him for a sum less than 5l. in an action of tort, shall recover such sum only and no costs,—does not apply to judgment by default and assessment of damages upon a writ of inquiry.

The defendant's point was, that the 129th section of the act applies as well to the case of a verdict upon a writ of inquiry, as to that of a verdict upon the trial of a cause, and also extends to deprive a plaintiff of costs where less than 5l. damages is recovered in an action founded on tort, whether the damages claimed in the declaration exceed 20l. or not.

(*a*)[2] 1 A. & E. 75, 3 N. & M. 839. S. P., *Claridge* v. *Smith*, 4 Dowl. P. C. 583.

as shewing the equitable construction which the courts are disposed to put upon these restraining statutes. When a plaintiff obtains a verdict for less than 40s., upon a writ of inquiry, in a case within the 22 & 23 Car. 2, c. 9, s. 136, he is entitled to full costs: *Sheldon* v. *Ludgate* (*d*). In *Bale* v. *Hodgetts* (1 Bingh. 182, 7 J. B. Moore, 602), Park, J., says: "Can I suppose that the legislature did not understand the difference between a judgment by default and a judgment after verdict, or that this difference escaped their notice? If they meant that the defendant should pay costs in all cases where the plaintiff succeeds, **[633]** quod voluerunt non dixerunt." So, the restriction in the old Middlesex county-court act (23 G. 2, c. 33, s. 19) does not extend to verdicts after judgment by default: *Strutton* v. *Whitwell* (1 Mann. & Ryl. 562). Lord Tenterden there says: "I think we ought to act upon the authority of the case of *Harris* v. *Lloyd* (4 M. & S. 171), and grant no rule in this case. It was there decided by this court, that a suggestion cannot be entered under this act of parliament, in order to entitle the defendant to double costs, after judgment by default, and writ of inquiry; but only where there has been a trial. I am of opinion that that was a right decision; and I consider it much better to act upon it in the first instance, than, by granting a rule to shew cause, to unsettle the question." In *Waller* v. *Deane* (7 M. & G. 936, 8 Scott, N. R. 760), it was held that a proviso in a court of requests act, giving costs to the defendant, where the jury, upon the trial of the cause, found damages under 40s., does not apply to such a finding after judgment by default. In a case of *Dunster* v. *Day* (8 East, 239), under the London court of requests act (39 & 40 G. 3, c. civ. s. 12), providing, that, if any action should be commenced out of that court, for any debt not exceeding 5l., arising within the jurisdiction, the plaintiff should not, by reason of a verdict for him, or otherwise, be entitled to costs, &c.,—it was held, that, after judgment by default, and damages assessed upon a writ of inquiry, the defendant might move to stay proceedings, on payment of the damages assessed, without costs. But, in that case, as pointed out by Lord Ellenborough, the words "or otherwise" brought the plaintiff within the restriction. [Cresswell, J. Where the matter is confessed, no certificate is necessary. V. Williams, J. It has **[634]** been held, upon the statute of Charles (22 & 23 Car. 2, c. 9, s. 136), that the word "actions" did not extend to other actions than actions of battery, by reason of the latter part of the section speaking of those actions only in which a battery can be certified: *Ven* v. *Phillips* (1 Salk. 208). You say, that, where the action is so disposed of as that there could not have been a certificate, the case is not within the statute.] That is what is contended for.

Wise, in support of the suggestion. In *Jones* v. *Barnes* (2 M. & W. 313, S. C., per nom. *Jones* v. *Bond*, 5 Dowl. P. C. 455), it was held that the sheriff has no power to certify under the statute of Elizabeth (43 Eliz. c. 6, s. 2), where the verdict upon a writ of trial is under 40s. But the power to grant a certificate has nothing to do with the question now before the court.

The cases cited on the other side turned upon the precise words of the particular acts of parliament, and have little or no bearing upon the present statute. In *Bishop* v. *Marsh* (6 N. C. 12, 8 Scott, 128), and *Forbes* v. *Simmons* (9 Dowl. P. C. 37), it was expressly held, upon the Middlesex court of requests act, that the 43 Eliz. c. 6, s. 2, did apply, although the sheriff had no power to certify. The right of the defendant to deprive the plaintiff of costs, arises, if the latter does not recover more than 40s. It is for the plaintiff to come to the court and say that the judge has certified in his favour. In *Nind* v. *Rhodes* (17 Law Journ. N. S., Q. B. 179; 5 D. & L. 621), one of the questions was, whether the defendant was bound to negative the fact that the judge had given a certificate. [V. Williams, J. There may be this difference between *Bishop* v. *Marsh*, and that class of cases, and the present. Suppose there were an action for a tort under 5l., and that it was not **[635]** a fit action to try before the county-court. In such a case, according to your argument, it would always be in the power of a defendant to deprive the plaintiff of costs.] The court must look at the affirmative words in the statute, which is a general act, and one that ought to receive a liberal construction. To get rid of the effect of the previous words in the clause, the plaintiff should bring himself within the proviso, by producing a certificate; according to the rule of pleading, that, where a clause is in favour of the pleader, and

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(*d*) C. B. T. 3 G. 1, Bull. N. P. 329. But writs of inquiry are now included: see 13 & 14 Vict. c. 24, s. 2.

there is a proviso against him, the latter should come from his opponent: *Simpson* v. *Ready* (12 M. & W. 736, 1 D. & L. 1024); *Pilkington* v. *Cooke* (16 M. & W. 615). [Coltman, J. That is merely a rule of pleading, and has no bearing on the construction of an act of parliament.] In *Barnard* v. *Moss* (1 H. Bl. 107), a case of *Biddulph* v. *Cooper* is cited, which was an action for not setting out tithes under the 8 & 9 W. 3, c. 11, s. 3, which statute gives costs to the plaintiff in all actions of that description, "wherein the single value or damages found by the jury, shall not exceed the sum of 20 nobles" (6l. 13s. 4d.). The plaintiff declared for less than 20 nobles, and signed judgment for want of a plea. On applying to the prothonotaries to tax his costs, they consulted Gould, J., who gave it as his opinion, that, as no trial or inquisition had been had by a jury, the plaintiff was not entitled to costs. In the present case, there has been an inquisition. In *Jefferies* v. *Berat* (17 Law Journ., N. S., Q. B. 290, 12 Jurist, 1003), upon a writ of trial, in a case within the London small-debts act (10 & 11 Vict. c. lxxi.), it was contended, before Wightman, J., that the 113th section of that act (corresponding with the 129th section of the new county-courts act (9 & 10 Vict. c. 95), which deprives the plaintiff **[636]** of his right to costs in certain cases, contemplates trials before a judge who can certify. That learned judge said, that a judge of a superior court only could certify, but that the proper course would be, to make it a term in the order for a writ of trial, that the sheriff should have power to certify. [V. Williams, J. There may be a difference. Suppose the defendant does not dispute the debt, the case may nevertheless be one which ought to be brought in the superior court, though the damages are assessed at less than 5l. On an application for a writ of trial, the plaintiff may represent to the judge that he may lose his costs, and the writ of trial may be refused, unless the defendant will consent that the sheriff shall have power to certify.] The cases referred to on the other side, turned upon the construction of local acts: here, the court has to deal with a general statute. [Wilde, C. J. The legislature must be taken to have been apprised of the previous decisions, and would avoid the adoption of language which would defeat their purpose.] In *Simpson* v. *Ready* (12 M. & W. 736, 1 D. & L. 1025), it was held, that, where a statute directed that certain actions should not be brought except by a burgess, it was not necessary to state in the declaration that the plaintiff was such burgess. [Wilde, C. J. That was a rule of pleading, as to the mode in which the matter was to be brought before the court; but here we have to decide upon the effect of the clause.] A party ought not to be allowed to obtain a benefit by false pleading: *Pilkington* v. *Cooke* (16 M. & W. 615). There, although the bankrupt would be bound to defend the action, for the benefit of his creditors, he was held to be liable as for a vexatious defence. The statute of Charles (22 & 23 Car. 2, c. 9) contains, an express affirmative enactment. [Wilde, C. J. Does not the **[637]** clause profess to deal with cases that shall be tried? and may not the plaintiff here be entitled to costs, there being no verdict within the meaning of the section? If it was intended to apply to a judgment by default, it is most inaptly drawn; but not so much so, if intended to apply only to cases where there had been a trial.] That may be so, if the proviso is to be considered as incorporated with the clause. The word "verdict," however, is ambiguous, and may mean a verdict of a jury upon issue joined, or a verdict after interlocutory judgment by default. If the construction contended for by the plaintiff be adopted, a defendant who ought to have been sued in the county-court will in no case suffer judgment by default, but will be driven to plead, and go to the trial, in order to deprive the plaintiff of costs, which he otherwise would have to pay.

Creasy, in reply. In *Taylor* v. *Rolf* (5 Q. B. 337, 1 D. & Mer. 229), it was held that the words "issue or issues tried," in the 3 & 4 Vict. c. 24, s. 12, do not comprehend an inquiry after judgment on demurrer. Where there is no issue, there can be no trial. *Nind* v. *Rhodes* is inconsistent with *Bale* v. *Hodgetts* (1 Bingh. 182, 7 J. B. Moore, 602). The cases of *Lewis* v. *Hance* (17 Law Journ., N. S., Q. B. 172) and *Jones* v. *Brown* (2 Exch. Rep. 329) shew that the courts will not extend the words of the county-court act beyond their fair meaning. In *Bishop* v. *Marsh*, there had been a trial: here there was none.

Wilde, C. J. Though I have had some doubt, I have come to the conclusion that this case does not fall **[638]** within the statute, and that a suggestion to deprive the plaintiff of his costs ought not to be entered. Two objections have been urged against the suggestion. The first is, that the case is not within the statute, by reason of its having been so dealt with that there was no power to give the certificate mentioned in the latter part of the section in question. The second is, that the case has not been tried, and, consequently, no such verdict has been found as was intended by the clause to be found, in order to deprive the plaintiff of his costs.

With respect to the first objection, it seems to me to be answered by the cases of *Bishop* v. *Marsh* and *Forbes* v. *Simmons*, where it was held that the operation of the Middlesex courts of requests act was not excluded by reason of there being no power to grant the plaintiff a certificate for his costs.

As regards the other objection, I am of opinion that it is well founded; and that the clause does not contemplate a judgment by default, and an assessment of damages under 5l. upon a writ of inquiry. Looking at the whole clause, it appears to me clearly to exclude cases of judgment by default. The words are, "If a verdict shall be found for the plaintiff for a sum less than 5l., if the action be founded on a tort, the said plaintiff shall have judgment to recover such sum only, and no costs." If the clause had stopped there, some difficulty would have existed in construing it. Whatever the rule of pleading may be—that the plaintiff should bring forward the proviso at the end of the section, by way of answer—the court, in construing it, are not relieved from the necessity of looking at the whole clause, in order to arrive at its meaning. The section then proceeds: "and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause shall certify," &c. The **[639]** words "if a verdict shall not be found for the plaintiff," cannot apply to a judgment by default, where the verdict must be found for the plaintiff,—a judgment that is interlocutory only because the court is not informed as to the amount of the damages sustained. There is a great difficulty in supposing that the clause applies to a case where a verdict cannot be found for the plaintiff; and a still greater difficulty in coming to the conclusion that the absence of such a verdict should not only deprive him of costs, but render him liable to pay those of the defendant, as between attorney and client. These considerations seems to me strongly to shew that the section contemplates the case only of a trial in which the plaintiff might not obtain a verdict; in which event alone the defendant is to be entitled to costs. There are many cases in which the court may assess the damages without the intervention of a jury. Most important cases may be decided on demurrer (*a*). Is it to be intended, that, in all these cases, the plaintiff shall be liable to pay costs? I feel the full force of the ingenious argument of the defendant's counsel, that this construction may induce defendants in trifling actions to plead and go to trial in order to get their costs. Such consequences may result; but I cannot believe that the legislature, in passing this clause, had in contemplation a judgment by default. I do not suppose that it intended expressly to exclude such a case; but, its attention being directed to other objects, judgments obtained without a trial were not considered. I am of opinion that the plaintiff is entitled to his costs, inasmuch as they are not taken away by this section.

[640] Coltman, J. Upon the best consideration which I can give to this case, it appears to me that the plaintiff is entitled to the judgment of the court. It is quite clear that he ought to have his costs under the statute of Gloucester, unless they are taken away by the 129th section of the county-courts act. I agree that this section may deprive a plaintiff of costs, though he may not have had the power of obtaining a certificate from the judge. But, although the power to grant a certificate may not be necessary in order to deprive a plaintiff of costs, the proviso is by no means to be left out in considering the clause; for, it reflects light upon the whole. Looking at the former part of the section, in connection with the proviso, it appears to me that the clause applies only to cases where there has been a trial, and a verdict found by a jury. The effect would be serious, were another construction to prevail. There are many cases of great importance in point of law, in which defendants, by suffering judgment by default, might deprive plaintiffs of costs.

Cresswell, J. I certainly entertain great doubt as to the correctness of the view

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(*a*) The necessity for a further inquiry after judgment upon demurrer, will depend upon whether the decision is for the plaintiff or for the defendant, and, if for the plaintiff, whether a liquidated cause of action, as, in debt, or an unliquidated cause of action, as, in assumpsit, trespass, &c., has been confessed.

taken by the lord chief justice and my brother Coltman; and that doubt I am bound to express. In endeavouring to ascertain the true construction of the section, we must look at what we find in other parts of the statute. The first part of the section is not limited to cases where the judge has power to grant a certificate. Setting aside, therefore, the latter part of the clause, let us look at the first part alone. The words are, "if a verdict shall be found for the plaintiff for less than 20l., if the action is founded on contract, or less than 5l., if it be founded on tort, the plaintiff shall have judgment for such sum only, and no costs." The word "verdict" strictly means a verdict upon the trial of an issue; but, in common **[641]** parlance, it is applied to the finding of a jury upon an inquisition of damages, and is so used in Lord Denman's act (3 & 4 Vict. c. 24, s. 2). The last part of the section is,—"and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless the judge who shall try the cause, shall certify," &c. That is supposed to limit the operation of the clause to cases in which verdicts have been found on the trial of a cause by a jury. I do not see why it should be so limited, or why it should not apply to cases where the court is in a situation to give damages without the intervention of a jury. It may mean, where the plaintiff attempts to get a verdict, and fails. It is said that it would be a great hardship, were the section to apply to judgments by default. It may be that difficulties would arise in certain cases; but it may be that the difficulty is the other way: and, as I cannot determine which way the balance of advantage or disadvantage would be, it is perhaps better, in construing the clause, to lay such considerations aside, unless a manifest absurdity arises. I find, that, by the 58th section of the act, certain cases which are supposed to involve questions of law, or to concern the feelings of parties, are excluded from the jurisdiction of the county-courts; but that, with respect to all other cases, whatever the difficulties might be, the legislature intended the county-court to have jurisdiction: and it seems to me that the intention equally was, that the plaintiff should not have his costs unless he recovered above a given amount. That is my present impression; but, if I am wrong, no injustice will be done to this plaintiff.

WILLIAMS, J. I am of opinion, with the lord chief justice and my brother Coltman, that the plaintiff is **[642]** entitled to our judgment. The question is, whether a verdict has been found for him for less than 5l., within the meaning of the 129th section of the county-courts act. I think the clause does not apply to cases where there has been a judgment by default, or on demurrer. I agree with my brother Cresswell, that the legislature has excluded various cases from the jurisdiction of the county-courts; but, at the same time, it is equally clear that the statute contemplates a class of cases being brought in the superior courts, for which plaints might be commenced in the county-courts. If this were otherwise, the 129th section would not have contained a provision giving the judge power to certify so as to entitle the plaintiff to costs, notwithstanding he has not recovered more than a certain amount. If this be so, it seems absurd, that, in a case which is a fit case to be brought in the superior courts, the defendant, by suffering judgment by default, should be enabled to deprive the plaintiff of costs. If the words of the section had been clear, we might be driven to such a conclusion; but, if they will admit of another construction, I think we ought to adopt that construction, so as to avoid such an absurdity. Suppose, in an action brought in a superior court on a bill of exchange, there is judgment by default, a rule to compute, and the damages are assessed at less than 5l. by the court,—if the larger construction contended for by the defendant were to prevail, the plaintiff not only would lose his costs, but would have to pay costs to the defendant, as between attorney and client.

Judgment for the plaintiff.

[643] WARD AND OTHERS, Assignees of W. D. Dauncey, a Bankrupt, v. DALTON. April 25, 1849.

[S. C. 18 L. J. C. P. 236; 13 Jur. 734.]

A. gave B. a warrant of attorney, under which judgment was entered up. On the 24th of August, 1840, a fi. fa. issued, under which the sheriff, on the 26th, seized A.'s goods, consisting of machinery, iron, &c. On the 3rd of September, A. committed an act of bankruptcy. On the 8th and 9th of September, the sheriff sold part of the goods by auction, in lots, and received a deposit on each lot, but the lots were not separated from the mass. On the 11th of September, a fiat in bankruptcy was granted against A. On the 19th of September, and following days, the goods were weighed out and delivered to the purchasers. The sheriff subsequently paid over the whole of the proceeds of the sale to B.:—Held, that the assignees of A. were entitled to recover the whole of the proceeds, including the deposits, inasmuch as there had been no perfect sale, but only an inchoate sale, at the time of the fiat, and B. still remained a creditor of A. having security, within the provisions of the 108th section of the 6 G. 4, c. 16.

In this action, the summons issued on the 21st of August, 1846. The declaration was for money had and received by the defendant to the use of the plaintiffs, as assignees under a fiat of bankruptcy issued against W. D. Dauncey. The bill of particulars stated, "The plaintiffs seek to recover the sum of 1294l. 14s. 6d., being the proceeds of a certain execution levied at the suit of the present defendant, upon the goods of W. D. Dauncey, in or about the month of August, 1840." The defendant pleaded, first, non assumpsit; secondly, a traverse of the plaintiffs' being assignees of the estate and effects of the said W. D. Dauncey.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiffs for 1260l. 10s. and costs of suit, subject to the opinion of the court upon the following case:—

A fiat in bankruptcy issued against W. D. Dauncey, dated the 11th of September, 1840, and under that fiat he was duly found and adjudged bankrupt, and the **[644]** plaintiffs are the assignees of his estate and effects under the bankruptcy. The plaintiffs Ward and Solly were appointed assignees on the 3rd of October, 1840, and the plaintiff Valpy, the official assignee, was appointed on the 30th of May, 1843. The bankruptcy of W. D. Dauncey was duly proved at the trial. On the 20th of January, 1840, a writ of summons against the bankrupt, at the suit of the defendant, in an action on promises, was duly issued, and served upon the bankrupt on the 3rd of February, 1840. On the 9th of March, 1840, the bankrupt executed a warrant of attorney to confess judgment at the suit of the defendant for 3500l., in an action of debt. Judgment was signed upon this warrant on the 12th of March, 1840, and it was duly filed on the same day. Copies of all these documents are to be taken as part of the case.

On the 24th of August, 1840, a writ of fi. fa. was issued on the above-mentioned judgment, and lodged with the sheriff of Warwickshire, indorsed to levy 1787l. 3s., and a warrant was issued thereon by the sheriff to his officer the same day. The officer seized the goods of the bankrupt on the 25th of August, and afterwards sold them (as hereinafter mentioned). The present action is brought to recover the proceeds of those goods.

On the 3rd of September, W. D. Dauncey committed an act of bankruptcy. On the 8th and 9th of September the goods (a quantity of machinery, iron, &c.) were sold by auction by the sheriff, in lots, at so much per ton or per cwt. The lots did not refer to specific parcels of iron, but the quantity described in each lot was weighed out to the respective purchasers from a large parcel. The auctioneer received deposits on the days of sale from the purchasers, to the amount of 93l. 13s. 1d. The goods were weighed out and delivered to the purchasers on the days and to the value as follows:—

[645]

September 19.	£84	1	1	
21.	60	15	0	
23.	58	0	11	
26.	5	0	0	
29.	4	10	2	
30.	158	3	9	
October 5.	300	0	0	
25.	252	13	3	
Making, with the	93	13	1	for deposits,
a total of	£1016	17	3	

The fiat issued on the 11th of September, 1840.

On the 13th of October, 1840, the sheriff sold the residue of the goods so seized under the execution, which produced the sum of 650l.; and the net proceeds of the whole of the goods, after deducting rent, sheriff's poundage, officer's fees, &c., were paid over by the sheriff to the defendant's attorney in the cause of *Dalton* v. *Dauncey*, on the dates and in the sums following, viz.:

1840.	November 17.	£1190	11	1
1841.	January 13.	104	3	5
1840.	September 12.	50	3	0
,,	December 22.	15	16	7
		£1360	11	1

The court is to adopt such inferences from the facts as it thinks the jury ought to have drawn.

The question for the opinion of the court is, whether the plaintiffs are entitled to recover any part of the amount paid to the defendant's attorney, as before-mentioned. And, if the court shall be of opinion that the plaintiffs are entitled to recover, the verdict is to stand, or to be reduced to the amount the court shall determine they are so entitled to recover. If the court shall be of opinion that the plaintiffs are not entitled to **[646]** recover any part of the said amount, a nonsuit to be entered.

The points on behalf of the plaintiffs were,—"first, that they are entitled to the whole amount of the proceeds of the several sales, on the ground that the execution mentioned in the case was defeated by the fiat;—secondly, that the execution was defeated by the act of bankruptcy;—lastly, that they are, at all events, entitled to the sum of 650l., the proceeds of the sale on 13th of October, 1840, on the ground that this sale was after the act of bankruptcy, and after the fiat."

The defendant's points were,—"first, that, as no notice of any act of bankruptcy was proved to have been had by the sheriff or execution-creditor before the execution, the plaintiffs cannot recover;—secondly, that, as the defendant had commenced an adverse action against the bankrupt previously to the giving the warrant of attorney, the plaintiffs have no right to recover;—thirdly, that the evidence, if it shall be deemed to support any claim, is in respect of a claim, not for money had and received for the use of the plaintiff Valpy jointly with the two other plaintiffs;—lastly, that, as to the sum of 710l. 11s. 1d., the net proceeds of the sales anterior to the fiat, under the circumstances stated in the case, in no event can the plaintiffs recover."

M. D. Hill for the plaintiffs. The plaintiffs, at any rate, are clearly entitled to recover the proceeds of the sale on the 13th of October 1840, which was upwards of a month after the issuing of the fiat. The bankrupt having confessed judgment on a warrant of attorney, the case falls within the express words of the proviso to the 108th section of the 6 G. 4, c. 16. [Wilde, C. J. The court are with you on this part of the case.] The other part of the plaintiffs' claim stands substantially on the same ground. It is submitted that there was not any sale of any part of the goods, so as to take **[647]** the property in them out of the bankrupt, until after the fiat. Until the goods were weighed out and delivered to the purchasers, the property in them remained in the bankrupt. In *Rugg* v. *Minett* (11 East, 210), it was decided, that, so long as any thing remains to be done by the seller, the property in goods sold, does not pass to the buyer. Here, the goods, from the time of their being knocked down by the auctioneer, remained in one mass until weighed and delivered out. [Cresswell, J. The first lot was weighed and delivered out on the 19th of September. What portion of the whole belonged to the purchaser on the 18th?] It was decided, in *Giles* v. *Grover* (9 Bingh. 128, 2 M. & Scott, 197), that seizure of goods in execution, makes no change in the property. Lord Tenterden, in the course of his judgment, says, p. 280: "The judgment-creditor has no property in the goods while they remain in the hands of the sheriff." Here, the defendant continued to be a creditor of the bankrupt until long after the fiat.

Petersdorff (with whom was Byles, Serjt.), for the defendant. The question is, whether the facts stated bring this case within the 108th section of the 6 G. 4, c. 16. Although it is not distinctly found, it sufficiently appears, that the warrant of attorney was given in the action of assumpsit, which was adversely brought by the defendant against the bankrupt. If this be so, then the transaction is protected by the 1 W. 4, c. 7, s. 7. Suppose, in the action on promises, the declaration had been in debt, and no advantage had been taken of that irregularity, and judgment had been signed as in an action of debt, would not the court say that the judgment was in an adverse suit? [Cresswell, J. What was the judgment on which the execution issued?] It was in debt. [Cresswell, J. Then it had nothing to do with the action on promises. Wilde, C. J. It would be improper for us to hold the judgment on the warrant **[648]** of attorney to be a judgment in the action on promises.] With respect to the main question, supposing a distinction may be drawn between the sale on the 8th and 9th of September and that on the 13th of October, it is submitted, that, as regards the former sale, there was a binding contract before the issuing of the fiat; which is sufficient to take this case out of the 108th section of the 6 G. 4, c. 16. It is true that there was then no handing over to the purchasers of any specific portions of the goods: but the whole property in them was disposed of, and a deposit was paid. No authority can be found in which it has been held, that, to take the case out of that section, the sheriff must not only have sold the goods, but have received the whole of the purchase-money. [Wilde, C. J. It must be such a sale that the execution-creditor has ceased to be a creditor. If you can make out that the contract between the sheriff and the vendees of the goods had the effect of making the execution-creditor no longer a creditor, you will establish your point.] Supposing the sheriff to sell, and take a bond for the amount, the execution-creditor could no longer sue on the original debt. [Wilde, C. J. Suppose the sheriff were to sell on credit, would that be any satisfaction of the debt?] The proper test is, when do the goods cease to be the property of the debtor? Do they not cease to be his property when the sheriff sells? [Cresswell, J. Supposing the bankrupt himself had sold the goods on the 8th and 9th of September, in portions which were not separated from the rest, would the property in them have passed to the vendees?] No. [Cresswell, J. Then, would it pass under the circumstances of the present case?] Here, the property is either in the sheriff or in the vendees. [Cresswell, J. If in the former, then the defendant is still a creditor having security: *Wymer* v. *Kemble* (6 B. & C. 479, 9 D. & R. 511). Wilde, C. J. Could **[649]** the vendees of the goods have maintained trover for them?] No. [Wilde, C. J. Supposing they had been destroyed by fire, could the sheriff have brought an action for their price?] No. [Wilde, C. J. Then, what change of property is there in the goods?] A deposit was paid on the goods previously to the fiat. In what position does the defendant stand as to that deposit? With respect to the 93l. 13s. 1d. received for deposits, it is difficult to see how the plaintiffs have any claim. It is submitted, that, if the sheriff has so dealt with the goods as to become responsible for them, the execution-creditor ceased to be a creditor having security. Suppose the sheriff had taken securities for the purchase-money, would not the bankrupt have been discharged from the original debt? And if so, the defendant would no longer have been a creditor having security. This case is only a step short of that; for, the sheriff takes the promises of the vendees. [Coltman, J. But he has the goods in his possession at the time of the fiat, and the vendees are not entitled to them without paying the remainder of the price.] It was, however, paid afterwards, and part of it was received before as a deposit. There was part payment on every lot, and a contract with the vendees for the rest of the purchase-money. [Wilde, C. J. The auctioneer could not have been compelled to pay over the deposits; he received them as a stakeholder.]

Wilde, C. J. I am of opinion that the plaintiffs are entitled to the judgment of the court for the whole of the sum claimed. The case lies in a narrow compass. The construction put upon the 108th section of the 6 G. 4, c. 16, was adopted shortly after the passing of the statute, namely, that no creditor who has sued out execution on a judgment obtained by default, confession, or nil dicit, is protected, until he has ceased to be a creditor having security. If such a creditor **[650]** has received payment, and his debtor afterwards becomes bankrupt, the money cannot be recovered back. If he still continues to have security for his debt, he cannot enforce such security for his own exclusive advantage, but must share ratably with the other creditors. The question is, was the defendant, at the time of the fiat, a creditor having security? He had obtained a judgment, and had issued execution thereon, and had seized the bankrupt's goods, which thereupon became a security to him for his debt. The seizure, however, had not the effect of extinguishing the debt. He is, therefore, a creditor having security; and the law says that he shall not avail himself of it, to the prejudice of the other creditors. It is contended, that, because the goods did not continue simply in the hands of the sheriff, but remained in them subject to certain contracts of sale, the case is altered. It seems to me that there are no grounds for that proposition; for, such contracts did not extinguish the defendant's debt, or operate so as to make him no longer a creditor having security. I can see no distinction as to the 93l. 13s. 1d. It is true that sum came into the hands of the auctioneer before the fiat: but it was paid for deposits in respect of unexecuted contracts of sale, and as a security for their fulfilment. It appears to me that it remained in the hands of the auctioneer, subject to the same legal rights as the goods themselves; and I can see no reason why the assignees are not entitled to it as well as the rest of the money.

Coltman, J. Although there was originally a difficulty with regard to the 108th section of the bankrupt act, it afterwards received a well-established construction. We must look at the state of things at the time of the fiat. The goods were at that time in the hands of the sheriff, and the defendant was a creditor **[651]** of the bankrupt having security. If the goods had been before then sold and handed over to the vendees, the defendant would no longer have been a creditor having security. As to the other point, the auctioneer held the 93l. 13s. 1d., not as a payment, but as a stakeholder; and the vendor would not have been entitled to it, if the sales had not been afterwards completed.

Cresswell, J. I am of the same opinion. There was no perfect sale of the goods previously to the fiat, but an inchoate sale only.

V. Williams, J., concurred.

Judgment for plaintiffs.

Tempson and Another *v.* Knowles. April 27, 1849.

[S. C. 18 L. J. C. P. 222.]

B. and C., members of a railway committee, being indebted to A. in a large sum, which A. sought to recover by contributions from the committee, and A. having brought an action against B., and having threatened to sue C., D. promises, that, in consideration that A. will cease to prosecute the action brought, and will forbear to sue C., he, D., will pay a certain smaller sum to A. In declaring upon this promise, it is not necessary to allege that D. was a member of the committee, or that A. had any well-founded claim against the committee, or that the actions brought and threatened related to the committee, or that the plaintiff was ready and willing to accept the smaller sum in satisfaction of the debt owing from B. and C.

Assumpsit. The declaration stated, that the defendant and his partner were solicitors to, and Charles Greatrex and Charles Shaw were members of, a committee of the Midland and South-Eastern Counties Junction Railway Company, and were indebted to the plaintiffs in a large sum of money, to wit, 1000l., which the plaintiffs sought to recover from **[652]** and by contributions thereto from members of the said committee, and for the recovery whereof the plaintiffs had brought an action against Greatrex in the Common Pleas, and had threatened, and then intended, to bring an action against Shaw; that thereupon, whilst the said action was so depending against Greatrex, the defendant, in consideration of the premises, and also in consideration that the plaintiffs would cease to prosecute, and would stay the proceedings in, the action against Greatrex, and would not take any proceedings against Shaw, promised the plaintiffs, that, unless the amount realised by the contributions of the committee should be sufficient to liquidate the said claim of the plaintiffs on or before the 1st of May then next, he the defendant would pay to the plaintiffs 30l. in discharge of all claims which the plaintiffs might have, in connection with the company, against Greatrex and Shaw,—averment, that the plaintiffs had ceased to prosecute the action against Greatrex, and had stayed proceedings therein, and that they had not taken any proceedings against Shaw; that the amount realised by such contributions was not sufficient to liquidate the said claims of the plaintiffs on or before the said first day of May, but that, on the contrary thereof, the sum so realised amounted to less than the said claim, to wit, to 500l., and no more; and that the plaintiffs had not realised the said claim from such contributions, or from any of them,—notice, and request and refusal to pay the 30l.

General demurrer, and joinder.

Phipson, in support of the demurrer. No breach of promise is shewn. The declaration ought to shew a claim of the same nature as the promise; but it is not stated that Greatrex and Shaw were indebted as members of the company, or that the debt had any thing to **[653]** do with the company. The allegation is, that the defendant, jointly with his partner, was solicitor to, and Greatrex and Shaw were members of, the committee, and were indebted to the plaintiffs. Construed grammatically, this would import that all four were indebted. The words "in connection with the company" relate to the connection of the plaintiffs with the company; and the declaration ought to have disclosed some claim which the plaintiffs had against Greatrex and Shaw in connection with the company. [V. Williams, J. The declaration seems to ascertain the effect the payment was to have. Wilde, C. J. Supposing the promise had been to pay 30l. in full of all demands, would it have been necessary to shew that there were any demands? Coltman, J. The promise is, to pay 30l. in discharge of all and every claim which the plaintiffs might have, in connection with the company, against Greatrex and Shaw; not at all affirming that there were any claims.] If the plaintiff had declared upon a promise to pay 30l. simply, there would have been a variance. The promise must be construed to mean, that the defendant will pay any claims which the plaintiffs can substantiate, not exceeding 30l. It does not appear that the plaintiffs were willing to accept the 30l. in satisfaction.

Wilde, C. J. As I read the declaration, the objections raised in the argument, on the part of the defendant, are not well founded. The declaration states, that the plaintiff had a claim against Greatrex and Shaw for 1000l., and that, in consideration that he would cease to prosecute an action which he had commenced against Greatrex, and would forbear to sue Shaw, the defendant promised to pay the plaintiffs 30l. in discharge of their claims, in connection with the railway company, against Greatrex and Shaw. It is said that there may have been no such claims. Perhaps there were none. The **[654]** defendant says, in effect, "I will pay you 30l., provided you will take it in satisfaction of all claims you may have upon Greatrex and Shaw, in connection with the company." Although there were no claim, the defendant might stipulate for the renunciation of the possibility of claim, engaging to pay 30l. absolutely. Such an arrangement might be very reasonable, because, although contribution only was sought, a liability might remain for a much larger sum than 30l.

Coltman, J. It seems to me that the declaration is quite sufficient. It begins by setting out a debt due from Greatrex and Shaw, but does not state that the debt is due in respect of the company. The defendant promises to pay 30l., which is to operate in discharge of the debt.

Cresswell, J. I am of the same opinion.

V. Williams, J., concurred.

Judgment for the plaintiffs (*a*).

Woodhams v. Newman. May 1, 1849.

[S. C. 6 D. & L. 683; 18 L. J. C. P. 213; 13 Jur. 456. See note to *Beswick* v. *Capper*, 7 C. B. 669.]

A defendant is not entitled to enter a suggestion to deprive a plaintiff of costs, under the 129th section of the county-courts act, 9 & 10 Vict. c. 95, where the debt or demand, originally exceeding 20l., is reduced below that sum by a claim of set-off. —The words "on balance of account or otherwise," in s. 58, have reference to a debt reduced by payments, or a balance settled and ascertained before action brought.

This was an action of debt for work and labour and materials, goods sold and delivered, money paid, and money found due upon an account stated.

[655] Pleas,—first, except as to so much of the causes of action in the declaration mentioned as related to the sum of 18l. 4s. 2d., parcel of the moneys in the declaration mentioned, and the damages sustained by the plaintiff by reason of the non-payment thereof, nunquam indebitatus;—secondly, except as in the introductory part of the first plea was excepted, a set-off for work and labour, goods sold and delivered,

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(*a*) See *Wilson* v. *Bevan*, post, p. 673.

money lent, money paid, money had and received, and money found due upon an account stated;—thirdly, as to the said sum of 18l. 4s. 2d., parcel, &c., and the damages sustained by the plaintiff by reason of the non-payment thereof, payment of that sum and 1s. into court, and no damages ultrà.

The plaintiff joined issue on the first plea, pleaded never indebted to the second, and took the money out of court in satisfaction pro tanto.

At the trial, at the first sitting in Middlesex in this term, the plaintiff proved that the defendant was indebted to him, in respect of the causes of action in the declaration, to the amount of 84l. 11s. 5d. beyond the sum paid into court. The defendant claimed to set off a demand amounting to 84l. 17s. 4¼d., which, with the exception of one item, was not disputed.

The jury having returned a verdict for 20s. only beyond the sum paid into court, and the judge having declined to certify, under the 129th section of the 9 & 10 Vict. c. 95, that the action was fit to be brought in the superior court,

R. Clarke, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why he should not bring in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs, he having obtained a verdict for a less sum than 20l., and the demand being one for the **[656]** recovery of which a plaint might have been entered in a county-court, pursuant to the statute 9 & 10 Vict. c. 95. The affidavit upon which the motion was founded, stated, that the plaintiff "is a plumber and glazier, and resides, and carries on business, at 47 High Street, Portland Town, in the county of Middlesex;" that the action was commenced on the 8th of February, 1849; that, at the trial, the plaintiff proved a demand exceeding 20l., and the defendant proved a set-off to such an amount as reduced the plaintiff's demand to a less sum than 20l., including the moneys paid into court, and that thereupon the jury gave a verdict for the plaintiff for 20s., and no more; that, before and at the time of the commencement of the action, the deponent (the defendant) dwelt and carried on his business at St. Paul's Road, Camden Town, in the county of Middlesex, and that all the work mentioned in the plaintiff's particulars of demand, and alleged in the declaration to have been done, and the materials for the same provided, and in respect of which said work and materials the said verdict was, in part, so obtained as aforesaid, were so done and provided at Camden Town aforesaid, and at St. John's Wood, in the said county of Middlesex; and that all the goods mentioned in the said particulars of demand were purchased by the deponent of and from the plaintiff at Portland Town aforesaid, and delivered to the servants of the deponent at Portland Town aforesaid, being the sale and delivery in the declaration mentioned, and in respect whereof the said verdict was in part obtained as aforesaid; that, at the time when this action was commenced, the plaintiff did not dwell more than twenty miles from the defendant, and did, and still does, dwell within twenty miles of the defendant; that the cause of action arose, in some material point, within the jurisdiction of the county-court within which the defendant dwelt and carried on **[657]** his business at the time this action was commenced; that the place where the defendant dwelt before and at the time when this action was commenced as aforesaid, and where he still dwells, and where the said work was done and the said materials provided and the said goods delivered as aforesaid, was, at the time when this action was commenced, and still is, within the jurisdiction of the county-court of Middlesex, and that such county-court was opened and established, and a plaint might have been entered in the said court for the sum recovered from this deponent by the plaintiff in this action, and due from the deponent to the plaintiff, before and at the time that this action was commenced, and the deponent then was liable to have been summoned in the said county-court for the sum recovered against him in this action. The affidavit then proceeded to negative that either of the parties was an officer of the county-court, and to negative that the judge had certified under s. 129, and concluded with an averment, that, with the exception of one item of 4s. alleged to have been paid by the plaintiff for the deponent, and which, if paid, was paid within the jurisdiction of the county-court of Middlesex aforesaid,—and in respect of which, to the best of the deponent's knowledge and belief, no evidence was given upon the trial of this cause,—the plaintiff's particular of demand in the action related only to the work done and the materials provided, and to the goods sold and delivered by the plaintiff to the deponent, which were thereinbefore mentioned.

Prentice now shewed cause, upon an affidavit, stating, amongst other things, that no account had been stated by and between the plaintiff and defendant, or any balance ascertained to be due and owing from the defendant to the plaintiff, before the commencement of the suit. The affidavit upon which this rule was ob-[658]-tained, is insufficient; it does not allege,—as it ought to do, *Brooker* v. *Cooper* (18 Law Journ., N. S., Exch. 41),—that, at the time of the commencement of the suit, the plaintiff and defendant were resident within twenty miles of each other (*b*).

A case of reduction of the demand by set-off is not within the words, or the policy, of the statute 9 & 10 Vict. c. 95. The 58th section, which defines the jurisdiction of the county-court, enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise, may be holden in the county-court, without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act:" and then follows a proviso which is inapplicable to this case. The only other sections that have any bearing upon this question are, the 128th and the 129th. The 128th enacts, "that all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record,—where the plaintiff dwells more than twenty miles from the defendant,—or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought,—or where any officer of the county-court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed." And the 129th section enacts, "that, if any [659] action shall be commenced, after the passing of this act, in any of Her Majesty's superior courts of record, for any other cause than those lastly-hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20l. if the said action is founded on contract, or less than 5l. if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client; unless, in either case, the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court." Under the old courts of requests acts, the suggestion to deprive the plaintiff of costs, or to entitle the defendant to costs, was only allowed where the debt, originally above, was reduced below the limited amount by part payment, *Clark* v. *Askew* (8 East, 28, on the Southwark act, 22 G. 2, c. 47, s. 6), *Horn* v. *Hughes* (8 East, 347, on the London act, 39 & 40 G. 3, c. civ. s. 12), *Fountain* v. *Young* (1 Taunt. 60, on the Southwark act, 46 G. 3, c. lxxxvii. s. 12), *Walker* v. *Watson* (8 Bingh. 414, 1 M. & Scott, 674, on the Halifax act, 17 G. 3, c. xv. s. 30), or by a plea of the statute of limitations, *Rothery* v. *Munnings* (1 B. & Ad. 18, n., on the London act, 39 & 40 G. 3, c. civ. s. 12), infancy, *Bateman* v. *Smith* (14 East, 301, on the Middlesex act, 23 G. 2, c. 33, s. 19), or the statute of limitations, *Stilwell* v. *Bracher* (1 D. & L. 231, on the Middlesex act, 23 G. 2, c. 33, s. 19); the statutes did not apply to cases where the demand was reduced by a set-off, *Pitts* v. *Carpenter* (2 Stra. 1191, 1 Wils. 19, on the London act, 3 Jac. 1, c. 15), *Gross* v. *Fisher* (3 Wils. 48, on the Middlesex act, 23 G. 2, c. 33, s. 19), *Cottle* v. *Lang*-[660]-*man* (9 J. B. Moore, 625, on the Bath act, 45 G. 3, c. lxvii. s. 47), *Jenkinson* v. *Morton* (1 M. & W. 300, Tyrwh. & G. 676, 5 Dowl. P. C. 74, on the Middlesex act, 23 G. 2, c. 33, s. 19), *Bailey* v. *Chitty* (2 M. & W. 28, 5 Dowl. P. C. 307, on the Middlesex act, 23 G. 2, c. 33, s. 19). In *Jones* v. *Harris* (1 Dowl. P. C. 374, on the Middlesex act, 23 G. 2, c. 33, s. 19), Taunton, J., says: "The cases of *Bateman* v. *Smith* and *Chadwick* v. *Bunning* (5 B. & C. 532, 8 D. & R. 155, on the Middlesex act, 23 G. 2, c. 33, s. 19) shew, that, if the damages found by the jury for the plaintiff are reduced to less than 40s., in consequence of the original contract between the parties, or of part payments before action brought, the defendant is entitled to double costs under this act. But, if the plaintiff had an original demand against the defendant, exceeding 40s., and for which a verdict must have been found at common law, before the statute which gave the set-off, the case might be very different. It is not necessary now to give any

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(*b*) The affidavit upon which cause was shewn supplied this defect.

opinion on that point; there are very good reasons why a case in which the plaintiff's demand is reduced by a set-off should be exempted from the operation of the statute. Those reasons may be found very pointedly and very strongly expressed in the case of *Pitts* v. *Carpenter*. The court there observed—'How could the plaintiff tell whether the defendant would set off any thing in that action, so as to be bound to choose that jurisdiction? Besides, he has in effect recovered 4l. 15s. 3d.; because a debt which he must otherwise have paid, is now satisfied.'" So, in *Cottle* v. *Langman*, Best, C. J., says: "It would be an act of injustice to the plaintiff, if this application were allowed to prevail; for, the defendant was indebted to him in the sum of 22l.; and, although he was aware that the latter had a counter-claim, yet he refused to give him an account of it; and it did not necessarily follow that the defendant would plead a set-off, or **[661]** deliver particulars, so as to reduce the plaintiff's original demand below 10l. If he had sued the defendant under the local act, he could only have recovered to that amount; and the latter might then have commenced an action against him for the amount of his set-off." It being at the defendant's option to set off the cross demand or not, the plaintiff could not safely proceed for the balance only. [Wilde, C. J. The judge would have first to decide upon the amount of the plaintiff's demand, and then to inquire as to the defendant's set-off, and so balance the account. I think it is impossible that such a case can be within the act.]

The defendant's affidavit does not shew within which of the eleven districts into which Middlesex is divided, the cause of action arose, or the parties resided at the time of the commencement of the action (*a*). The "county-court of Middlesex" is, in s. 12, recognised as the court which is regulated by the 23 G. 2, c. 33.

At all events, the plaintiff would be entitled to the costs up to the time of paying money into court.

R. Clarke, in support of his rule. In *Fairbrass* v. *Pettit* (12 M. & W. 453, 1 D. & L. 622, on the Sandwich act, 47 G. 3, c. xxxv. s. 45), Parke, B., says: "The sum recovered by verdict, and not the amount claimed, is to be considered the debt for which the action is brought. That was so decided in *Shaddick* v. *Bennett* (4 B. & C. 769, 7 D. & R. 229, on the London act, 39 & 40 G. 3, c. civ. s. 12), which must govern the present case." The like was held in *Drews* v. *Coles* (2 Tyrwh. 503), where the demand having been reduced by a set-off so as to bring it within the Bradford court of **[662]** requests acts (3 G. 3, c. xix., and 47 G. 3, sess. 2, c. xxxix.), the court ordered a suggestion to be entered, to deprive the plaintiff of costs. The cases of *Pitts* v. *Carpenter*, *Gross* v. *Fisher*, *Cottle* v. *Langman*, *Jenkinson* v. *Morton*, and *Bailey* v. *Chitty*,—turned upon the particular language of the several statutes. Whether the demand be reduced by payment, by tender, or by set-off, can make no difference. In *Laing* v. *Chatham* (1 Campb. 252), it was ruled by Lord Ellenborough, that, where the defendant has a set-off against the plaintiff, of which he gives notice under the statute, but does not appear at the trial, to offer evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, with a special indorsement on the postea, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off (*c*). That case shews that there is no such difficulty as is suggested on the other side. [Wilde, J. What would be the plaintiff's position, in the case put, if the defendant brought his action in another court? (*d*). Maule, J. How would the plaintiff have framed his plaint in the county-court, if he had wanted to try what was tried here?] The 58th section, which gives jurisdiction to the county-court where the debt or damage claimed is not more than 20l., "whether on balance of account or otherwise," clearly embraces reduction by set-off. [Maule, J. Surely it cannot mean balanced by set-off.]

Wilde, C. J. I am of opinion that this case does not fall within the 9 & 10 Vict. c. 95, and therefore that the defendant is not entitled to enter a suggestion upon **[663]** the record to deprive the plaintiff of costs. The application is founded upon the 129th

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(*a*) The affidavit seems to be bad in form, as misnaming the court, and in substance, by reason of its giving imperfect information as to the district in which the cause of action arose and the parties resided. See *Hayter* v. *Fish*, ante, vol. vi. p. 568.

(*c*) Vide post, p. 672.

(*d*) Ibid. 671 (*b*).

section of the act, which enacts, that, "if any action shall be commenced, after the passing of this act, in any of Her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified (*a*), for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a less sum than 20l. if the said action is founded on contract, or less than 5l. if it be founded on tort, the said plaintiff shall have judgment to recover that sum only, and no costs." Before, therefore, a plaintiff can be deprived of costs under that section, the verdict must have been obtained in respect of a demand for which a plaint might have been levied in a county-court. In construing this act, our attention is not to be confined to the particular section: regard must be had to the general scope of its provisions. The 58th section is considered as bearing upon the question now before us, and as assisting the construction of s. 129: the one section limits the power of the superior courts, in certain cases, to the giving judgment for the debt, without costs; the other regulates and defines the jurisdiction conferred upon the county-court. It is said that this is a case in which a plaint might have been levied in the county-court, by force of the 58th section, which,—subject to a proviso not applicable here,—enacts that all pleas of personal actions, where the debt or damage claimed is not [664] more than 20l., whether on balance of account or otherwise, may be holden in the county-court, without writ: for, that a debt or demand originally exceeding 20l., but reduced by set-off below that sum, falls expressly within the words "claimed on balance of account, or otherwise." It seems clear to me that these words were meant to apply to accounts that have been adjusted and balanced by the parties, or reduced within the prescribed limits by payments. Still, whatever the meaning of the words, this is not a case wherein a plaint might have been levied in the county-court. The legislature evidently intended to confine the jurisdiction of these courts to small demands not requiring the intervention of a jury: otherwise, one cannot very well see the reason for limiting the amount recoverable at all. Very intricate and important questions might arise in a case of this sort. The right of the one party or the other to the verdict, might depend upon one entire item to the amount of 50l., or any larger sum. In considering whether the construction we are invited to put upon the statute is or is not the true one, we must not shut our eyes to the inconveniences to which it might lead. What was the amount of the debt claimed in this case? The plaintiff's demand exceeded 100l. The county-court must have determined, whether, and to what extent, that demand was established, before proceeding to consider to what extent it was reduced by the defendant's set-off. Here, in the result, a balance a little below 20l., in favour of the plaintiff, is arrived at, in ascertaining what was due to either party in respect of two several accounts each considerably exceeding that sum. How could the plaintiff in such a case levy a plaint in the county-court? He has no means of knowing that the defendant will avail himself of his right of set-off; nor could he, by giving the defendant credit for the amount he conceived to be due to him, prevent the defendant [665] from taking the opinion of a superior court upon the subject of his counter-claim. The plaintiff, therefore, would have no certain means of coming to a conclusion as to the amount, or, in many cases, as to the nature, of the set-off. I do not perceive how a plaintiff, generally speaking, could, under such circumstances, levy a plaint in the county-court. I therefore think the present case is neither within the words or the meaning of the act. It never could have been intended that these inferior tribunals should be engaged in the discussion of mutual claims to an unlimited amount, merely because the ultimate balance might, by means of a set off, be reduced to less than 20l. For these reasons, it appears to me that the rule was moved upon a misconstruction of the act, and must be discharged.

COLTMAN, J. The cases decided upon the old courts of requests act, seem to me to have a very considerable bearing upon this question. The principle they furnish is, that these inferior courts, which were established for the recovery of debts and

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(*a*) That is, where the plaintiff dwells more than twenty miles from the defendant; or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought; or where any officer of the county-court is a party,—except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof: s. 128.

demands of small amount, are not to assume to themselves jurisdiction in a case which in point of fact involves the decision of two several actions of large amount. The words of the 58th section, which give the jurisdiction, give it in cases "where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise." The cases undoubtedly shew that the sum claimed is in general to be measured by the amount recovered by the verdict. But those were cases where the amount really due was shewn, before the jury, to be less than the sum for which the plaintiff originally went, and not cases where the demand was reduced by a claim of set-off. They do not, therefore, apply to this case. I think this is a matter for which the plaintiff could not have levied a plaint in **[666]** the county-court; and, if so, it is idle to contend that he was precluded from suing in the superior courts.

Maule, J. I am of the same opinion. This is an application founded upon the 129th section of the county-court act, by which the defendant seeks to deprive the plaintiff of costs, on the ground that he commenced his action in a superior court, for a cause, other than those described in the 128th section, for which a plaint might have been entered in a county-court under the act. The simple question, therefore, is, whether the plaintiff's cause of action was one for which a plaint might have been entered in the county-court. I conceive, that, if the case had been one in which the plaintiff might have had the same measure of justice meted out to him by the county-court, as he could in the superior court, he ought to be deprived of the costs he has incurred in needlessly suing before the more expensive tribunal. To deprive a party of costs for suing in a superior court, when he could not proceed in the county-court with effect, would be a practical absurdity: it would be giving a forced construction to the language of the act, and making it an engine of oppression. The plaintiff in the present case clearly could not have obtained full justice in the county-court. If he stated his whole claim, it would shew that he was not entitled to sue in the county-court. If he entered his plaint for 20l. or less, he must abandon the rest of his claim (*a*). The defendant could not be compelled **[667]** to bring forward his counter-claim in the county-court: or, he might set off his demand to the extent of 20l., leaving the residue to be the subject of a future action in the superior or inferior court, as the case might be; in which action the plaintiff in the former action could not, by set-off or otherwise, avail himself of the abandoned portion of his claim. The 58th section enacts that all pleas of personal actions, where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise, may be holden in the county-court. This clearly is not a claim on balance of account. Those words, I conceive, mean this—Suppose a claim to be preferred in the county-court for a sum below 20l., and it appears that the debt originally exceeded 20l., but has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say that the case is without the jurisdiction of the county-court, because the debt originally exceeded 20l. The verdict is the criterion of the amount of the claim: but, in my opinion, the statute never was meant to apply to the case of a demand reduced by set-off.

Cresswell, J. I am entirely of the same opinion. The 129th section deprives the plaintiff of costs only where the action is brought in a superior court for a cause,—not within the exceptions,—for which a plaint might have been entered in a court holden under the 9 & 10 Vict. c. 95, and where the amount of the debt or demand for which a verdict has been recovered does not exceed 20l. The jurisdiction conferred upon the county-court by s. 58 is not to be ousted by alleging, and failing to prove, a demand exceeding 20l. It cannot **[668]** be truly said that the sum claimed in this case was due upon any balance of accounts. There had been no balance ascertained and struck between the parties, in consequence of cross-claims, or payments on account, or otherwise. Limiting a claim to an amount recoverable in the county-court, and abandoning the excess, is a matter wholly independent of any question of set-off.

(*a*) Under s. 63, which enacts, "that it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than 20l., for which a plaint might be entered under this act if not for more than 20l., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20l.; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." See *Vines* v. *Arnold*, M. T. 1849, post, vol. viii.

It is always optional with the defendant to avail himself of his set-off or not: and by s. 76, the set-off is expressly excluded, without the consent of the plaintiff, unless the defendant shall have given to the clerk of the court such notice thereof as the rules made for the regulation of the practice of the court direct (*a*). For these reasons (*b*), I am of opinion that this case does not fall within the 129th section, and consequently that there is no ground for entering a suggestion to deprive the plaintiff of his costs.

Rule discharged (*c*).

[669] Beswick *v.* Capper. June 12, 1849.

[S. C. 18 L. J. C. P. 216 (*n*). Referred to, *Neale* v. *Clarke*, 1879, 4 Ex. D. 296; *Lovejoy* v. *Cole*, [1894] 2 Q. B. 865.]

A demand exceeding 20l., and reduced by set-off to a sum not exceeding 20l., is not within the jurisdiction of the county-courts created by 9 & 10 Vict. c. 95.

In June, 1847, Beswick brought an action against Capper in the court of Exchequer, in which he sought to recover 62l. 5s. 8d., being the balance alleged by Beswick to be due to him from Capper in respect of a building-contract, after deducting a sum of 186l. 16s. 9d., which Beswick admitted to be due from him to Capper, for cash to the amount of 70l. paid on account, and goods sold and delivered to the amount of 116l. 16s. 9d. To this action Capper pleaded, not guilty, and a set-off of 126l. 9s. 5d., for goods sold and delivered, work and labour, and money paid by him on account of Beswick. At the trial before Rolfe, B., at the last summer assises at Stafford, the contract not being produced, the plaintiff was nonsuited.

In April last, Capper commenced an action against Beswick, in the Exchequer, to recover 40l. 16s. 4d., being the balance alleged by Capper to be due to him from Beswick, after giving credit for 175l., the sum mentioned in the building-contract.

On the 14th of May instant, Capper was served with a summons issuing out of the county-court of Staffordshire, at Hanley, at the suit of Beswick, whereby the latter sought to recover 20l. as and for "balance of account for goods sold and delivered, work and labour done, and materials supplied." Annexed to the summons were the following particulars of the plaintiff's demand:—

"In the county-court of Staffordshire, at Hanley, &c.

"This action is brought to recover the sum of 20l., as due to the said plaintiff from the said defendant, [670] upon the balance of account in respect of the contract mentioned below, and for the extra work done and materials found and provided by the said plaintiff for the said defendant beyond the work specified or referred to in the said contract; the said plaintiff consenting to allow the set-off of the said defendant, and to abandon the excess which may be due to him beyond the sum of 20l.

"15th May, 1846. Amount as per contract of this date .	£175	0	0
Extras beyond contract [here followed a great number of items, in the aggregate amounting to]	52	2	8
	£227	2	8
Creditor by cash and goods	186	16	9
Balance . . .	£40	5	11"

The parties appeared at the county-court, when it was objected, on the part of Capper, that the judge had no jurisdiction in the matter, inasmuch as it involved a set-off and cross-demands between him and Beswick, each exceeding 20l.; and he was referred to *Woodhouse* v. *Newman* (ante, p. 654). The judge, notwithstanding, proceeded to hear and determine the case, and gave judgment for the plaintiff for the

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(*a*) Five clear days before the day of hearing. Rule 17.

(*b*) Nothing fell from the court as to the second objection, which appears to be also fatal. Vide supra, 661.

(*c*) See the next case.

amount claimed; the defendant not having given any notice of set-off, or in any way assented to the judge's right to try the cause.

Upon affidavits setting out the above facts, and alleging that the above-mentioned sum of 40l. 5s. 11d. was not, nor was any part thereof, a balance of any account between Beswick and Capper, and that no accounts between them in respect of the matters mentioned in the particulars had ever been settled,

[671] T. Jones, on a former day, obtained a rule calling upon Beswick to shew cause why a writ of prohibition should not issue to the judge of the county-court of Staffordshire, at Hanley, to prohibit all further proceedings in the said court against Capper upon the judgment recovered against him upon the said plaint.

Greaves shewed cause. The question is whether a debt reduced by set-off is not equally within the 9 & 10 Vict. c. 95, as one reduced by payment. [Cresswell, J. The plaintiff's claim here was 227l. 2s. 8d. How can the county-court have jurisdiction in such a case?] The plaintiff only claims 20l.: the rest is admitted to be satisfied, or abandoned. [Cresswell, J. No doubt, the plaintiff was at liberty to abandon all but 20l. That, however, he does not do. He says, in effect, that he is willing to take the 186l. 16s. 9d., which he admits that the defendant is entitled to claim from him, in satisfaction of so much of his demand, and to abandon 20l. 5s. 11d. Wilde, C. J. To entitle the plaintiff to recover the 20l., he must prove a claim overtopping, by that sum, the defendant's admitted claim of 186l. 16s. 9d.] The same thing must be done in the case of a demand reduced by payment. [Cresswell, J. The case of payment is expressly provided for. But you cannot compel a defendant to avail himself of his right to set off a counter-claim. You would find a difficulty in meeting his action for the cross-demand.] *Laing* v. *Chatham* (1 Campb. 252, cited ante, p. 662) shews the remedy for that. [Cresswell, J. Do you find that that case has ever been acted upon?] It must be admitted that there is no trace of the course there pointed out having ever been adopted (*b*)[1].

[672] Jones was not required to support his rule.

Wilde, C. J. It appears to me that this was not a case within the jurisdiction of the county-court. It is a mistake to say that the plaintiff abandoned all his claim beyond 20l. To establish his right to recover to that extent, he would be bound to prove a demand exceeding the amount of the defendant's set-off (*a*). The matter in contest, therefore, was very much beyond what the legislature contemplated should be submitted to the inferior jurisdiction. The case of an adjusted account is altogether different (*b*)[2]. The only assent to the set-off here, was, by the plaintiff's thinking fit to give credit for it in his particulars. The rule for a prohibition must be made absolute.

Coltman, J. I am of the same opinion. This point was, in effect, decided in *Woodhams* v. *Newman* (*c*). A demand reduced by set-off, is not within the statute.

Cresswell, J., concurred.

Rule absolute.

[673] Wilson and Others *v.* Bevan. May 2, 1849.

[S. C. 18 L. J. C. P. 244.]

A declaration, in assumpsit, stated that the plaintiffs had commenced an action against A. to recover a sum due to them from A., and another action against B., as a party

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(*b*)[1] Lord Ellenborough seems to have been of opinion that the effect of the indorsement on the postea would be, to place the parties nearly in the same position as if the defendant had pleaded his set-off to so much of the plaintiff's demand as corresponded with the amount of the set-off, and the plaintiff had confessed the plea and had established a demand ultra. If the defendant entered into the rule suggested, he would, of course, be liable to an attachment, if he sued for the set-off.

(*a*) The plaintiff, by his particulars, undertook so to do: but, quære how far he would be bound by that undertaking, if the defendant did not think fit to give notice of set-off. Another difficulty presents itself: if the plaintiff did not abandon the excess of his cause of action, beyond 20l., how was he entitled to sue in the county-court, under s. 63?

(*b*)[2] Ante, vol. iii. p. 212, n.

(*c*) Ante, p. 654.

liable in respect of the same debt; that, in consideration that the plaintiffs would consent to stay the proceedings in the action against A. until a given day, and would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the court would admit of,—the defendant promised that he would indemnify the plaintiffs against all costs and expenses connected with the action against B., whether the same should be decided in favour of the plaintiffs or of B., and that he, the defendant, would pay the same costs and expenses when requested by the plaintiffs. The declaration then averred that the plaintiffs, confiding in the promise of the defendant, did consent to stay, and did stay, the proceedings in the action against A., and that they duly proceeded to trial with the action against B., and obtained a verdict therein; that the verdict was afterwards set aside, and a new trial ordered, upon payment of costs by B.; that the plaintiffs again set down the cause for trial; that, by the direction and at the request of the defendant, the record was withdrawn; and that the plaintiffs had incurred, and paid, certain costs and expenses in connection with the said action: and assigned for breach, the defendant's refusal to reimburse them:—Held, that the declaration disclosed a good cause of action, the final determination of the action against B. not being a condition precedent to the plaintiffs' right to sue for the costs, and the consideration being satisfied by the plaintiffs' staying proceedings against A., and going to trial against B.

This was an action of assumpsit upon a contract of indemnity.

The first count of the declaration stated, that, before the making of the promise by the defendant as thereinafter next mentioned, the plaintiffs had commenced and prosecuted, in the court of our lady the Queen before the barons of her Exchequer at Westminster, a certain action at the suit of the now plaintiffs against one W. F. Black, G. Mackintosh, and F. I. van Zeller, for the recovery of a certain sum of money due and owing to the plaintiffs, to wit, the sum of 252l. 12s. 2d., for goods supplied by the now plaintiffs on the order of one Robert Moore, as for the use of a certain company or undertaking called the Great Western and **[674]** Cornwall Junction Railway, and in which said debt or sum of 252l. 12s. 2d. the said W. F. Black, G. Mackintosh, and F. I. van Zeller, at the time of the commencement of the said action, were justly and truly indebted to the now plaintiffs, and which said action at the suit of the now plaintiffs against the said W. F. Black, G. Mackintosh, and F. I. van Zeller, before and at the time of the making of the said promise by the defendant, was pending in the said court, and was being proceeded with by the plaintiffs, according to the practice of the said court, for the recovery of the said debt or sum of money; that, before the making of the said promise by the defendant as thereinafter next mentioned, the plaintiffs had also commenced and prosecuted in the said court of our lady the Queen, before the barons of her Exchequer at Westminster, a certain other action, at the suit of the now plaintiffs, against one H. F. Wollaston, as a member of the provisional committee of the said company, for the recovery of the said debt or sum of 252l. 12s. 2d., and which said action against the said H. F. Wollaston, before and at the time of the making of the said promise by the defendant as thereinafter next mentioned, was also then pending in the said court: that thereupon, theretofore, to wit, on the 19th of February, 1846, in consideration that the plaintiffs, at the request of the now defendant, would consent to stay all further proceedings in the said action against the said W. F. Black, G. Mackintosh, and F. I. van Zeller, until the 1st of May then next, and also in further consideration that the plaintiffs would proceed to trial with the said action against the said H. F. Wollaston, at the first sitting of nisi prius of the said court, which should be holden in and for the city of London in Easter term then next, or so soon after as the practice of the said court would admit, the defendant **[675]** did then guarantee, and then undertake and promise to and with the now plaintiffs, that he, the defendant, would hold them, the now plaintiffs, and each of them, harmless and indemnified against all costs, charges, and expenses in any manner connected with the said action to be tried at their suit against the said H. F. Wollaston as aforesaid, whether the same should be decided in favour of the plaintiffs or of the said H. F. Wollaston, and that he the defendant would pay the same costs, charges, and expenses, whenever requested so to do by the plaintiffs: Averment, that the plaintiffs, relying on, and confiding in, the said promise of the defendant, did, to wit, on the said 19th of

February, 1846, consent to stay, and did then stay, and the plaintiffs, from the time of the making of the said promise by the defendant as aforesaid, did consent to stay, and did stay, all further proceedings in the said action against the said W. F. Black, G. Mackintosh, and F. I. van Zeller, until the said 1st of May next after the making of the said promise by the defendant, to wit, until the 1st of May, 1846, and thence for a long time afterwards, to wit, hitherto; that the plaintiffs, further relying on the said promise so made by the defendant as aforesaid, did proceed to trial with the said action against the said H. F. Wollaston at the said first sittings of nisi prius of the said court of Exchequer in and for the said city of London holden in Easter term next following the making of the defendant's said promise, to wit, at the sitting of nisi prius of the said court held on the 30th of April, 1846, in Easter term in the same year, in and for the city of London, at the Guildhall in the said city, before the Right Hon. Sir F. Pollock, knight, Her Majesty's lord chief baron of the said court; that the plaintiffs, at the said first sittings so holden as aforesaid, to wit, on the day and year last aforesaid, did cause to be tried, and the said [676] last-mentioned action against the said H. F. Wollaston was then, at the same sittings, accordingly tried before the said Sir F. Pollock, being such chief baron as aforesaid, and a jury in that behalf then duly sworn and chosen; that the jury by whom the same action was so tried then found and returned a verdict for the plaintiffs in the said action, for the said sum of 252l. 12s. 2d., and 2l. costs; that, afterwards, to wit, on the 8th of May, 1846, in Easter term, 9 Vict., the said verdict, so found for the plaintiffs in the said action against the said H. F. Wollaston, was, by rule of the said court then made in the said action, set aside, and a new trial therein ordered, upon payment of costs by the (then) defendant to the said plaintiffs, their attorney or agent; that thereupon, the said action against the said H. F. Wollaston was afterwards, to wit, on the day and year last aforesaid, again set down for trial at the sittings of nisi prius of the said court, to be holden in and for the said city of London after Trinity term, 1846; that, before the said action against the said H. F. Wollaston could come or did come on to be tried such second time as aforesaid, the nisi prius record was, on, to wit, the 7th of July, 1846, withdrawn by the direction and at the request of the defendant; that the plaintiffs did incur and were put to, and did sustain, and had incurred, and been put to and sustained, divers costs, charges, and expenses in connection with, and in relation to, and in and about the said action against the said H. F. Wollaston, so tried at their suit as aforesaid, amounting in the whole to a large sum of money, to wit, 100l., which the plaintiffs afterwards, to wit, on the 26th of January, 1847, were called upon, and were then forced and obliged to, and did then pay to their attorneys, that is to say, to certain persons using the name, style, and firm of H. & A., the attorneys for the plaintiffs conducting and prosecuting, for them the plaintiffs, the said action [677] against the said H. F. Wollaston to trial as aforesaid,—of all which said several premises the defendant, afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of money, to wit, the said sum of 100l. so by them paid to the said attorneys of the plaintiffs as aforesaid: yet that the defendant, not regarding his said promise, did not pay the same, or any part thereof, nor hold the plaintiffs, or any or either of them, harmless or indemnified against the said costs, charges, or expenses, or any part thereof, so connected with, and relating to, and incurred in and about the said action at their suit against the said H. F. Wollaston, and amounting to the said sum of money, but the defendant had always theretofore refused so to do; nor did nor would the defendant, when he was requested by the plaintiffs so to do as aforesaid, pay them the said costs, charges, or expenses, or any part thereof, amounting to the said sum of money, to wit, the said sum of 100l. which the plaintiffs were so forced and obliged to and did pay to their said attorneys as aforesaid; and the defendant had hitherto altogether neglected and refused to pay the amount, or any part thereof, to the plaintiffs' damage, &c.

Special demurrer, assigning for causes,—that it appears from the said first count, that one of the considerations for the promise by the defendant, was, that the plaintiffs would proceed to trial with the said action against the said H. F. Wollaston, in such a manner that the said action should be decided in favour of the plaintiffs or of the said H. F. Wollaston, but it is not averred or shewn in the said declaration, that the plaintiffs did proceed, or have proceeded, to any decisive trial of the said action, or that the said action has been decided one way or the other, nor is it averred that the plaintiffs were ready to proceed to such trial, and that they were [678] requested by the defendant not to do so, or were prevented by the defendant from so doing, but, on the contrary, it appears from the said first count, that the said action is still pending and undecided, and it is not averred that the plaintiffs were or are ready to proceed to a decisive and effectual trial thereof,—that it is no sufficient excuse for not proceeding to trial at all, that, on one particular occasion the record was withdrawn at the request of the defendant, and that, although such withdrawal may be a sufficient excuse for not proceeding to trial so soon as the practice of the said court would admit, according to the said contract, it is no sufficient excuse for neglecting to proceed to trial of the said action altogether, or for not procuring the same to be decided one way or the other; and the said first count ought to have alleged that the plaintiffs were ready to proceed to such trial, and procure the said action to be decided, and ought then to have shewn a sufficient excuse for their neglecting so to do,—that the said first count is bad, in this, that it appears from the whole tenor of the said contract and promise therein mentioned, that the defendant was not liable to indemnify the plaintiffs from all costs connected with the said action, until the same should have been decided in favour of the plaintiffs or of the said H. F. Wollaston, but it is not shewn or averred in the said first count that the said action has been decided in any way, nor is there any sufficient excuse averred in the said first count why the said action has not been decided, or proceeded with to a decisive and effectual trial on the merits,—that the said first count is uncertain and ambiguous, in this, that the said new trial was ordered to be had, on payment of costs, and it is not stated whether the said costs were paid, so as to entitle the defendant in the said action to the said new trial thereof; and that it is therefore uncertain whether the plaintiffs [679] mean to rely on the said first trial as an effectual and decisive trial of the said action; and that, if such costs were paid to the plaintiffs, it does not appear what other costs they could have incurred by reason of any other proceedings mentioned in the said first count, —and that the said first count is in other respects informal and insufficient, &c. Joinder.

Montague Smith, in support of the demurrer. The declaration, by way of inducement, states that the plaintiffs had commenced an action against Black and others, and another action against Wollaston; it then states that, in consideration that the plaintiffs would consent to stay all further proceedings in the action against Black until a given day, and would proceed to trial with the action against Wollaston at a certain sitting, or as soon after as the practice of the court would admit of,—the defendant undertook and promised to hold the plaintiffs harmless and indemnified against all costs, &c., in the action against Wollaston, whether the same should be decided in favour of the plaintiffs or of Wollaston; and that he would pay the same costs, &c., whenever requested so to do by the plaintiffs. The declaration then avers that the proceedings in the action against Black and others were stayed until the stipulated time, and that the plaintiffs proceeded to trial in the action against Wollaston, and obtained a verdict, but that such verdict was afterwards set aside, and a new trial directed; that the cause was again set down for trial, but that, before it could come on to be tried, the record was withdrawn by the direction and request of the defendant. The action against Wollaston not having been decided, this action is premature: the liability of the defendant to be called upon to reimburse the plaintiffs, could not arise until the action against Wollaston had been finally disposed of. If the fact had been, that [680] the record was withdrawn because the present defendant was desirous of putting an end to the action, the declaration should have so alleged. [V. Williams, J. Would not this declaration have been sufficient if it had simply alleged that the plaintiffs proceeded to trial against Wollaston, and obtained a verdict?] It is submitted that it would not. The plaintiffs were bound to go on and obtain judgment against him. [Wilde, C. J. And execution?] And execution. [Cresswell, J. Suppose a writ of error were brought?] It is not to be presumed that a writ of error will be brought: it will not be gratuitously assumed that a judgment of a competent court is wrong. At all events, that would be matter of averment to come from the other side. In actions for malicious arrest, the declaration always avers, in direct terms, that the action in which the arrest took place was determined. [Cresswell, J. There is an absolute engagement to pay the costs.] The declaration does not shew with certainty upon what event the alleged liability to pay the costs arose,—whether on the first occasion, or upon the withdrawal of the record.

Peacock, contrà. The legal effect of the contract is, that the defendant will pay the costs, when requested. [Cresswell, J. What costs?] The costs incurred in proceeding to the trial of the action against Wollaston at the time mentioned. There is nothing on the face of the declaration to shew that the obtaining a judgment in that action was a condition precedent to the plaintiffs' right to sue the defendant for those costs. The agreement clearly contemplated the proceeding to trial at the first sitting only. Suppose Wollaston had obtained a verdict on that occasion, would the plaintiffs have been bound to move to set aside the verdict and obtain a new trial, before they could call upon the present defendant to reimburse them their costs?

[681] M. Smith, in reply. If the construction contended for on the other side is correct, the declaration is clearly ambiguous. The true meaning of the agreement is, that the defendant is to pay the costs when the cause is finally decided. It never could have been contemplated that the plaintiffs were to be at liberty to stop at any period of the cause. [Wilde, C. J. It might have been an imprudent thing,—in reference to the other action,—for the plaintiffs to bind themselves to proceed to judgment against Wollaston.] The question is not, what was prudent, but what the plaintiffs have in fact stipulated for.

Wilde, C. J. I am of opinion that the plaintiffs in this case are entitled to judgment. It must be admitted that it is not an easy task to ascertain the meaning of the parties, from the terms of the agreement they have entered into. However, I think I can discover sufficient to justify the conclusion at which I have arrived. The declaration sets forth a twofold promise,—first, a promise to hold the plaintiffs harmless, and indemnify them against all costs, charges, and expenses in any manner connected with the action to be tried at their suit against Wollaston,—and, secondly, a promise, in aid of the former, that the defendant would pay the same costs, charges, and expenses, whenever requested so to do by the plaintiffs. There is therefore, a distinct allegation of a promise which the defendant is liable to be called upon to perform. But, inasmuch as the first promise is a promise to indemnify against the costs of the action against Wollaston, "whether the same should be decided in favour of the plaintiffs or of Wollaston," it is insisted, on the part of the present defendant, that he was not to be liable to be called upon to perform his promise until the action against Wollaston had been decided, or in other words, that the final determination **[682]** of that action was a condition precedent to the now defendant's liability to perform the engagement he had entered into. It does not strike me that that is the fair effect of those words: it seems to me that they were introduced solely for the purpose of shewing that the defendant's contract of indemnity was to be wholly independent of the result of the former action. We are left without the means of forming an opinion as to what was the inducement for the defendant's entering into the contract. But the declaration discloses a detriment sustained by the plaintiffs, in staying the proceedings in the action against Black, at the instance of the defendant, and that is a sufficient consideration for the defendant's promise. Being plaintiffs in two actions, they, at the defendant's request, abstain from proceeding in one of them, and consent to go to trial in the other: there is, therefore, a perfectly good consideration, though the defendant's motive for entering into the engagement, or the benefit to result to him therefrom, is not apparent. The parties, no doubt, contemplated that the trial of the action against Wollaston would be a decisive event. There is no ground for presuming that the defendant had any interest in the action's proceeding further than a verdict. The defendant having, in consideration of the plaintiffs' consenting to proceed to trial, promised to indemnify them against the costs of the action, further agrees that he will pay the same costs, that is, the costs of the action, whenever requested so to do by the plaintiffs. Some reliance has been placed upon the use of the expression "costs of the action." I think, however, the expression used was the only one that was apt and proper to convey the real meaning of the parties, and that the change of phrase introduces no ambiguity. An undertaking simply to pay the costs of the trial, clearly would not have been what was intended. It is said that the defendant's **[683]** liability was only to arise upon the final legal determination and result of the cause,—as in cases of excessive arrest or malicious prosecution. The contract, however, as I read it, imports an absolute indemnity against the costs of the action against Wollaston, whatever its result, in consideration of the plaintiffs' staying the proceedings in the action against Black, and proceeding to try that against Wollaston, and also an absolute and distinct promise to pay those costs, upon request. I find nothing to shew that the legal effect of the contract is not such as the pleader has stated it to be. The case certainly is not free from difficulty. Suppose the plaintiffs proceeded to trial against Wollaston, and to judgment and execution; was the defendant to pay the costs up to the trial only, or how much further? The defendant has put his own construction upon his contract; for, there having been a trial and verdict, and a rule made absolute for a new trial, he assumes that he has not done with the matter, by interfering to cause the record to be withdrawn. Upon the whole, I think it sufficiently appears upon the face of the declaration, that the defendant has made himself responsible for the costs of the action against Wollaston, and, consequently, the plaintiffs are entitled to judgment.

Coltman, J. I am of the same opinion. One can easily conjecture how such an agreement as this came to be entered into. Black and Wollaston probably were members of a committee of a railway company; and the defendant, being desirous to protect Black, was anxious that the action against Wollaston should proceed, in order to compel him to bear his proportion of the liabilities of the concern. In order to meet the object of such an agreement, it might be necessary for the parties to proceed to trial, but possibly it might not have been [684] in their contemplation to go further. The consideration stated in the declaration is—"in consideration that the plaintiffs, at the request of the now defendant, would consent to stay all further procedings in the said action against Black until the 1st of May then next, and would proceed to trial with the action against Wollaston at the first sitting of the court of Exchequer in London, in the next Easter term, or as soon after as the practice of the court would admit of." The defendant now seeks to engraft on it something more, viz. that "they would proceed to final judgment in the last-mentioned action," which would be introducing by implication a consideration which does not appear in direct terms. And, as that would be a material variation from the contract alleged, I think we ought not to import it, unless we could see that it was clearly to be inferred. I entirely agree with the lord chief justice in the construction he has put upon the promise as alleged. The object of the parties evidently was, that the plaintiffs should be indemnified against the costs of the action against Wollaston, whether they were successful or not. It does not appear to me to be necessarily implied that the action should be prosecuted to final judgment. Upon the whole, I think, though the case is not quite free from difficulty, that the plaintiffs have shewn sufficient to entitle them to maintain this action.

Cresswell, J. I concur with the lord chief justice and my brother Coltman in giving judgment for the plaintiff in this case, although I do not profess to have arrived at any very clear understanding of the contract stated in the declaration. Where the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to its words. Where the intention is doubtful, the safest course is, to take the words in their [685] ordinary sense. Now, what are the words of this contract? They are—"in consideration that the plaintiffs, at the request of the now defendant, would consent to stay all further proceedings in the action against Black, until the 1st of May then next, and also in further consideration that the plaintiffs (*a*) would proceed to trial with the action against Wollaston, at, &c." That consideration the defendant has had. Then comes the promise:—"The defendant did then guarantee and then undertake and promise to and with the now plaintiffs, that he, the defendant, would hold them, the plaintiffs, and each of them, harmless and indemnified against all costs, charges, and expenses in any manner connected with the said action to be tried at their suit against Wollaston, as aforesaid, whether the same should be decided in favour of the plaintiffs or of Wollaston; and that he, the defendant, would pay the same costs, charges, and expenses, whenever requested so to do by the plaintiffs." It is argued, on the one side, that this means that the defendant is to indemnify the plaintiffs against the whole costs of the action, and therefore that the action must be finally disposed of and determined before the defendant's liability could arise. On the other hand, it is said, all that the consideration fairly imports is, that the plaintiffs were to proceed to trial in the action against Wollaston. The natural meaning of the words certainly is, that the plaintiffs were to carry the cause to trial: and it is by no means clear that they

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(*a*) Not alleging (as unnecessarily alleged with respect to the former part of this executory consideration) that it was at the defendant's request.

were bound to do any thing more. I also agree with the lord chief justice and my brother Coltman in the construction they put upon the words "whether the same should be decided in favour of the plaintiffs or of Wollaston," viz. that the contract is to be **[686]** performed, without reference to the success or the failure of the plaintiffs in that action. It seems to me that this is the safer construction to put upon the entire contract, in the absence of any thing clearly ascertained to the contrary, and that the defendant has in truth all that he bargained for.

V. Williams, J. I am of the same opinion. Whether or not the statement in the declaration truly represents the real contract between the parties, we have no means of knowing. As it appears upon the face of the declaration, I think it means this,—the defendant says to the plaintiffs,—"If you will stay the proceedings in the action against Black, and will proceed to trial with the action against Wollaston at such a sitting, I will indemnify you against all costs and expenses in any manner connected with the last-mentioned action. whether the same shall be decided in your favour or in Wollaston's; and I will pay those costs and expenses whenever requested so to do." The plaintiffs aver performance of this agreement on their part, in terms: and the defendant, in answer, says, that one of the considerations for his promise was, that the plaintiffs should so proceed with the action against Wollaston, that the cause should be finally determined. No such consideration, however, is stated upon the record: and we cannot assume it. The costs to be paid by the defendant are, costs connected with the action against Wollaston? and they are equally so, whether incurred before or after final judgment. The defendant's liability is to be quite irrespective of the plaintiffs' success or failure in that action.

If the defendant is prejudiced by the decision we have come to, he must take that as the necessary consequence of the manner in which he has worded his contract.

Judgment for the plaintiffs.

[687] Fish v. Kempton. April 16, 1849.

[S. C. 18 L. J. C. P. 206; 13 Jur. 750. See, *Catterall* v. *Hindle*, 1866-67, L. R. 1 C. P. 190; L. R. 2 C. P. 368; *Grissell* v. *Bristowe*, 1868, L. R. 3 C. P. 127; L. R. 4 C. P. 36. Referred to, *New Zealand Land Company* v. *Ruston*, 1880-81, 5 Q. B. D. 480; 7 Q. B. D. 374; *Maspons* v. *Mildred*, 1882-83, 9 Q. B. D. 544; 18 App. Cas. 874; *Cooke* v. *Eshelby*, 1887, 12 App. Cas. 282. Applied, *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.]

A. buys goods of B., knowing that B. is selling them as factor. He cannot, in an action by the principal for the price, set off a debt due to him from B., although it is found that A. made the purchase bonâ fide.—But, semble, that payment to B., though made prematurely, would, if made bonâ fide, bind the principal.

This was an action of debt and detinue. The first count of the declaration was in debt for goods, chattels, and effects sold and delivered; the second was in detinue for certain leather alleged to have come to the possession of the defendant by finding.

To the first count, the defendant pleaded,—first, never indebted,—secondly, payment,—thirdly, that the said goods, chattels, and effects in the first count mentioned, were sold and delivered as therein mentioned, through the agency of certain persons, to wit, William Tanner and John Ward, who, at the time of the said sale and delivery, were the agents and factors of and for the plaintiff, and intrusted by him, as such agents, with the said goods, chattels, and effects, and, with the assent of the plaintiff, to wit, on the day and year in the said first count mentioned, sold them to the defendant, in their, the said William Tanner and John Ward's own names, as the true and sole owners thereof, and then appeared to be the true and sole owners thereof by the plaintiff's consent; that the plaintiff did not, at or before the time of the sale and delivery in the first count mentioned, of the said goods, chattels, and effects to the defendant, appear, nor was he then known by the defendant, as the proprietor of, or interested in, the said goods, chattels, and effects, or any or either of them; that he, the defendant, then bought and accepted and received the said goods, chattels, and effects of and from the said William Tanner and John Ward, as the proper goods, chattels, and effects of the said William Tanner and John Ward, and **[688]** that credit for the said goods, chattels, and effects was given to the defendant by the said

William Tanner and John Ward; that the said William Tanner and John Ward, before and at the time of the said sale and delivery of the said goods, chattels, and effects, and thence continually had been, and still were, indebted to the defendant in a large sum of money, to wit, the sum of 6100l., for goods before then sold and delivered by the defendant to the said William Tanner and John Ward, at their request, and for goods bargained and sold, &c., which said sum so due to the defendant equals the supposed debt above demanded, and all damages by the plaintiff sustained by reason of the detention thereof, and against which said sum of money so due to the defendant, he the defendant was ready and willing, and thereby offered to set off and allow, &c. &c.; verification.

To the last count, the defendant pleaded,—first, that he did not detain the goods in that count mentioned,—secondly, not possessed.

The plaintiff joined issue on the first, second, fourth, and fifth pleas, and replied to the third, "that the said William Tanner and John Ward did not, with the assent of the plaintiff, sell the said goods and chattels to the defendant, in their own names, as the true and sole owners thereof, and did not appear to be the true and sole owners thereof, with the plaintiff's consent, in manner and form as in the said third plea alleged, &c." Issue thereon.

The cause was tried before Wilde, C. J., at the sitting in London, after Hilary term last. The facts were as follows:—Tanner and Ward carried on a considerable business as leather-factors, in which capacity they had frequent dealings with the plaintiff. They sometimes also bought leather on their own account. In the month of November, 1847, a negotiation took place between Tanner and Ward and the defendant, relative to the **[689]** purchase by the defendant of a quantity of leather called "kips." The contract was concluded on the 23rd; the kips were delivered to defendant on the evening of the 24th; and on the 25th Tanner & Ward stopped payment, and eventually became bankrupt,—the fiat against them bearing date the 18th of February, 1848.

At the time of the sale, Tanner & Ward were indebted to the defendant in a sum considerably exceeding the value of the kips.

After the bankruptcy of Tanner & Ward, the plaintiff, as principal, demanded from the defendant the price of the kips; and, upon his refusing to pay it, the present action was brought.

On the part of the defendant, it was insisted,—first, that the goods were sold by Tanner & Ward as principals, and not as factors,—secondly, that, assuming that Tanner & Ward sold as factors, and not as principals, still, upon the authority of *Warner* v. *M'Kay* (1 M. & W. 591), the sale was subject to the state of accounts between the factors and the vendee.

For the plaintiffs, evidence was given for the purpose of shewing, that, at the time he made the purchase, the defendant knew that Tanner & Ward were entrusted with the goods as factors, and that they were in failing circumstances, and consequently that the transaction was fraudulent.

In answer to questions put to them by the learned judge, the jury found, that the goods were sold by Tanner & Ward as factors, and that the defendant bought them with knowledge of that fact; and that the purchase by the defendant was bonâ fide (*b*): and they therefore, under the direction of his lordship, returned a verdict for the plaintiff for 190l., the amount claimed.

[690] Byles, Serjt., pursuant to leave reserved to him at the trial, now moved for a rule nisi to enter a verdict for the defendant, or a nonsuit. The finding of the jury removes the defendant from the first point made by him at the trial. The only question, therefore, that now remains is, whether the knowledge of the vendee that the seller is dealing with the goods as factor, deprives the former of the right to set off a debt due to him from the seller. It is submitted, upon principle, as well as authority, that it does not. *Warner* v. *M'Kay* is precisely in point (*a*). There, before the first sale of the sugars in respect of which the action (by the principals) was brought, the defendant knew that B. & Co., from whom he purchased, sold as factors; and the names of the principals were communicated to him before the set-off was

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(*b*) Q. d. without any view of obtaining satisfaction of a bad or a doubtful debt, at the expense of the plaintiff.

(*a*) See remarks upon this case, in *Smart* v. *Sandars*, ante, vol. iii. p. 399.

incurred. The jury here found that the defendant acted bonâ fide: and he had a right to suppose that Tanner & Ward were acting honestly. [Wilde, C. J. How can the principal, unless he has done something to accredit the factors, be affected by the defendant's belief or bona fides?] The ruling of Parke, B., is distinct upon the subject. [Cresswell, J. Is not that in effect overruled by what afterwards took place in banco?] It is submitted that it is not. [Wilde, C. J. Lord Abinger, C. B., treats it as a case of payment.] If premature payment will protect, à fortiori will a set-off. [Wilde, C. J. Payment, though made prematurely, puts the factor in a position to do justice to his principal; and set-off does not. There is a large class of cases wherein the difference between set-off and payment has been well ascertained. I have always understood payment to a factor to be good, inasmuch as it enables him to settle with his principal; but that, **[691]** where a man buys goods of a factor, knowing him to be dealing as such, and the principal has done nothing to accredit the factor as one dealing on his own account, he is not bound by a claim of set-off as between the factor and the vendee. At what period could the plaintiff here have brought an action for money had and received against Tanner & Ward?] The general replication de injuriâ could not have been adopted in this case, the plea involving an authority from the plaintiff, and so falling within the third exception in the rule in *Crogate's case* (8 Co. Rep. 66),—*Salter* v. *Purchell* (1 Q. B. 209). Accordingly, the plaintiff, admitting the set-off, replies that Tanner & Ward did not, with the assent of the plaintiff, sell the said goods and chattels to the defendant in their own names, as the true and sole owners thereof, and did not appear to be the true and sole owners thereof, with the plaintiff's consent. The jury found that the defendant made the purchase bonâ fide. [Cresswell, J. They found that Tanner & Ward sold as factors, and that the defendant bought of them knowing them to be selling as factors. That disposes of the issue in favour of the plaintiff.] If that be the true meaning of the issue, the replication is no answer to the plea, and the defendant will be entitled to judgment non obstante veredicto. [Wilde, C. J. The plea sets up an honest case; but you seek to use it for a different purpose.]

Wilde, C. J. In all these cases of set-off, the law endeavours to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to **[692]** turn round and tell the vendee that the character he himself has allowed the factor to assume, did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case, there would be no honesty in allowing the purchaser to set off a bad debt, at the expense of the principal. This, I consider to be clear and settled law: and I think we are bound not to exhibit any doubt, where none should exist, by granting a rule. The case of *Warner* v. *M'Kay*, as ultimately decided, in no degree breaks in upon the principle I have stated. It is quite clear that the court there do not adopt the idea that the vendee has a right to set off a debt due to him against the price of goods bought by him of a factor with knowledge that he sells as factor: but they put the case upon a ground which prevents it from having any bearing upon the present case, viz. that there the vendee had paid the factors. Where a factor sells, with notice to the vendee that he sells as factor, payment to him is good, even though made prematurely; but the vendee cannot, under such circumstances, claim a right of set-off. The substance of the third plea I consider to be this,—that the plaintiff induced the defendant to believe that Tanner & Ward were the true owners of the goods, and that the defendant purchased them in that belief. The replication, which traverses those allegations, therefore, traverses the substantial part of the plea. The law being well settled, I think there ought to be no rule.

Coltman, J. I am of the same opinion. The general rule undoubtedly is, that, where a factor sells as principal, the vendee may set off, in an action by the **[693]** principal for the price of the goods, a debt due to him from the factor; but that, where he sells as factor, no such set-off is allowed. That doctrine certainly was broken in upon by the ruling of Parke, B., in *Warner* v. *M'Kay*. But the court of Exchequer seem to have felt that that ruling was not sustainable: they upheld the verdict there on the score that there had been a payment to the brokers, though a premature one.

Whether that view was correct or not, the court refused to uphold the ruling of Parke, B. That case, therefore, is no authority for the purpose for which it has been cited to-day.

Cresswell, J. I am of the same opinion. This is an attempt to extend the rule laid down in *Rabone* v. *Williams* (7 T. R. 360 (*a*)) and *George* v. *Clagett* (7 T. R. 359), which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord Mansfield so lays down the rule distinctly in *Rabone* v. *Williams*. "Where," he says, "a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." The distinction between a factor and a broker is noticed by Abbott, C. J., and Bayley, J., in *Baring* v. *Corrie* (2 B. & Ald. 137). Abbott, C. J., says: "The distinction between a broker **[694]** and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited, the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not: and, at all events, they knew that he had a right to sell the goods." And Bayley, J., adds: "It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of *Rabone* v. *Williams* and that of *George* v. *Clagett*." With regard to *Warner* v. *M'Kay*, I must confess I never could satisfy myself as to the precise ground upon which that case was decided.

V. Williams, J. I am of the same opinion. The doctrine of *George* v. *Clagett*, and that class of cases, has no application, where the buyer knows that the factor sells as factor.

Rule refused.

[695] Cunliffe and Another *v.* Maltass. May 5, 1849.

An affidavit of debt alleging several distinct and separate causes of action for separate and distinct sums, some of which are well stated, and others not, is not therefore bad altogether.—A capias issued under a judge's order pursuant to the 1 & 2 Vict. c. 110, s. 3, indorsed for bail for 1050l., upon an affidavit stating distinct causes of action for four several amounts, three of them correctly, and one (for 500l.) imperfectly. The defendant, having been arrested, applied to a judge at chambers to discharge him out of custody. The judge declined to discharge the defendant, but made an order reducing the amount to be taken for bail, by the 500l. so defectively alleged:—The court refused to rescind the order.

On the 3rd of March last, an order was made in this cause by Patteson, J., at chambers—that the plaintiff be at liberty to issue one or more writs of capias, alias, or pluries capias, against the defendant, indorsed to hold him to bail for the sum of 1050l.

The affidavit upon which the learned judge was induced to make that order, was as follows:—

"James Cunliffe, of, &c., maketh oath and saith that the above-named defendant, William George Maltass, is justly and truly indebted unto this deponent and to Samuel Brooks, his co-partner (surviving partners of William Brooks, deceased), in the sum of 1050l., being the balance due for principal on four several bills of exchange,—one thereof being a bill dated the 7th of February, 1846, drawn by the said W. G. Maltass on, and accepted by, C. A. Calvert, for 400l., payable, at three months' date, to the order of Messrs. Keyser & Wilkin, and by them indorsed to Messrs. Beattie & Co., and by them indorsed to this deponent and his said co-partner and the said William Brooks, deceased, in his lifetime; which said bill of exchange was duly presented for payment when due, and was dishonoured, and due notice of the dishonour thereof given to the said W. G. Maltass,—another thereof being a bill of exchange dated the 7th of March, 1846, drawn by the said Messrs. Keyser & Wilkin on, and accepted by, **[696]** the said Messrs. Beattie & Co., for 500l., payable, at three months' date, to the order of the said W. G. Maltass, and by him indorsed to the said C. A. Calvert, and by the said C. A. Calvert indorsed to this deponent and his said partner and the said William Brooks, deceased, in his lifetime,—another of the said four bills of exchange, dated the 12th of March, 1846, drawn by one Giuseppe Bargigli, on, and accepted by, the said Messrs. Beattie & Co., for 250l., payable to the order of the said W .G. Maltass, at three months, and by the said W. G. Maltass indorsed to the said C. A. Calvert, and by him to this deponent and his said co-partner and the said William Brooks, deceased, in his lifetime; which said bill of exchange was duly presented for payment on the day when it became due, and was dishonoured, and due notice of its dishonour was given to the said W. G. Maltass,—and the other of the said four bills of exchange dated the 12th of March, 1846, drawn by the said G. Bargigli on, and accepted by, the said Messrs. Beattie & Co., for 400l., payable to the order of the said W. G. Maltass, the defendant, at three months' date, and by the said W. G. Maltass indorsed to the said C. A. Calvert, and by him indorsed to this deponent and his said co-partner and the said W. Brooks, deceased, in his lifetime; which said bill was duly presented for payment on the day when it became due, and was dishonoured, and due notice of its dishonour was given to the said W. G. Maltass. And this deponent further saith that all the said four bills of exchange are overdue, and the said sum of 1050l. still remains due and owing to this deponent and his said co-partner, as surviving partners of the said William Brooks, deceased, for principal money on the said four bills of exchange (*a*). And this **[697]** deponent further saith that he and his said co-partner are in danger of losing their said debt, unless the defendant be held to bail. And this deponent further saith that he hath been informed, and believes, that the said defendant is about leaving England for foreign parts."

The defendant was arrested on the 3rd of March upon a capias issued upon this order, indorsed for bail for 1050l.

A summons was afterwards taken out, on behalf of the defendant, calling upon the plaintiffs to shew cause why he should not be discharged out of custody. This summons came on to be heard, before Patteson, J., on the 10th of March, 1849, when, —it appearing to the learned judge that the affidavit upon which the former order was made, did not disclose a cause of action as to the second bill mentioned in such affidavit,—that learned judge made the following order:—"That the amount for which bail is to be given in this cause, be reduced to the sum of 550l., that the defendant be at liberty to pay that sum, and 20l. for costs, under the statute, into court, in lieu of bail, and that he be thereupon discharged out of custody."

Special bail having been put in and perfected, under the order of a judge, without prejudice to an application to the court to rescind the former orders,

Channell, Serjt., on a former day in this term, moved for a rule calling upon the plaintiffs to shew cause why the two orders of Patteson, J., should not be rescinded, why the writ of capias issued in pursuance of the first order should not be set aside, and why the recognisance of the defendant's special bail put in and perfected should not be vacated, or why an exoneretur should not be entered on the bail-piece in this action, on the defendant's entering a common appearance, on **[698]** the ground that the affidavit upon which the defendant was so held to bail, was insufficient, inasmuch as it shewed no cause of action for the amount for which the defendant was so held to bail. The defect in the affidavit was, that, as to the bill for 500l., dated the 7th of March, 1846, it did not allege that the bill had been presented and dishonoured, and that the defendant had notice of dishonour. He referred to *Kirk* v. *Almond* (2 C. & J. 354, 1 Dowl. P. C. 318, 2 Tyrwh. 316), and *Drake* v. *Harding* (1 Harr. & W. 364), as authorities to shew that an affidavit bad in part is bad altogether; and submitted, that, although these cases seemed to have been overruled by *Jones* v. *Collins*

(*a*) The aggregate being 1550l.

(6 Dowl. P. C. 526), yet that case was distinguishable. upon the ground that here the affidavit had been acted upon, and the defendant actually arrested upon a writ indorsed for the entire sum: *Caunce* v. *Rigby* (3 M. & W. 67). [V. Williams, J., referred to *The Bank of England* v. *Reid* (8 Dowl. P. C. 848), where Parke, B., upon *Kirk* v. *Almond* being cited, said: "That case has been disapproved of, and is only acted upon when the part which is good cannot be distinguished from that which is bad."]

A rule nisi having been granted,

Byles, Serjt., and Taprell, now shewed cause. The authorities clearly establish, that, although an affidavit to hold to bail may be insufficient as to part, the defendant may still be held to bail for the amount that is well sworn to, provided it be separable from the bad part; and that the amount may be reduced even after a capias has issued and been acted upon. The cases of *Kirk* v. *Almond* and *Drake* v. *Harding* are no longer considered law. In *Prior* v. *Lucas* (1 Harr. & W. 365, n.),—which oc-**[699]**-curred at chambers before Littledale, J.,—the affidavit of debt stated that the defendant was indebted to the plaintiff in 50l. for goods sold and delivered to the defendant at his request, and in 26l. on a bill of exchange, the amount of which was not stated. Littledale, J., said that it was true that there were two decisions of the court of Exchequer,—*Baker* v. *Wills* (1 C. & M. 238, 1 Dowl. P. C. 631) and *Kirk* v. *Almond*,—that an affidavit of debt bad in part is bad altogether; but that he thought those cases had not been properly decided; that he had conversed with the judges on the point, and believed that the barons themselves had adopted the same opinion: and, accordingly, he made an order to discharge the defendant, on giving bail for 50l. So, in *Jones* v. *Collins*, it was distinctly held that an affidavit of debt stating two causes of action, one imperfectly, and the other correctly, is not bad altogether, but the defendant may be held to bail for the latter, if separate from, and independent of, the former. Williams, J., after time taken for deliberation, there,—having first disposed of other points in the case,—says: "Next comes the question, on which there has been a variation in the decisions, whether, when there are two distinct and separate causes of action stated in an affidavit of debt, one of which is bad, and the other good, the arrest being for the joint amount, the affidavit is bad altogether. It has been held, undoubtedly, to be bad altogether; and that opinion has been for a long time acted upon. In *Kirk* v. *Almond*, it was held that an affidavit which was good in part and bad in part was bad altogether, and the defendant was discharged out of custody. That case was acted on for some time; as, in the case of *Drake* v. *Harding*, by my brother Coleridge. But since that time there has been a variation in the opinions of the judges, which it is **[700]** unnecessary now to trace. In the case of *Prior* v. *Lucas*,—which is in a note to the report of the case of *Drake* v. *Harding*, and which was before my brother Littledale at chambers, the report states that the cases in the court of Exchequer, of *Baker* v. *Wills* and *Kirk* v. *Almond*, were referred to, and that my brother Littledale did not agree with those decisions, and that he had consulted with the other judges on the subject. I have seen my brother Littledale, and he says that the report of that case is correct, and that he did, on that occasion, consult the other judges; and the result is, that the cases of *Drake* v. *Harding* and *Kirk* v. *Almond* are no longer to be considered as good law; the case of *Prior* v. *Lucas* establishing this rule, that, where the total amount sworn to is not mixed up with that which is partly good and partly bad, but distinct and separate causes of action, in separate amounts, are sworn to, one of which is properly, and the other improperly sworn to, the affidavit is good as to that amount in respect of which it is correct, and that the court will not discharge the defendant altogether for such objection." That decision received the sanction of Parke, B., in *The Bank of England* v. *Reid*. Here, as to three of the bills, amounting together to 1050l., the affidavit shews a clear and distinct cause of action; as to the fourth, a bill for 500l., it must be conceded that the affidavit is defective: but, applying the 500l. paid on account, to the amount that is sufficiently sworn to, the affidavit shews at least 550l. for which the defendant might well be held to bail.

Channell, Serjt., in support of the rule. It is not disputed, that, if the original affidavit was good, the first order was well made; nor is it denied that the second order was good, if the learned judge had power to correct the first. The fair result of the cases is, that, **[701]** where an affidavit states any part of the cause of action defectively, the part for which it is proposed to use it must be clearly severable from the rest,—as in *The Bank of England* v. *Reid*. But in no case has it been held that the bad part of the affidavit can be rejected, after it has once been acted upon in its entirety. [Cresswell, J. Was it not so used in the cases of *Prior* v. *Lucas* and *Jones* v. *Collins?*] No such point seems to have been made in either of those cases at the bar, nor was it adverted to by the court. And the observations of Alderson, B., in the case of *Caunce* v. *Rigby*, seem to shew that this was the impression of that learned judge. The marginal note of that case states, that, if an affidavit be good as to one distinct sum stated in it, and that be an arrestable amount, it is no objection that it is bad as to another sum stated in it, unless it appears that process has issued on it for the whole amount, and not for the former sum only. Upon its being urged by the counsel for the defendant that "*Kirk* v. *Almond* and *Baker* v. *Wills* are authorities that an affidavit of debt, bad in part is bad altogether," Alderson, B., says: "No doubt, if it were shewn that the defendant was arrested for the whole amount." The policy of the law of late years has been to limit the right to imprison a debtor.

Wilde, C. J. This is a rule calling upon the plaintiffs to shew cause why two orders of Patteson, J. should not be rescinded, the writ of capias issued in pursuance of the first of those orders set aside, the recognisance of bail vacated, and an exoneretur entered on the bail-piece. The case comes before the court under the statute 1 & 2 Vict. c. 110, which gives authority to a judge of either of the superior courts, under certain circumstances, to make an order to hold a defendant to bail. Originally, the capias was the **[702]** commencement of the action; and such capias was not deemed irregular because improperly indorsed as to the amount of bail to be taken. When the writ was indorsed for an amount not warranted by the affidavit, the course was, not to move to set aside the capias, but to discharge the defendant upon his entering an appearance and filing common bail,—leaving the capias still to be the commencement of the action. It is now no longer the capias, but the writ of summons that is the commencement of the suit: the capias issues for a collateral purpose; and it may issue at any time before final judgment. The words of the 3rd section of the statute are—that, "if a plaintiff in any action in any of Her Majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by the affidavit of himself or of some other person, shew to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20l. or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias, into one or more different counties, as the case may require," &c. The arrest, therefore, now takes place, not by force of the affidavit stating the amount of the debt, but for such amount as the judge in his **[703]** discretion may think fit; such discretion, of course, to be exercised, not arbitrarily, but according to the practice of the court. The regularity or irregularity of the affidavit, therefore, does not stand quite upon the same footing as it did before. In the present case, the learned judge made an order that a capias issue indorsed for 1050l., the sum alleged in the affidavit to be due for principal. Formerly, when an ordinary capias issued, the court required the affidavit to contain a distinct statement of the amount of the debt. In administering the law under the statute in question, they have adhered to that practice, and still require the affidavit to be certain to a certain intent. The affidavit presented to the learned judge here, stated that the defendant was indebted to the plaintiffs in the sum of 1050l., being the balance due for principal on four several bills of exchange, describing them, and which four bills in the aggregate exceeded, by 500l., the sum claimed to be due. The judge accordingly directed the capias to issue for 1050l.; and the defendant was thereupon arrested. The defendant afterwards went before the judge, not for the purpose of asking that the order might be discharged, but that he himself might be discharged out of custody, on the ground that the whole sum indorsed on the writ was not properly sworn to. The learned judge,—looking more minutely at the affidavit, and finding that it did not disclose enough to warrant the arrest of the defendant as to a portion of the debt, inasmuch as it failed to describe a good cause of action against the defendant as to one of the bills,—took the view most favourable for the defendant, but, thinking that there must be at least 550l. due, made an order reducing the amount for which the defendant was to be held to bail, to that sum. That order has been acted upon, the defendant having procured it to be modified by allowing him to pay into court the 550l., [704] and 20l. for costs, in lieu of bail. Having afterwards perfected special bail, the defendant now comes and asks the court to rescind the two orders, to set aside the capias, and to vacate the recognisance of bail,—upon the ground that the original affidavit did not warrant the issuing of a capias indorsed for the amount mentioned in the first order. I apprehend, however, the defendant is not now in a situation to make an application different from that which he made before the judge at chambers. The motion is founded upon the 6th section of the statute, which enacts "that it shall be lawful for any person arrested upon any such writ of capias, to apply, at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have commenced, for an order or rule on the plaintiff in such action to shew cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such order therein as to such judge or court shall seem fit; provided that any such order made by a judge may be discharged or varied by the court, on application made thereto, by either party dissatisfied with such order." When, therefore, the parties come before the court, the court is to make such order as it conceives the justice of the case to require. Now, justice requires that we should deal with the case as it was presented before the judge. That he had authority to make the order to the extent of 550l., is conceded. The real objection is, that he erroneously exercised his discretion, by ordering the capias to issue for 1050l. We, therefore, cannot set aside the order altogether. It was admitted in argument that the authorities shew that the circumstance of a defendant's being arrested for [705] too large an amount affords no ground for his discharge, if the affidavit warrants the arrest up to a certain extent. Further, it is not disputed, that not only may the party be held to bail for the lesser amount, where the sum is distinctly, and in terms, stated in the affidavit, but also where it may fairly be collected therefrom. The authorities upon this subject are not impugned: but it is said they are not controlling authorities, because there is a point here that was not present in the cases referred to; and this consequence is sought to be deduced from the language of Alderson, B., in *Caunce* v. *Rigby*. There the plaintiff was proceeding to outlawry: the defendant moved to set aside the capias and subsequent proceedings, on the ground of a defect in the affidavit to hold to bail: the affidavit stated that the defendant was indebted to the plaintiff in the sum of 31l. for work and labour done by him for the defendant at his request, and in the further sum of 20l. on a bill of exchange drawn by the defendant on one John Robinson, and indorsed to the plaintiff, "which said John Robinson made default in payment of the said bill when due." The objection was, that there was not a sufficient statement, as against the drawer, of the acceptor's default; and it was contended, on the authority of *Kirk* v. *Almond* and *Baker* v. *Wills*, that an affidavit of debt bad in part is bad altogether: upon which Alderson, B., says,—"No doubt, if it were shewn that the defendant was arrested for the whole amount; but suppose it was only for the 31l., would the court set it aside?" And, in giving judgment, the learned baron says: "I am not aware of any case in which a distinct part of an affidavit being good, and the amount mentioned in such good part only being indorsed on the capias, the affidavit has been held bad." My brother Channell infers from this, that the proceedings would have been set aside, if the capias had been in-[706]-dorsed for the larger amount. I think that is not a just inference from the language used by the learned baron. On the contrary, there are distinct authorities to shew that the party is not entitled to that relief, but that the court will permit the defendant to be held to bail for so much as the affidavit well shews to be due. It is not denied here that the affidavit shews, in correct and formal terms, a debt due to the plaintiffs, to the extent of 550l. Upon the whole, therefore, I think that the justice of the case is well met by allowing the capias to stand for that sum, and, consequently, the rule for setting aside the orders of my brother Patteson, will be discharged.

Coltman, J. I take it to be established by the cases, that, if, before the statute 1 & 2 Vict. c. 110, a defendant was sought to be arrested upon an affidavit disclosing two distinct causes of action, one of which is well stated, and the other not, the party would not have been entitled to be discharged on filing common bail, but the bail would have been reduced to the amount properly shewn to be due. None of the cases cited bear out the proposition of my brother Channell, except the two cases of *Kirk* v. *Almond* and *Drake* v. *Harding*, which have since been overruled. In point of good sense, I see no difference between a case where the affidavit distinctly discloses one good cause of action, and a case where it manifestly appears, upon looking at the whole affidavit, that a certain sum is due. This case arises upon the 3rd section of the 1 & 2 Vict. c. 110. Upon that, the matter seems to me to be even more clear than upon the old law. By that section, two matters are referred to the judge,—the one, whether the plaintiff has a cause of action against the defendant to the amount of 20l., or has sustained damage to that amount,—the other, whether there is probable cause for believ-**[707]**-ing that the defendant is about to quit England. When the judge makes an order to hold the defendant to bail for a particular amount, he is doing a judicial act. The question is, what is the mode of relief where the judge has directed a defendant to be held to bail for a larger sum than is warranted by the affidavit. The remedy is pointed out by the 6th section, which provides that any order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied therewith. That section, therefore, gives authority to the court to modify the order, by limiting the amount of bail. That has already been done in the present case.

Cresswell, J. I am entirely of the same opinion. It is beyond controversy that 550l. appears on the face of the affidavit to be due from the defendant to the plaintiffs, upon bills of exchange for which the defendant is liable, by reason of presentment and non-payment by the acceptor, and notice of dishonour to the defendant, as drawer,—rejecting altogether the 500l. bill as to which the defendant's liability is defectively stated, and ascribing the 500l. paid, to the other bills as to which the defendant's liability is well alleged. There being, then, a perfectly good affidavit to hold to bail for 550l., the judge had authority to order a capias to issue. It may be that he was in error in allowing the writ, in the first instance, to be indorsed for so large an amount. The only remedy for that is, to vary the order, under section 6. The whole thing is the creation of the statute. In *Hopkinson* v. *Salembier* (7 Dowl. P. C. 493), where the defendant had been arrested under the 1 & 2 Vict. c. 110, s. 3, by virtue of a judge's order made upon an affidavit having the **[708]** same defect as the affidavit in this case, it was held that the motion should be, not to set aside the capias, but to rescind the judge's order. The case is brought precisely within the principles that affected the capias under the old law. The cases of *Baker* v. *Wills*, *Kirk* v. *Almond*, and *Drake* v. *Harding*, were under review in *Jones* v. *Collins* and *The Bank of England* v. *Reid*. The result is, that, where the affidavit discloses a good cause of action, the defendant may be held to bail for that, notwithstanding the affidavit also states something further, which does not amount to a cause of action. It is suggested that there the point was not made, that, the party having originally been arrested for too large an amount, it was not competent to the plaintiff to hold him to bail for the lesser amount that was properly sworn to. But I cannot think the judge overlooked that.

V. Williams, J. I am of the same opinion. This is an appeal from the decision of my brother Patteson. He clearly had authority to make the original order. The deponent does pledge his oath to the existence of the debt to the full amount of 1050l., though, by reason of a technical omission, the affidavit fails to shew a good cause of action as to 500l. Before the recent statute, the affidavit was conclusive: but now it is competent to the defendant to dispute the existence of the debt itself.

Rule discharged, with costs.

[709] Doe d. Benjamin Hemming, Assignee of Joseph Willetts, an Insolvent, *v.* Thomas Willetts. April 19, 1849.

A testator, having four sons, A., B., C., and D., devised to his sons B., C., and D., "all those my five freehold messuages, tenements, and premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants, to hold to them, their heirs and assigns for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, and of the testator's death, consisted of five cottages and about three acres of meadow land adjoining:—Held, that the land passed to B., C., and D., as well as the cottages.—A certified copy, under the seal of the insolvent debtors court, of the assignment from the provisional assignee is, under the 7 G. 4, c. 57, s. 19, evidence of such assignment, without proof of any petition having been filed by the insolvent, or of any appointment of an assignee.

This was an action of ejectment brought to recover an undivided third part of three acres of land at Rowley Regis, in the county of Stafford.

The cause was tried before Coltman, J., at the last spring assizes at Stafford. The facts were as follows: One William Willetts, who died in 1829, leaving four sons,—John, Joseph, William, and Thomas,—was, at the time of his death, seised of five freehold cottages, with three acres of land adjoining, upon which was a stable. By his will, he devised to the three younger sons, from and after the death of his widow, "all those my five freehold messuages, tenements, and premises, with their appurtenances, at Rowley Regis, in the county of Stafford, in the occupation of James Priest, his under-tenant or under-tenants; to hold to them, their heirs and assigns, for ever, as tenants in common:" and he appointed his eldest son, John, his executor.

At the date of the will, and at the time of the testator's death, Priest was tenant of the three acres of land and stable, as well as of the five cottages. No part of the land had ever been held by any occupier of any of the cottages.

[710] The widow of the testator died in 1834; and, in the same year, Joseph Willetts, who had been taken in execution for a debt, petitioned for his discharge under the insolvents debtors act then in force—7 G. 4, c. 57. The lessor of the plaintiff claimed, as his assignee, one third of the land, which had been in the possession of the defendant ever since his mother's death.

In order to prove his title as assignee, the lessor of the plaintiff put in the assignment from Joseph Willetts, the insolvent, to Sturges, the provisional assignee of the insolvent court, and a document which purported to be a copy under the seal of the court, of an order to the provisional assignee to convey the insolvent's estate to the lessor of the plaintiff, and of an assignment made thereon. This latter copy, it was insisted, on the part of the defendant, was inadmissible; but the learned judge received it.

It was then objected, that there was no proof of any petition filed by Joseph Willetts, or of any appointment of an assignee; and it was further objected that the land in question did not pass by the will of William Willetts as appurtenant to the cottages.

The learned judge was of opinion that the land did pass by the will; and he directed the jury to find for the plaintiff,—reserving to the defendant leave to move to enter a nonsuit.

Allen, Serjt., now moved accordingly. 1. The copy of the order of the insolvent court was improperly received, without proof of the proceedings in the ordinary way. This case depends upon the 7 G. 4, c. 57, which contains no provisions analogous to the 105th section of the 1 & 2 Vict. c. 110 (*a*). [V. Williams, J. **[711]** The 76th section of the 7 G. 4, c. 57, provided that "a copy of such petition, schedule, order, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and sealed with the seal of the said court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid."] Under that statute, it was imperative on the party to shew that it was the seal of the court. [Cresswell, J. The objection seems to be

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(*a*) Which enacts, "that a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said court, shall, at all times, be admitted, in all courts and places whatever, as sufficient evidence of the same, without any other proof whatever given of the same."

removed by the 8 & 9 Vict. c. 113, the 1st section of which,—reciting that "whereas it is provided by many statutes, that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars, in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such and the like documents,"—enacts, "that, whenever by **[712]** any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular, in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding,—the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence." Here, the original record would clearly have been evidence: and this statute puts the copy in the same situation as the original.] That statute certainly seems to answer the first objection.

2. The document put in, and, as it now seems, properly admitted, was, an assignment from the provisional assignee to the lessor of the plaintiff: but there was no proof of any petition filed by Joseph Willetts, or of any proceedings thereon. The 11th section of the 7 G. 4, c. 57, provides that the insolvent shall, at the time of filing his petition, execute an assignment to the provisional assignee of all his estate and effects: and the 19th section provides for the appointment of other assignees, and for the assignment of the estate by the provisional assignee to them; and enacts "that every such conveyance and assignment as aforesaid to such provisional **[713]** assignee, and a counterpart of every such conveyance and assignment by such provisional assignee to such other assignee or assignees, shall be filed of record in the said court; and a copy of any such record, made upon parchment, and purporting to have the certificate of the provisional assignee of the said court, or his deputy, appointed for that purpose, indorsed thereon, and to be sealed with the seal of the said court, shall be recognised and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all courts, and before commissioners of bankrupt and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said court in the matter of such prisoner's petition." The question here is, whether the copy of the assignment shall be taken to be evidence that all had been done to constitute a legal title. [Wilde, C. J. It would be idle to say that a copy shall be evidence, if all the previous steps are still required to be proved. The very object of the act was to dispense with all such formal proof. Cresswell, J. referred to *Jackson* v. *Thompson* (2 Q. B. 887).]

3. The terms of the will were not sufficient to carry the land in question. [Wilde, C. J. Suppose you strike out the words "five freehold messuages and tenements," leaving it —"all those my premises, with their appurtenances, at Rowley Regis, in the occupation of James Priest,"—would not that pass the land, which was in the occupation of Priest? Is the effect of the word "premises" circumscribed by the previous words?] It is submitted that it is. There are many cases which shew that land will not pass by the word "appurtenances." *Hearn* v. *Allen* (Cro. Car. 57); *Roe d. Walker* **[714]** v. *Walker* (3 Bos. & Pull. 375). [V. Williams, J. There are cases both ways (*b*).] The learned judge, at the trial, relied on the word "premises," which clearly would not pass this land (*c*). [Wilde, C. J. "Tenements and premises" would undoubtedly pass the land.] This is a question of intention. It cannot be supposed that the testator intended to disinherit his heir. [Wilde, C. J. He certainly had not forgotten

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(*b*) Jarman on Wills, vol. i, pp. 708, 709.

(*c*) 1 Jarman, 707.

him; for, he appoints him his executor. The eldest son was probably otherwise provided for. Why is it to be assumed that the testator meant to die intestate as to any part of the premises in the occupation of Priest?]

WILDE, C. J. I cannot see any reasonable ground for doubt in this case. Taking the most general description of the property, I think it is clear that the testator intended that the whole should pass by his will. It appears that the land in question was contiguous to the five cottages, and that the whole was inclosed in a ring-fence. The words of the devise are—"All those my five freehold messuages, tenements, and premises, with their appurtenances, at Rowley Regis, in the county of Stafford, in the occupation of James Priest, his under-tenant or under-tenants; to hold to them, their heirs, and assigns, for ever, as tenants in common." In construing this devise, it is not necessary to resort to the word "appurtenances." The other words are abundant, and more apt, to shew what the testator intended. He has taken pains to exclude the possibility of doubt, by describing the subject matter as "in the occupation of James Priest, his under-tenant or under-tenants." The land, as well as the five cottages, was in the occupation of Priest: there is, therefore, abundantly sufficient to **[715]** pass the whole, not by implication merely, but by the very words of the will. The word "premises" is commonly used as comprising land and houses and other matters. Either "tenements" or "premises" would be sufficient to include the land. Taking, it, however, in conjunction with the words descriptive of the occupation, the case is perfectly clear and free from doubt.

The other grounds of motion having been disposed of during the argument, there will be no rule.

COLTMAN, J. There is no ground for saying that this is disinheriting the heir by implication: he is disinherited by the clear and unambiguous terms of the will.

CRESSWELL, J., concurred.

V. WILLIAMS, J. In *Doe d. Norton* v. *Webster* (12 Ad. & E. 442),—where almost all the cases are referred to, the words "a messuage or tenement formerly used as a workhouse, in the occupation of W., with the appurtenances," in a deed, were held sufficient to pass land which had always been occupied by the master of the workhouse. The words here are very much stronger.

Rule refused.

[716] SAINTER *v.* FERGUSON. April 18, 1849.

[S. C. 18 L. J. C. P. 217; 13 Jur. 828. For subsequent proceedings on claim for injunction see 1 Mac. & G. 286; 41 E. R. 1275 (with note to which add *General Accident Assurance Corporation* v. *Noel*, [1902] 1 K. B. 380).]

A. and B. entered into the following agreement:—"In consideration that A., of Macclesfield, surgeon and apothecary, will engage me, the undersigned B., as assistant to him as a surgeon, &c., I, the said B., promise the said A., that I will not at any time practice as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500l.: and I, the said A., do hereby agree with the said B. to engage the said B. as an assistant to me as a surgeon, &c., on the terms aforesaid."—In assumpsit by A. against B. for a breach of this agreement, the declaration averred that A. did, in pursuance and performance of the agreement, engage B. as assistant to him A. as surgeon, &c., according to the terms, true intent, and meaning of the agreement:—Held, that there was a sufficient consideration for the promise of B., and that the contract was not void as an unreasonable restraint of trade.—Held also, that the 500l. was not a penalty, but liquidated damages.

This was an action of assumpsit. The declaration stated that, on the 12th of April, 1848, a certain agreement in writing was made and entered into between the plaintiff of the one part and the defendant of the other part, which said agreement was and is in the words and figures following:—"In consideration that Joseph Denby Sainter, of Macclesfield, surgeon and apothecary, will engage me, the undersigned William Edward Ferguson, as assistant to him as a surgeon and apothecary, I the said William Edward Ferguson, promise the said Joseph Denby Sainter that I will not at any time practise, in my own name, or in the name or names of any other person or persons, as a surgeon or apothecary, at Macclesfield, or within seven miles thereof, under a penalty of 500l.: and I, the said Joseph Denby Sainter, do hereby agree with the said William Edward Ferguson to engage the said William Edward Ferguson as an assistant to me as surgeon and apothecary, on the terms aforesaid,"—which said agreement was duly signed and subscribed by the said William Edward Ferguson and Joseph Denby Sainter, parties thereto. Averment, that the said William Edward Fer-[717]-guson in the said agreement mentioned, and whose name was subscribed thereto, was and is the defendant, and that the said Joseph Denby Sainter, therein also mentioned, was and is the plaintiff: Mutual promises: Averment, that the plaintiff did, to wit, on, &c., in pursuance and performance of the said agreement, engage the defendant as assistant to him, the plaintiff, as surgeon and apothecary, according to the terms, true intent, and meaning of the said agreement; and that the plaintiff had been at all times in all things ready and willing to observe and perform his part of the said agreement,—whereof the defendant had continually had notice: yet that the defendant, after the making of the agreement, to wit, on, &c., and from thence continually up to the commencement of the suit, did, and still continued to practise in his own name as a surgeon and apothecary, at Macclesfield, in the said agreement mentioned, although the defendant had not, at any time before the commencement of the suit, in any manner paid or satisfied the said penalty of 500l. in the said agreement mentioned, or any part thereof, contrary to his, the defendant's, said agreement and promise.

The defendant pleaded,—first, non assumpsit,—secondly, that the plaintiff did not engage the defendant,—thirdly, that the plaintiff was not a surgeon,—fourthly, that the agreement was made and entered into by the fraud and misrepresentation of the plaintiff,—fifthly, discharge from performance, before breach,—sixthly, that the defendant did not practise in his own name at Macclesfield,—seventhly, leave and licence.

The cause was tried before Cresswell, J., at the last spring assizes at Chester. On the part of the defendant, it was objected that the agreement was void, as an unreasonable restraint of trade, inasmuch as it professed to bind the defendant not to practise, at any time, as a surgeon and apothecary at Macclesfield, or within seven [718] miles thereof; and that the 500l. was in the nature of a penalty merely, and not liquidated damages.

Under the direction of the learned judge, the jury found for the plaintiff, damages 500l., the points being reserved.

Channell, Serjt., accordingly, now moved to enter a nonsuit, or for a new trial on the ground of misdirection, or to arrest the judgment. The fair meaning of the contract is, that the defendant shall not practise as a surgeon and apothecary at or within the prescribed distance from Macclesfield so long as he shall remain in the service of the plaintiff. [Wilde, C. J. The words are plainly sufficient to restrain the defendant from practising at any time,—even after the plaintiff had ceased to practise as a surgeon and apothecary at Macclesfield, or, perhaps, after the plaintiff had ceased to exist: and the authorities shew that such a contract would not be objectionable.]

Then the contract is void, as creating an unreasonable restraint of trade, and being without consideration, and without mutuality. There is no obligation on the plaintiff's part, to employ the defendant. To sustain a contract of this description, the restraint must be partial, and there must be a reasonable consideration: notes to *Mitchel* v. *Reynolds* (1 P. Wms. 181, 1 Smith's Leading Cases, 182): although the courts will not now inquire into the adequacy of the consideration: *Hitchcock* v. *Coker* (6 Ad. & E. 438, 1 N. & P. 796). Here, it is submitted there is no consideration. If there had been an agreement on the plaintiff's part, to employ the defendant as his assistant for any specified time, or for a reasonable time, or for so long as he should conduct himself properly, or even at a yearly salary, the consideration would have been [719] sufficient. This contract, however, is altogether defective in this respect: the plaintiff was at liberty to dismiss the defendant at any moment. *Young* v. *Timmins* (1 Tyrwh. 226, 1 C. & J. 331),—apart from the question of adequacy of consideration,—is in point. By an agreement, reciting that the defendants had for some time past employed, and then did employ George Ireland, in executing the orders which they from time to time received for brass foundry, and also reciting that the defendants had requested Ireland to enter into an agreement to work in his trade or business, and to execute the orders of the defendants, in manufacturing goods in the way of his trade for the defendants alone, to which he had consented, in consideration of his past employment, and also of the defendants' undertaking to continue to employ him as theretofore,—the defendants agreed with Ireland that they would, during the joint lives of themselves and Ireland, continue to employ him in executing their orders as theretofore, and upon the like or other usual terms, subject, nevertheless, to the provisos and agreements thereinafter mentioned; and Ireland agreed with the defendants that he would, during the joint lives of the defendants, work for, and execute their orders for, them as he had been accustomed, in his trade or business, in a good and workmanlike manner, and at general and proper prices or terms; and that he would not, at any time, work for, or execute or cause to be executed the orders of, any person or persons whatsoever, in his trade or business, without the consent in writing of the defendants, which consent should be necessary upon every distinct occasion, and should contain the address of the person or persons for whom he might thereby be permitted to be employed, and also the specific work which he was thereby permitted to perform: but it **[720]** was provided and agreed, that, in case the defendants should, at any time, be desirous to put an end to that agreement, and should give, or cause to be given, at least three months' notice in writing to Ireland, the agreement should be considered as at an end and determined: provided also, that, in case the defendants should at any time have occasion, or be under the necessity, by reason of the urgency or extent of orders, or should otherwise think fit, they should be at liberty to employ any other person or persons to execute orders for them in the trade or business of Ireland; and that without thereby releasing Ireland from his agreement therein contained of exclusively working for the defendants: and it was provided that nothing therein contained should be taken to restrain or prevent Ireland from executing the orders of any person or persons residing in the city of London, or within six miles thereof. The agreement was held void for inadequacy of consideration. Bayley, B., there said: "The restraint in this case, from the nature of the business carried on, was a restraint, not only of the party's own exertions in trade, but of the numerous workmen whom a tradesman of this description must necessarily employ. The restraint is prejudicial to the individual restrained, and to the rights of the public; for, every man has a right to the fruits of his own unrestricted exertions, and the public have a right to the benefit which they may derive from such exertions. We are, therefore, to see whether there is any adequate consideration for the restraint in question. The bankrupt was restrained from working for any person other than the defendants, except in London, or by their permission, and they are at liberty to judge whether they will grant such permission or not. Now, is there any reasonable consideration for Ireland's being restrained in this manner? If I could find in this agreement any obligation on the **[721]** part of the defendants to furnish Ireland with an adequate quantity of work, I should say that there was an adequate consideration; but, if there is nothing in this agreement to oblige them to furnish an adequate quantity of work, and especially if it appear probable, from the nature of the instrument, that it may happen that Ireland might be left without sufficient employment by the defendants, then the consideration in this case fails. It was well put, on the part of the plaintiffs, that the proper test for trying the present question, is, by considering whether Ireland, not having sufficient employment from the defendants, could maintain an action against them for not furnishing him with work. If he could maintain such action, I should think that there was an adequate consideration for this restraint: if he could not, I should think the consideration not adequate. It appears from the recital, that Ireland was employed to execute the orders which the defendants received for brass-foundry, and he agrees to manufacture for them alone. It manifestly appears that the bankrupt's employment was to depend upon the orders which the Messrs. Timmins should from time to time receive. If they received no orders, how was he to be employed? He could solicit no orders in his own neighbourhood, without the defendants' consent; which they were at liberty to withhold. But the defendants do not stipulate that they are to employ the bankrupt on all the orders which they receive; for, they are to be at large; they are at liberty to employ any other person or persons, by reason of the urgency or extent of orders, or if they should otherwise think fit. Even the liberty to employ others might greatly interfere with Ireland's employment; for, if they received orders which would have kept him in employment for a month, by such orders being distributed to him and others, he might only be employed for a few days. But, **[722]** further, the defendants are to be at liberty, not only if occasion should require, but if they should otherwise think fit: so that their liberty is not confined to an urgency of orders, but is to be exercised as they think fit. Suppose the defendants had found some other workman, and had thought fit to withdraw their work from Ireland, and give it to the other workman, what a situation Ireland would have been in. If Ireland were out of employment for six months, could he have maintained any action? The first answer would have been—we have had no orders to be executed. The second answer might be, we have employed other persons, as we thought fit. There is certainly the expression 'as heretofore;' but, at all events, the extent of the employment was confined of necessity to the orders to be received by the defendants; and I am therefore of opinion that this is a partial restraint of trade, but that there is no adequate consideration." [Cresswell, J., referred to *Johnston* v. *Nicholls* (ante, vol. i. p. 251).] No doubt, it is well decided, in the case of guarantees, that the adequacy of the consideration, so that the supply be not merely colourable, will not be inquired into. [V. Williams, J. How would it be, in the case of a guarantee for the good behaviour of a clerk? Wilde, C. J. The liability of the party would only be coextensive with the clerk's employment: there, there would be full consideration.] In all the cases, it will be found that there has been an engagement for a stipulated time, or for a reasonable time. [V. Williams, J. In *Nicholls* v. *Stretton* (7 Beavan, 42), A., on being articled to B., covenanted not to be concerned for any of B.'s clients, and to forfeit 100l. for any such breach. A., after being admitted, acted in contravention of this **[723]** covenant: and he was restrained by injunction (*a*)[1]. Wilde, C. J. A general hiring is a hiring for a year, according to the case of *Beeston* v. *Collyer* (4 Bingh. 309, 12 J. B. Moore, 552).] Could the defendant have maintained an action against the plaintiff for dismissing him before the end of the year? [Cresswell, J. No: and for this reason: the agreement does not import an engagement at all; the proposed engagement was to be something dehors.] This may be likened to the case of a promise by an executor to pay the debt of his testator, which, according to the dictum of Lord Hardwicke in *Reech* v. *Kennegal* (1 Ves. 126), will not personally bind the executor, unless some consideration be alleged—as, of assets come to his hands, or of forbearance. And in the notes to *Forth* v. *Stanton* (1 Wms. Saund. 210 c., n. (*c*)), it is said, that, "in all cases of forbearance to sue, such forbearance must be either **[724]** absolute (*a*)[2], or for a definite time (*b*), or for a reasonable time (*c*): forbearance for a little (*d*), or for some time (*e*), is not sufficient." In *Pilkington* v. *Scott* (15 M. & W. 657) and *Hartley* v. *Cummings* (ante, vol. v. p. 247), the agreements were held good, because the court could, on the face of them, collect an engagement on the part of the employers to employ the workmen. [Wilde, C. J. Is there not an undertaking to engage the defendant for a reasonable time, imported into this contract?] It is submitted that there is not: if it were, it would equally be so in the case of a forbearance to sue. Besides, the declaration here does not allege an engagement for a reasonable

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(*a*)[1] The deed in that case was never executed by the plaintiff, and it was therefore contended that there was no mutuality. It was also provided that the plaintiff should not be obliged to continue the defendant in his service against his will, during the whole or any part of the five years, but that the defendant should at any time quit the plaintiff's service, on receiving a week's notice so to do. Lord Langdale, M. R., said: "In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting; for, not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen not only in cases of solicitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted not to be employed for certain persons, and, those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this court cannot interfere in these cases, without the possibility of injury to third parties. That difficulty, however, has been passed over, and the court has repeatedly exercised its jurisdiction in cases of this nature."

(*a*)[2] Citing *Mapes* v. *Sidney*, Cro. Jac. 683.

(*b*) Citing *Fisher* v. *Richardson*, Cro. Jac. 47.

(*c*) Citing *Johnson* v. *Whitchcott*, 1 Roll. Abr. 24, pl. 33; translated 1 Vin. Abr. 311. And see *Payne* v. *Wilson*, 7 B. & C. 423, 1 M. & R. 708.

(*d*) Citing *Brooke* v. *Dowse*, 1 Roll. Abr. 23, pl. 25; translated 1 Vin. Abr. 308.

(*e*) Citing *Tilston* v. *Clarke*, ibid. pl. 26; ibid. 308.

time. [Coltman, J. Were the cases as to forbearance for some time or a little time, cases after verdict?] *Fisher* v. *Richardson* came before the court on demurrer to the declaration; *Johnson* v. *Whitchcott*, on demurrer to a plea by the executor that he had no assets at the time of the making of the promise; *Brooke* v. *Dowse* and *Tilston* v. *Clarke* came before the court on writ of error (*i*); and *Mapes* v. *Sidney* was a motion in arrest of judgment. [Cresswell, J. The agreement declared on is silent as to the terms or the duration of the engagement that is contemplated: there is no specific amount of salary agreed upon; nor does it appear whether the engagement is to be for a week or a year. The declaration avers that the plaintiff did engage the defendant, in pursuance of and according to the terms of the **[725]** agreement,—that means, upon terms mutually agreed upon between them.] For how long? [Cresswell, J. For so long as they should mutually agree. Would a bonâ fide engagement for an hour suffice?] It might. [V. Williams, J. It lies upon the plaintiff, who seeks to enforce the agreement, to shew that it is not an unreasonable restraint of trade.]

The learned judge miscarried in telling the jury that the 500l. might be treated as liquidated damages, and not as a penalty. It is not unimportant to observe that the agreement itself uses the latter word only. This is not, therefore, like the case of *Galsworthy* v. *Strutt* (15 M. & W. 659). In *Crisdee* v. *Bolton* (3 C. & P. 240). Best, C. J., in a similar case to this, left it to the jury to say what was the actual damage sustained by the defendant's breach of contract.

Wilde, C. J. Where there is any reasonable ground for doubt, the party ought to have a rule to shew cause; but it is equally important not to introduce uncertainty by granting a rule, where there ought to be no doubt. It appears to me that this case falls within the latter predicament. The first question is, whether the agreement here was made upon a good consideration. In order to determine this question, it is material to attend minutely to the terms of the contract, which is as follows:—"In consideration that J. D. Sainter, of Macclesfield, surgeon and apothecary, will engage me, the undersigned W. E. Ferguson, as assistant to him as a surgeon and apothecary, I, the said W. E. Ferguson, promise the said J. D. Sainter that I will not, at any time, practise, in my own name, or the names of any other person or persons, as surgeon or apothecary, at Macclesfield, or within seven miles thereof, under a penalty of 500l. And I, the said J. D. Sainter, do **[726]** hereby agree with the said W. E. Ferguson to engage the said W. E. Ferguson, as an assistant to me as a surgeon and apothecary, on the terms aforesaid." In consideration that the plaintiff will engage the defendant as an assistant, the latter promises not to practise in Macclesfield or the neighbourhood; and the plaintiff binds himself to engage the defendant as such assistant. What are we to understand from that? It would seem that the parties were not prepared, at the date of the contract, to fix the period or the terms of the engagement, but left that to be matter for future discussion. The stipulation for the restriction of the defendant's practising at Macclesfield, or within the prescribed limit, was to have effect only when the subsequent definitive engagement should have been entered into. Supposing the plaintiff to be a person of skill and reputation, the very fact of his engaging the defendant as his assistant, would give the latter a great advantage as a rival; inasmuch as his being so authenticated, would naturally give him an opportunity of worming himself into his employer's connexion. An engagement, therefore, even for a short time, would be advantageous to the defendant, and detrimental to the plaintiff. But we must suppose that the parties contemplated an engagement reasonable in point of time and other circumstances. It may fairly be assumed that an offer of an engagement which was merely illusory, would be rejected by the defendant: and in that case he would not be subjected to the proposed restriction. He therefore would have the means of protecting himself. The plaintiff contracts to enter into a reasonable engagement with the defendant; that is, in effect, to offer such reasonable terms as the defendant would be bound to accept. Looking at the contract, therefore, as importing an engagement which will have the defendant's assent, and the declaration alleging that the plaintiff did, in pursuance of the agreement, engage the defendant as assistant, I think it dis-**[727]**-closes a sufficient consideration. Consequently, the first objection fails.

(*i*) And after verdict, according to the report in Cro. Car. 438: as was also the case in *Brooke* (or *Cook*) v. *Dowse*, supra, n. (*d*), and Cro. Car. 241.

The next question is, whether the 500l. mentioned in the agreement is to be considered as liquidated damages or not. That is a question which has sometimes been left to the jury. That course was adopted by Best, C. J., in *Crisdee* v. *Bolton* (3 C. & P. 240). But it is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument. This agreement does not prohibit the defendant's doing several distinct and independent acts, each of which might be incapable of exact estimation: nor does it involve any of the circumstances that have, in any of the cases, induced the court to hold the sum to be a penalty only. The whole object of the plaintiff was, to protect himself from a rival; and it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement: it is not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid. And I think we can only give effect to the contract of the parties, by holding the 500l. to be liquidated damages, and not a mere penalty, and, consequently, that there ought to be no rule.

Coltman, J. As the law formerly stood, this declaration would have been bad; for, if the adequacy of the consideration were a matter to be looked at, it would be impossible to ascertain that without knowing the terms of the engagement. It is now, however, settled that the court will not inquire into the adequacy [728] of the consideration. That being so, all that is necessary is, to see whether there is any consideration on the face of the declaration. I must confess I was somewhat struck by the authorities referred to by my brother Channell, where forbearance of a debt for "some" or "a little" time, was held insufficient. But, in those cases, the court could evidently see that there was no contract for forbearance at all: whereas, here, the declaration distinctly avers that the plaintiff did, in pursuance and performance of the agreement, engage the defendant as his assistant, according to the terms, true intent, and meaning of the agreement. That being pleaded over to, sufficiently imports that a definite engagement was entered into between the parties. That being so, it seems to me that there is nothing unreasonable in the restriction, and that there is a sufficient statement of consideration.

As to the second point, I agree with the lord chief justice, that, although the word "penalty," which would primâ facie exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement, and the difficulty the plaintiff would be under in shewing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages.

Cresswell, J. I am of the same opinion. I think now, as I thought at the trial, that the agreement contemplated that the defendant should be restrained from practising at or within seven miles of Macclesfield, not only during the time he might be acting as assistant to the plaintiff, but at any time; and that the contract is [729] free from the objection urged against it. The terms are,—"in consideration that Sainter will (thereafter) engage me, Ferguson, as assistant to him as a surgeon and apothecary, I promise him that I will not at any time practise, in my own name, or in the name or names of any other person or persons, as surgeon or apothecary at Macclesfield or within seven miles thereof, under a penalty of 500l. And I, Sainter, do hereby agree with Ferguson to engage him as an assistant to me as a surgeon and apothecary, on the terms aforesaid." If the plaintiff did not engage the defendant, the latter was not restrained; if he did, then he was restrained. The declaration avers that the plaintiff did engage the defendant, that is, did contract with him to employ him as his assistant. The cases cited as to forbearance of a debt, proceeded upon the footing that there was no agreement. Here, there was a contract, founded upon some consideration: its adequacy is not in question: *Hitchcock* v. *Coker*. It would be singular, indeed, if such an inquiry could be entered into. The question, then, is, was it reasonable that the defendant should be restrained? As between the parties, it was undoubtedly reasonable that they should be mutually bound by their contract. Then, is it reasonable as far as the public is concerned? It has been held, in many cases, that a contract restraining a party from carrying on a particular business, at a given place, or within a given district, is valid. In *Ward* v. *Byrne* (5 M. & W. 548, 561), Parke, B., says: "A restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with **[730]** whom the contract is made." In the case of a cow-keeper, a limit of five miles from a certain spot was held not unreasonable: *Proctor* v. *Sargent* (2 M. & G. 31, 2 Scott, N. R. 289). In *Mallan* v. *May* (11 M. & W. 653), a stipulation that the defendant should not practise as a dentist in London, was held not an unreasonable restraint. So, here, I think the prohibition to practise in Macclesfield, or within seven miles thereof, is not, with reference to the public at large, an unreasonable protection to the plaintiff.

With respect to the damages, I concur in what has fallen from the lord chief justice and my brother Coltman. If there be only one event upon which the money was to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

V. Williams, J. I am of the same opinion. It seems clear that the contract is not confined to a restraint durante servitio. And I think there was a sufficient legal consideration. Since the case of *Hitchcock* v. *Coker*, it has been uniformly held that the court will not inquire into the extent or the adequacy of the consideration for a contract of this sort. Primâ facie, all restraints of trade are bad. But, if the restraint is such as not to be unreasonable as between the parties, or injurious to the public, the rule does not apply. In cases like this, the restraint has been regarded rather as a necessary security for the employer, provided it be not larger than his protection reasonably requires.

As to the last point, I agree with the rest of the court, that it is competent to the parties by mutual **[731]** agreement to settle the amount of damages that are in their nature uncertain and difficult of estimation, where they depend upon the failure to perform a single act.

Rule refused.

Francis, a Pauper, *v.* Webb. April 16, 1849.

The court will not interfere, even in the case of a plaintiff suing in formâ pauperis, to prevent effect being given to a settlement between the parties,—although it be evident that the attorney will lose his costs,—unless the settlement be clearly collusive.

Assumpsit, for a balance of 172l., due upon a building contract, and for work and labour. Pending the cause (*a*), the plaintiff obtained leave to prosecute the action in formâ pauperis. Subsequently, the parties agreed to refer the matters in difference to two surveyors. The arbitrators allowed the time for making their award to elapse, and no leave was obtained to enlarge it. On the 1st of January, 1849, the plaintiff's attorney gave the defendant's attorney notice of trial for the first sitting in the next term. On the 3rd, the defendant, as he swore,—"in consequence of the plaintiff's prosecuting the action in formâ pauperis, and being well assured that he was not indebted to the plaintiff, but in order to save the heavy expenses attendant on the further prosecution of the reference, entered into a negotiation with the plaintiff to pay him 100l.," which sum he paid to the plaintiff on the following day, taking from him a receipt in full of all demands. On the 4th, the plaintiff's attorney gave a notice to the defendant and also to his attorney, as follows:—"I hereby give you notice, that I have a lien on the debt in this action, for costs; and you are hereby required not to settle or **[732]** compromise this action with the plaintiff, without my written consent. And I further give you notice, that, if you do so compromise this action in any way

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(*a*) As to leave to proceed in formâ pauperis obtained pendente lite, see *Bland* v. *Lamb*, 2 Jac. & W. 402; *Brunt* v. *Wardle*, 3 M. & G. 534, 4 Scott, N. R. 188, 9 Dowl. N. S. 229; *Doe d. Ellis* v. *Owens*, 9 M. & W. 455, 1 Dowl. N. S. 404; *Hall* v. *Ive*, 7 M. & G. 1001, 8 Scott, N. R. 715, 2 D. & L. 610.

with the plaintiff, or any other person than myself in this behalf, until my lien aforesaid has been first paid, I shall hold you liable to pay over again the amount thereof to me." On the 9th, the defendant's attorney gave the plaintiff's notice that the action had been settled, and required him to withdraw the notice of trial. On the 12th, a notice to produce and to inspect and admit certain documents in the cause, was served upon the defendant's attorney. And on the 19th, a judge's order was obtained by the plaintiff's attorney, making the cause a remanet to the second sitting. On the 20th, an order was made by Coltman, J., to produce certain documents in the custody or power of the defendant, to be stamped, the plaintiff's attorney undertaking to pay the costs of that application. On the 22nd, the defendant's attorney delivered a bill of costs, with an appointment to tax indorsed thereon. On the 25th,

Archbold, for the defendant, obtained a rule nisi to set aside the judge's order, and for a stay of proceedings, for irregularity.

This rule was afterwards enlarged until the first day of Easter term, on the usual conditions.

Parry and Metcalfe now appeared to shew cause, when,

Byles, Serjt., objected that the affidavits to be used in opposition to the rule had not been filed a week before the term, as required by the practice of the court.

[733] Parry produced an affidavit to explain the reason of the omission. It appeared that the attorney's clerk went to the office for the purpose of filing the affidavits, on Thursday the 5th of April, but found it closed for the Easter holidays, and consequently he was unable to file them until the following Wednesday. It was submitted, that, as the defendant could not, if the affidavits had been duly filed, have obtained copies of them until after the holidays, he had sustained no injury, and the case might fairly be held to fall within *Hoare* v. *Hill* (1 Chitt. Rep. 27) and *Re James Mackay* (1 D. & L. 206), in the former of which it was held that affidavits might be read, though, by accident, not filed in due time; and, in the latter, that the party was estopped from taking such an objection, where he had obtained office copies of the affidavits. [Wilde, C. J. The rule was distinctly laid down in *Turner* v. *Unwin* (4 Dowl. P. C. 16), that nothing will excuse the omission to file the affidavits pursuant to the rule, but some inevitable accident; as was the case in *Mackay, Ex parte.* The provision as to filing affidavits a week before the term is a bargain between the parties, which the court ought not to interfere with.]

Byles, Serjt., proposed, and Parry agreed, that the affidavits should be read, it being understood that the defendant should not be charged with the expence of them in the event of the rule being discharged.

Parry and Metcalfe accordingly proceeded to shew cause. They submitted, that the affidavits,—which stated, that, about the time of the settlement of the action, the plaintiff and defendant were seen drinking and going about together to places of amusement, and that the plaintiff had been heard to use expressions **[734]** indicative of an intention on his part to defraud his attorney; saying, in answer to an inquiry as to whether he had settled with his attorney, "No. Mr. Webb and I have made that all right; and the lawyers may go to hell,"—clearly established a case of fraudulent collusion between the parties to cheat the plaintiff's attorney of his costs; and that the application was too late.

Byles, Serjt., and Archbold, in support of the rule. In Lush's Practice (page 285), it is said: "It is well settled, that, if the opposite party pay money to the client after notice from the attorney that his costs are unpaid, and that he looks to the proceeds of the action for payment, the court will on motion compel him to pay those costs. It is like paying a debt which has been assigned, after notice. Whether the party has paid a smaller sum by way of compromise, or whether he has paid the whole demand, costs included, seems upon the general question immaterial. It is the fact of notice which creates the right. Independently of this, the party has a right to pay the amount due from him to his opponent, and the latter is bound to receive it" (*Anon.* 1 Dowl. P. C. 173). In *Jordan* v. *Hunt* (3 Dowl. P. C. 666), Parke, B., says: "It is quite competent to parties to settle actions behind the backs of the attorneys, for it is the client's action and not the attorney's. It must be shewn affirmatively that the settlement was effected with the view of cheating the attorney of his costs." The rule is similarly laid down in Archbold's Practice (8th edit., by Chitty, vol. i. p. 108), and in Archbold's Practice of Attorneys (3rd edit., vol. i. p. 92). And in Mr. Broom's more recent work (1 Broom's Practice, 192), the subject is thus treated: "A party is, notwithstanding the attorney's lien on the judgment, when recovered, always **[735]** at liberty to compromise the action in his absence, provided this be not done with a view to deprive the plaintiff's attorney of his costs, and with a fraudulent intent on the part of the client (*a*); and the defendant's attorney has no such interest in the suit as will enable him to prevent a compromise (*b*). Where, moreover, the action is for damages purely unliquidated, and there has been no surprise or misrepresentation in the case, the court will not, it seems, interfere in behalf of the plaintiff's attorney, although notice has been given to the defendant by the plaintiff's attorney not to settle or compromise the action without his consent (*c*). Further, an attorney is not justified in proceeding with an action after it has been settled between the parties, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; but it must be shewn, affirmatively, that the settlement was come to for the purpose of cheating the attorney (*d*). For instance, the plaintiff and defendant having settled an action, after verdict for the plaintiff, without the knowledge of the plaintiff's attorney, the defendant gave notice of the compromise to the attorney, who afterwards signed final judgment. The court, upon affidavits denying any conspiracy to defraud the attorney of his costs, made a rule absolute to set aside the judgment" (*e*). [Wilde, C. J. The principal difficulty in your way is this: here is an action brought to recover 172l., the balance of a builder's account amounting to 1646l. 11s. 9d.: the plaintiff is suing in formâ pauperis: the defendant is told that the compromise is **[736]** a fraudulent one; and yet, when he comes to the court to stay the proceedings, his affidavit does not state that the settlement was made bonâ fide, and not with a view to cheat the plaintiff's attorney of his costs.] It is for the attorney to shew collusion and fraud. Of this there is no evidence whatever to affect the defendant. The defendant did what he had an undoubted right to do. And the plaintiff can hardly be said to be a pauper, when he has received 100l., out of which he might have paid his attorney.

Wilde, C. J. In cases of this description, the court requires a clear case of collusion to be made out, before they will, at the instance of the plaintiff's attorney, interfere to prevent effect being given to an adjustment of the disputes between the parties themselves. Here is a transaction of considerable magnitude. The plaintiff's claim amounts to 1646l. 11s. 9d.; against which the defendant claims to set off 1782l. 16s. 10½d. for cash advanced and goods supplied to the plaintiff. The matters in difference were agreed to be referred to surveyors. The order of reference gave the arbitrators no power to enlarge the time for making their award. By consent the time was enlarged once. But the enlarged time having been suffered to elapse, and the parties not agreeing to a further enlargement, no award was ever made. In this state of things, the defendant enters into a negotiation with the plaintiff, proposing to give him 100l. in satisfaction of all demands; and the plaintiff agrees to accept that sum. What is the evidence of collusion between the parties to defraud the attorney, prior to the time of the settlement? There is absolutely nothing in any of the affidavits to justify us in coming to the conclusion that the parties entertained a design to deprive the plaintiff's attorney of his costs. The sum paid,—**[737]** 100l.,—was not a mere nominal sum: it put the plaintiff in a position to pay his attorney, if he had been honestly inclined. It was no part of the defendant's duty to see that the attorney was paid. All that was incumbent on him, was, to forbear from colluding with the plaintiff to deprive the attorney of his fair remuneration. Then, what is there in the circumstances that occurred after the settlement was effected, to shew collusion? The substance of the affidavits is, that the plaintiff and defendant were seen to be upon very friendly terms, and that the plaintiff, on being asked if he had paid his lawyer his expenses, said—"No. Mr. Webb and I have made that all right; and the lawyers may go to hell." Undoubtedly, this was very ungenerous conduct on the part of a pauper plaintiff towards his attorney: and, if I could discover any

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(*a*) Citing *Nelson* v. *Wilson*, 6 Bingh. 568, 4 M. & P. 385.

(*b*) Citing *Jordan* v. *Hunt*, 3 Dowl. P. C. 666; *Quested* v. *Callis*, 10 M. & W. 18; *Marr* v. *Smith*, 4 B. & Ald. 466.

(*c*) Citing *Hart, Ex parte*, 1 B. & Ad. 660.

(*d*) Citing *Jordan* v. *Hunt*, 3 Dowl. P. C. 666.

(*e*) Citing *Clark* v. *Smith*, 1 D. & L. 960.

evidence of collusion on the part of the defendant, I should feel much satisfaction in visiting him with costs. But I find no such evidence, nor even any fair ground of suspicion of collusion. The defendant is not to be held responsible for the coarse expression imputed to the plaintiff.

The only mode the defendant had to relieve himself from the proceedings on the part of the plaintiff's attorney, was, to come to the court. Has he come too late? The reference having gone off, notice of trial was given on the 1st of January, 1849, for the first sitting in Hilary term. On the 9th, the plaintiff's attorney receives notice that the action has been settled; on the 12th, he gives the defendant's attorney notice to produce, inspect, and admit; and on the 22nd, he obtains a judge's order for the production of documents by the defendant, for the purpose of stamping them. It is said that the defendant should have come to the court to set aside that order. But, having already given the plaintiff's attorney notice that the action was settled, **[738]** I think he was perfectly justified in leaving him to pursue his own course. This application was made on the 25th of January. The plaintiff's attorney has proceeded, upon a supposition that he had a lien on the debt for his costs. In this he is mistaken. The plaintiff has unquestionably acted in a most unhandsome and ungenerous manner towards his attorney. But I think justice to the defendant requires that this rule should be made absolute in its terms.

Coltman, J. Settlements between the parties in pauper causes should be watched with considerable jealousy (*a*). If, in this case, the plaintiff's attorney had, before the money was paid, given notice to the defendant not to settle with the plaintiff until his claim for costs was satisfied, I should have thought the affidavits, unanswered, made out a case of collusion. But here the plaintiff's attorney did not take that step. And there was nothing to lead the defendant to suppose that any fraud would be committed by the plaintiff upon his attorney. It does not appear that the ground upon which the attorney was proceeding with the action, was ever distinctly notified to the defendant. And that, I think, is excuse enough for his abstaining from negativing collusion, by anticipation.

Cresswell, J. I agree with the lord chief justice and my brother Coltman in thinking that this rule ought to be made absolute. The defendant's affidavit certainly might have been more satisfactory as to the arrangement about the 100l. It was, however, for the plaintiff's attorney to make out a case of collusion. It is said that the plaintiff and defendant are co-**[739]**-conspirators, and therefore what is said or done by one is evidence against both. Assume that they were co-conspirators, what was said by Francis after the completion of the transaction, was clearly no evidence as against Webb of any preconcerted conspiracy. The attorney has failed to make out a case to justify our interference on his behalf.

V. Williams, J., had gone to chambers.

Rule absolute, with costs.

Cooper v. Pennefather. April 30, 1849.

The statute 3 & 4 W. 4, c. 42, s. 23, does not authorise the amendment of the record upon the trial of an issue of nul tiel record.

Upon an issue of nul tiel record in debt on a judgment, the record being produced, it shewed a recovery of 20l. for debt and 6l. for damages and costs; whereas the declaration claimed the whole 26l. as damages for the detention of the debt.

Barstow, for the defendant, submitted that the record produced did not sustain the issue; and he cited *Munkenbeck* v. *Bushnell* (1 Scott, 569) to shew that the court would not allow the variance to be amended, without a substantive application for that purpose.

T. Jones, contrà, insisted that the plaintiff was entitled to ask to have the record amended under the 3 & 4 W. 4, c. 42, s. 23 (*b*). [Maule, J. Does that statute apply

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(*a*) See *Wright* v. *Burroughes*, ante, vol. iii. p. 344, 4 D. & L. 226, and *Jones* v. *Bonner*, 2 Exch. 230, 5 D. & L. 718.

(*b*) Which recites that, "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record or document on which to **[740]** the case of a trial of an issue of nul tiel record?] Such a case is clearly within the mischief of the preamble; **[741]** and the enacting part of the clause does not exclude it. A distinction is taken between trials at nisi prius and trials by the court. [Maule, J. That may mean a trial at bar, or by an inferior court of record. When the statute speaks of the terms upon which the amendment is to be allowed, it speaks of "postponing the trial, to be had before the same or another jury." The 24th section,—which enacts "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case,"—shews that all the cases that fall within s. 23 are cases that may be tried before a jury.] The court has power to amend, independently of the statute. [Maule, J. This court has every power of amending

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the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence, and the record; and that it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause:" and enacts "that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court, or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial, to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and, in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and, after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and, in case such trial shall be had at nisi prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and, in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had: provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and, in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

that existed at common law.] Then, the amendment being quite a matter of course, the record may be considered as amended, and the plaintiff may ask for judgment at once.

[742] Maule, J. You may have a rule nisi to amend, against which cause may be shewn at the proper time. If the plaintiff does not choose to take that course, the defendant must have judgment.

Per curiam (*a*). Judgment for the defendant.

Sargent *v.* Gannon. April 30, 1849.

[S. C. 18 L. J. C. P. 220; 6 D. & L. 691.]

An attorney's bill, to be in strict compliance with the statute 6 & 7 Vict. c. 73, s. 37, must contain, in express terms, or by reasonable inference, a statement of the name of every cause and of every court in which any part of the business charged for has been transacted.—A bill of costs headed "Yourself v. Round" (the client's name being Gannon), and indorsed "*Hancock* v. *Round*," was inclosed in a signed letter addressed to Gannon, beginning "*Hancocks* v. *Round*,—I send you my bill in this matter." All the business comprised in the bill had reference to a purchase of land under a decree of the court of Chancery in a cause of "*Hancock* v. *Round*:"—Held, that the name of the cause sufficiently appeared.—The bill was not headed in any court: but the whole related to one transaction, and some of the items were for attendances at the accountant-general's and at the master's offices, and in court upon a petition to the Vice-Chancellor:—Held, that the bill gave reasonable information to the client as to the course to be pursued in order to tax the bill, and therefore that the statute was complied with.

Debt, for work and labour, money paid, and money found due upon an account stated.

Plea (amongst others), that the work and labour were done and bestowed, and the money paid by the plaintiff, as attorney and solicitor for the defendant, and the account stated in respect thereof, and that no signed bill was delivered pursuant to the statute.

Replication, that, pursuant to the requisites of the statute, the plaintiff, one calendar month before action, sent by post to the defendant a bill inclosed in, and accompanied by, a letter subscribed with the proper hand of the plaintiff, &c. Issue thereon.

The cause was tried before V. Williams, J., at the **[743]** second sitting in Middlesex, in Easter term last. The facts were as follows:—The plaintiff had been employed as solicitor for the defendant, upon the purchase by the latter of certain copyhold property which was sold in pursuance of a decree of the court of Chancery made in a cause of *Hancock* v. *Round*.

The bill of costs,—which was sent to the defendant by post, in a letter signed by the plaintiff, commencing, "*Hancocks* v. *Round*. I send you my bill in this matter,"—was indorsed "*Hancock* v. *Round*," but was headed and commenced thus:—

"E. M. Gannon, Esq., to R. Sargent.

"Yourself v. Round.

"Trinity term, 1845.

	£	s.	d.
"May 23. Attending you on your calling on me with particulars and conditions of sale of property under this decree, perusing and considering the same, as it was your intention to become the purchaser of lot 1, if possible	0	0	0
Attending you afterwards, when you stated you had purchased lot 1, and instructed me to do what was necessary to complete the purchase	0	6	8
Attending accordingly at the master's office, bespeaking copy of master's report, and attending for same	0	6	8

(*a*) Coltman, J., Maule, J., and V. Williams, J.

	£	s.	d.
31. Paid for it	1	0	0
Paid transcribing	0	3	4
Attending to file report; bespeaking office-copy	0	6	8
Instructions to counsel to move for order to confirm master's report of purchase	0	10	6
Attending court, order made: copy and service of order on plaintiff's solicitors; the like on defendant's solicitors	0	13	4
[744] July 18. Instructions to counsel to move to make order absolute	0	13	4
21. Attending court, order made absolute	0	13	4
Writing you, requesting a remittance of the purchase-money, to pay into the bank	0	5	0
28. Attending to draw up order absolute confirming master's report	0	6	8
Instructions to counsel to move for leave that the Vice-Chancellor Wigram may be applied to for an order to pay purchase-money into court	0	13	4
Attending court, order made	0	6	8
Instructions to counsel to move Vice-Chancellor Wigram for leave to pay money into court pursuant to order of Lord Chancellor	0	13	4
Attending court, order made	0	13	4
August 6. Writing defendant's solicitors, requesting them to send me abstract of title	0	5	0
Attending and comparing abstract with original deeds	2	2	0
14. Attending for order to pay in purchase-money	0	6	0
22. Attending to lodge office-copy at accountant-general's office, and bespeaking ticket to pay in purchase-money and interest: attending for same	0	6	8
Attending at the Bank of England, paying in 113l. 10s. 7d., taking receipt	1	1	0
December 11. Attending counsel this day, when he advised that the title would be bad, if certain parties did not join in the conveyance	0	6	8
Attending you in conference with reference to counsel's opinion on the conveyance	0	6	8
Attending at the accountant-general's, doing the needful to prevent defendant's solicitors from taking money out of court	0	6	8

[745] "Hilary term, 1846.

	£	s.	d.
"January 10. Many attendances upon you with reference to rescinding the contract, which you were desirous of doing, if possible; when I suggested the propriety of having a consultation with an eminent Queen's counsel, prior to taking any step for that purpose, and you expressed your approval of that course being adopted	0	6	8
Attending consultation, when Mr. J. P. considered that the vendors could not make a good title, and recommended that you should present a petition to have your purchase-money paid out of court to you	0	13	4
Instructions for petition	0	13	4
Two fair copies for the Lord Chancellor	1	0	0
23. Attending court at Westminster, when Mr. J. P. advised that the prayer of the petition should be amended, and leave of the court was accordingly obtained for that purpose	0	13	4
Having been served with warrant to settle the conveyance before the master, attending same, when the master refused to interfere in the matter until the petition had been disposed of	0	6	8

	£	s.	d.
Attending at Westminster to amend the Vice-Chancellor's copy petition	0	6	8
February 14. Attending court this day, when petition argued, and dismissed with costs	0	13	4
28. Attending warrant to settle conveyance before the master, when, after hearing solicitors on both sides, he took time to consider his judgment	0	6	8
March 14. Attending to bespeak copy of plaintiff's costs; afterwards, for same	0	6	8"

[746] On the part of the defendant, it was contended that the bill did not sufficiently shew the court and the cause in which the business therein contained had been transacted, to satisfy the statute 6 & 7 Vict. c. 73, s. 37 (*a*). For the plaintiff, it was

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(*a*) Which enacts "that no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner, referring to such bill: Provided that it shall be lawful for any judge of the superior courts of law or equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England: And, upon the application of the party chargeable by such bill, within such month, it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the high court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and, in case any part of such business shall have been transacted in any other court, for the courts of Queen's Bench, Common Pleas, Exchequer, court of Common Pleas at Lancaster, or court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required, to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference: and, in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the court or judge making such reference shall think proper: and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been insisted that the [747] statute had been complied with. *Martindale* v. *Falkner* (ante, vol. ii. p. 706) and *Engleheart* v. *Moore* (15 M. & W. 548) were cited.

The learned judge directed a verdict for the plaintiff for the amount of the bill, reserving to the defendant leave to move to enter a verdict for him, if the court should be of opinion that no proper bill had been delivered.

Humfrey accordingly obtained a rule nisi. In addition to the cases mentioned at the trial, he referred [748] to *Lewis* v. *Primrose* (6 Q. B. 265): and Wilde, C. J., observed—"No one, looking at the bill, could doubt in what court the applications were made. But the difficulty I feel is as to the heading, 'Yourself v. Round,' there being no such cause as '*Gannon* v. *Round*.'"

Byles and Kinglake, Serjts., and Ball, now shewed cause. Most of the cases were decided upon the 2 G. 2, c. 23, s. 23, which did not, in terms, require the name of the court and cause to appear on the face of the bill. The decisions, however, require both to appear. Under the former act, it was essential that the client should be informed of the name of the cause: but the like necessity does not exist under the recent statute. Assuming it to be necessary, it is impossible to say that the client could have been misled by the manner in which it is stated here. The indorsement on the bill and the heading of the letter shew a perfect compliance with the statute. [Wilde, C. J. It will be contended that the signature to the letter is no signature of the bill: they relate to different causes.] It is, as the letter states, a bill of costs in the matter referred to. "Yourself v. Round" represented a petition in the cause of "*Hancock* v. *Round*." In *Anderson* v. *Boynton* (12 Law Times, 421), it was held that an attorney's bill for conducting the defence of a shareholder in a joint-stock bank, to a scire facias upon a judgment against the public officer, is sufficient if it state the court in which the business was done, and the nature of the proceedings can be gathered from the items in the bill, though the technical name of the original cause, or the scire facias, be not stated. There, the bill was headed "Mr. John Boynton to Robert E. Anderson. In the Exchequer of Pleas" (the court in which all the proceedings connected with *Es*-[749]-*daile* v. *Wood* had been taken): it was not headed with the name of any cause; but the cause of *Esdaile* v. *Wood* was mentioned by name in one item, and the others spoke of the proceedings taken by the London and Westminster Bank against the defendant and Lund. Lord Denman, in giving the judgment of the court, said: "It was contended for the defendant, that the name of the cause, as well as of the court, ought to have been specified; and his counsel quoted *Lewis* v. *Primrose*, *Engleheart* v. *Moore*, *Martindale* v. *Falkner*, and *Ivimey* v. *Marks* (16 M. & W. 843): but the result of these cases appears to be, that the court and the cause must be so specified as to enable the client, by the bill alone, to take upon himself the duty of taxation. In this case, enough appears to have been stated of the facts for that purpose: the court is named, and the original cause is specified; and that description would be more intelligible to the client than the technical name, the parties to the suit being probably known by the names of the banks or the public officers, as well as by those of the technical name given when a copy of the judgment was obtained. With respect to the proceeding on scire facias against the defendant and others, the technical name in the scire facias, when brought to trial, would not facilitate the taxation; and we cannot discover any reason for thinking that the particulars which are given are insufficient for the purpose for which the delivery of the bill was required." [Maule, J. You may assume that the name of the cause is sufficiently stated. Humfrey assented. Cresswell, J. Does the bill sufficiently shew the court in which the business was done?] It is obvious that the proceedings are in Chancery. In which of the three courts, is immaterial, so far as concerns the reference of the bill to taxation. [Maule, J. [750] A skilful person might form a conjecture on the subject. The proceedings might have been in lunacy or bankruptcy.] It is enough,

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delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made: and, upon every such reference, if either the attorney or solicitor, or executor, administrator or assignee of the attorney or solicitor whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made, may proceed to tax and settle such bill and demand ex parte."

according to the opinions of the majority of the court in *Martindale* v. *Falkner*, if the court and the cause are capable of being collected by fair and reasonable intendment from the nature of the several items of charge. [Maule, J. All these transactions might possibly have taken place in the Irish court of Chancery.] There is no Vice-Chancellor in Ireland. [Maule, J. The 2 G. 2, c. 23, s. 23, shews the sort of people the legislature proposed to protect,—persons not technically skilled. It was not intended that a man who has been fleeced by one lawyer, should be compelled to have recourse to another for relief.] It is enough to shew that the business is in Chancery. [Maule, J. Does it appear upon this bill that all the business was done in the court of Chancery? Where the client has the option, he should have such information as to enable him to ascertain to which court he may apply for the taxation.] There is no one item in this bill that has not reference either to business done in the court of Chancery, or to conveyancing. The judgment of Tindal, C. J., in *Martindale* v. *Falkner*, is quite conclusive. The court will not put a strained construction upon the bill, for the purpose of defeating the attorney's just claim.

Humfrey and H. S. Wilde, in support of the rule. If there be any one item in this bill that is capable of being taxed in a court that is not mentioned therein by name, this rule must be made absolute. In *Engleheart* v. *Moore*, Alderson, B., says: "This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client, and strictly for the attorney; for, the latter knows the law, and the former does not. With the view to the taxa-**[751]**-tion and payment of the bill, if the client desired it, the legislature intended that the client should be informed where each item of the business was done, and that the attorney should hold his hand for a month after the delivery of the bill, for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose, it is very material that the bill should shew in what court the business was done, because the fees are different in different courts; and, how can an attorney advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid? Without such information, he could not know whether, upon taxation, one sixth of the bill would be struck off or not." So, in *Ivimey* v. *Marks*, it was held that an attorney is bound to specify in his bill as well every court, as the name of every suit, in which the business charged for was done; and that such bill is an entire bill, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge, or be advised, whether he should refer the whole bill for taxation; and the charges in the same bill for equity business, though correctly stated, cannot be recovered. The court will not be disposed to extend the doctrine of *Martindale* v. *Falkner*.

COLTMAN, J.(*a*) It appears to be established by the cases, that there are two requisites to make an attorney's bill of costs a compliance with the statute, viz. that it should contain the name of the cause and also that of the court in which the business charged for has been transacted. At the same time, it appears to **[752]** me, that, in ascertaining whether or not these two essentials concur, we are bound to apply every reasonable and fair intendment to the language of the bill; for, though I agree that the act ought to be so construed as to give the client the benefit intended, yet we are not to shut our eyes to the attorney's claim to have equal justice meted out to him also. Having carefully looked through this bill, and construing it as I have suggested, all the business therein mentioned, does appear to me to have been transacted before the Lord Chancellor and the Vice-Chancellor: and that seems to me to be a sufficient intimation to the client as to the place to which he is to have recourse for its taxation. It is true that the client is not to be supposed to be conversant with law: but he must be assumed to be acquainted with the ordinary business of life. He must know that the Lord Chancellor transacts business in the court of Chancery. And every suitor there may reasonably be taken to know who are the great officers of that court. If any part of the business had been done elsewhere, or in a special manner, then the bill might have been faulty, as conveying untrue information to the client. Had the bill, for instance, contained any items leading to a supposition that any of the business had been transacted in a court of common law, that would have been ground for holding it to be insufficient. But nothing of the sort appears: it is not pretended

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(*a*) Wilde, C. J., was absent.

that the whole business was not in Chancery. I think ample information is conveyed by the bill, and that there is nothing to justify any doubt in the matter.

As to the name of the cause,—although some little difficulty is introduced by the heading of the bill "Yourself v. Round," I think that is corrected by the indorsement: and, with respect to the insertion of the letter "s" in the original plaintiff's name, in the letter **[753]** in which the bill was inclosed, I think that is quite an immaterial variance.

For these reasons, I am of opinion that the rule ought to be discharged.

MAULE, J. As part of the argument took place on a former day, when I was not present, I take no part in the decision.

V. WILLIAMS, J. I also am of opinion that this rule ought to be discharged. The only question is whether any person not a lawyer could be misled by this bill, or induced to doubt that the whole was for business done in the court of Chancery. I think it is impossible that he could be.

Rule discharged.

BARDELL *v.* MILLER. April 28, 1849.

[S. C. 6 D. & L. 721; 18 L. J. C. P. 249.]

The indorsement on a writ of summons claiming a sum for principal and interest, should either state the amount of the interest claimed, or the date from which it is to be calculated.—The following indorsement was held insufficient:—"The plaintiff claims 102l. 5s., and interest thereon at 5l. per cent. per annum from the 31st of March (not saying what March), till payment, for debt, and 2l. 2s. for costs," &c.

Talfourd, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the copy of the writ of summons in this cause, and the service thereof, should not be set aside for irregularity. The irregularity complained of was, that the indorsement on the writ of summons,—which was as follows, "The plaintiff claims 102l. 5s. and interest thereon at 5l. per cent. per annum from 31st of March till payment, for debt, and 2l. 2s. for costs; **[754]** and, if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed,"—did not comply with the rule of Hilary term, 2 W. 4, r. II.(*a*), which provides, "that, upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed," &c. The learned serjeant referred to *Chapman* v. *Becke* (3 D. & L. 350) and *Allen* v. *Bussell* (4 D. & L. 430).

Gaselee, Serjt., contrà, submitted that the indorsement was sufficiently certain, "the 31st of March" by fair intendment meaning March last; and that it was not necessary to state the amount of interest claimed—*Copello* v. *Brown* (1 C. M. & R. 575, 5 Tyrwh. 217, 3 Dowl. P. C. 166). [Wilde, C. J., referred to the cases of ejectment in which the notice which was without date, or required the tenant to appear at an impossible day, was yet held sufficient.]

Talfourd, Serjt., in support of his rule. The cases last adverted to have no application here. In those, the notice had relation to an act to be done, and was therefore held to speak from the time of service; whereas, in this case, the indorsement speaks of a by-gone transaction. *Chapman* v. *Becke*, though not pre-**[755]**-cisely this case, is sufficiently near to govern it. There, the writ was indorsed "the plaintiff claims 150l. and interest for debt, and 3l. 3s. costs;" and that was held irregular. Patteson, J., said: "It appears to me that the rule of court is very clear. Its object is, to shew the defendant, in express terms, what the plaintiff is contented to take, in order that the former may tender it, together with costs, within the four days; and therefore it is that such a notice is obliged to be indorsed on the writ. The plaintiff, consequently, ought to have stated what sum he claimed for interest, or from what time he claimed

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(*a*) Extended by Reg. Gen. Michaelmas term, 3 W. 4, r. 5, to "all writs of summons, distringas, capias, and detainer, issued under the authority of the statute 2 W. 4, c. 39, and to the copy of every such writ."

it. It is possible to conceive cases where the defendant could not find out from what time the interest was intended to be claimed. It may be that the plaintiff is not obliged to state the precise amount of interest, and that, according to the cases, it would be sufficient to say that interest at such a rate is claimed from a certain day. Without, however, going into that question, I think that the rule was framed for the purpose of giving specific information, which has not been afforded in the present case. The case of *Fitzgerald* v. *Evans* (6 M. & G. 207, 6 Scott, N. R. 220, 2 Dowl. N. S. 916) is not a direct authority upon the point; but my lord chief justice and my brother Maule seem both to have considered that the writ there might have been set aside for irregularity, for a similar defect to that which exists in the present case." [Wilde, C. J. In *Humphries* v. *Cullingwood* (2 B. & Ald. 642) it was held to be no objection to the notice at the foot of a bill of Middlesex, that it wholly omitted to state the year, or the word *next:* the court observing—"It is unnecessary to state the year, because the party by the statement of the day of the month must understand that he is to appear at the earliest time to which the notice **[756]** could apply." The court will hardly allow any intendment to prevail against the plain words of a rule the compliance with which is so easy.

Wilde, C. J. It is to be very much lamented that parties should be put to so much expense in relation to a rule which was framed for the express purpose of avoiding expense. The rule is one of considerable importance: it enables the defendant to ascertain, at an early stage of the proceedings, the exact sum that is demanded of him. If he chooses to make a legal tender of a less sum, if it turns out that the sum tendered is all that he really owes, he is not liable for any further costs. It seems to me to be a rule that is obviously founded in convenience and good sense: to depart from it is to introduce uncertainty and promote litigation. The rule is simple in its terms, and may easily be complied with. The court in all cases best discharges its duty by adhering to the plain words of an act of parliament or a rule. The rule in question requires that information be given to the defendant, by the indorsement on the writ, as to the precise amount which the plaintiff claims for debt and for costs. Here, the indorsement states that the plaintiff claims a certain sum, and interest thereon at a given rate "from the 31st of March,"—leaving it quite uncertain whether that refers to the March immediately antecedent to the service of the writ, or the month of March in some preceding year. I am of opinion, therefore, that the indorsement does not give the defendant such information as the rule of court contemplated and intended that he should have, and that it is not a compliance either with the letter or with the spirit of the rule. This rule, therefore, will be made absolute.

The rest of the court concurring,
Rule absolute.

[757] Smith and Another *v.* Troup. April 17, 1849.

[S. C. 6 D. & L. 679; 18 L. J. C. P. 209. Referred to, *Neale* v. *Gordon-Lennox*, [1902] 1 K. B. 850; [1902] A. C. 465.]

The attorney on the record has authority to consent to a reference on behalf of his client.—A personal demand of money payable under an award, with a view to a proceeding on a rule of court, under the 1 & 2 Vict. c. 110, s. 18, may be dispensed with, where the party is evidently keeping out of the way to avoid the demand.

By an order of reference made in this cause on the 28th of July, 1845, "upon hearing the attorneys on both sides, and by their consent," it was ordered, inter alia, "that it be referred to the award, order, arbitrament, final end, and determination of James Crosby, of, &c., gentleman, to ascertain what sum was due to the plaintiffs from the defendant on the 3rd of April, 1844, and that the said James Crosby shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as shall require the same, on or before the 15th of September now next ensuing, or such other day as the said parties shall mutually agree upon, being not more than one calendar month after the said 15th of September; that the costs of the cause shall abide the event; and that the costs of the reference and award shall be in the discretion of the arbitrator."

The time for making the award was by various orders, made "upon hearing the attorneys on both sides, and by consent," enlarged until the first day of Michaelmas term, 1847: and, on the 1st of November in that year, the arbitrator made his award as follows:—

"I do first ascertain, award, order, and determine that the sum of 83l. 17s. was due to the said plaintiffs George Smith and William Barnes, from the said defendant James Troup, on the 3rd day of April, 1844, and that the same is still due and unpaid: And I award, order, and direct the said sum of 83l. 17s. to be paid by the said defendant James Troup to the said plaintiffs [758] George Smith and William Barnes on the 1st of December now next: And I do further award, order, and direct that the costs of the said reference shall be borne and paid by the said James Troup: And I do further award, order, and direct that one moiety of the costs of this my award shall be paid by the said George Smith and William Barnes, and the other moiety thereof by the said James Troup."

On the 8th of December, 1847, the defendant was duly served with a copy of the award, and of the rule making the order of reference a rule of court, and also with an appointment to tax the costs. The taxation was attended by the defendant's attorneys, pursuant to the appointment, when the plaintiff's costs of the cause and of the reference, including one moiety of the costs of the award, were allowed at the sum of 42l. 11s.

On the 20th of December, 1847, the plaintiffs executed a power of attorney, whereby, after reciting the order of reference, the award, and the allocatur, they appointed Deane, Dyke, and Shorter their joint and separate attorneys, "for them, and in their names, and for their use and benefit, to ask, demand, recover, and receive of and from the said James Troup, the sum of 126l. 8s., which said sum comprises the said sum of 83l. 17s. so awarded to them as aforesaid, as due to them from the defendant, and 42l. 11s., being the amount of such taxed costs; and also from time to time to substitute, nominate, and appoint one or more attorney or attorneys under them, the said Deane, Dyke, and Shorter, for all or any of the purposes aforesaid, and again at their pleasure to displace and remove, as they shall see occasion or think fit; they, the said George Smith and William Barnes, thereby ratifying and allowing, and promising and agreeing from time to time and at all times thereafter, to ratify, allow, and confirm all and whatsoever they, the said Deane, Dyke, and Shorter, [759] or their lawful attorney or attorneys, to be by them from time to time nominated and appointed, in pursuance of the power thereinbefore given to them for that purpose, should lawfully do or cause to be done in and concerning the premises, by virtue of those presents."

On the 2nd of August, 1848, the defendant was personally served by one Walduck, a process-server, with a copy of the master's allocatur, and of the power of attorney, and a written demand of payment signed by Deane, one of the attorneys, requiring the defendant, within twenty-four hours, to pay the money at a place named,—the originals of such allocatur and demand being at the same time shewn to him.

Upon affidavits setting forth the facts, and shewing repeated attempts by Dyke to make a personal demand upon the defendant, and his inability to do so, in consequence of the defendant's migratory habits, and stating that the money was still unpaid,

Bramwell, in Hilary term last, moved for a rule calling upon the defendant to shew cause why he should not be ordered to pay the two several sums of 83l. 17s. and 42l. 11s., with a view to the plaintiffs' availing themselves of the provisions of the statute 1 & 2 Vict. c. 110, s. 18 (*a*). He referred to *Doe d. Steer* v. *Brad*-[760]-*ley*

(*a*) Which enacts "that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor

(1 Dowl. N. S. 259), where the court granted a rule to shew cause why the sum mentioned in the master's allocatur upon a consent rule in an action of ejectment should not be paid, so as to enable the party to avail himself of the statute, although the allocatur could not be served personally, and on a special affidavit of circumstances shewing that personal service could not be effected, made that rule absolute; and also to *Hawkins* v. *Benton* (2 D. & L. 465), where it was held, that, although the court in general requires the same formalities to be observed, as to personal service, with a view to an execution under this statute for a sum awarded, as in cases of attachment, yet, where it clearly appears from the admissions of the party that he was aware of the contents of the award, the court will, under special circumstances, grant a rule calling upon him to shew cause why he should not pay the sum awarded. [Wilde, C. J. I never knew the court dispense with personal service, in the case of a proceeding to attachment, except where the party was shewn to be keeping house, so as to evade the service.] The affidavits here clearly shew that personal service was impossible. [Wilde, C. J. Very difficult, perhaps: but not impossible.] A rule nisi having been granted,

Montagu Chambers and Hawkins now shewed cause, upon an affidavit of the defendant stating that he never consented, or authorised his attorney to consent, to a reference, that he never attended before the arbitrator; and that, before the award was made, he sent to the arbitrator and to the plaintiffs notice of his protest against the proceedings. Assuming that the defendant's **[761]** attorney had at one time authority to refer, the defendant's protest operated as a revocation: and, where the submission has been revoked before the making of the award, an attachment will not be granted: *King* v. *Joseph* (5 Taunt. 452). [Wilde, C. J. Can you, in shewing cause against an attachment for non-performance of an award, urge any objection not apparent on the face of the award?] In *Milne* v. *Gratrix* (7 East, 608), it was held that a party is not liable to an attachment for not obeying an award, if made after a deed of revocation of the submission entered into before the submission was made a rule of court, and notice thereof given to the arbitrators. So, in *Dickenson* v. *Allsop* (13 M. & W. 722, 2 D. & L. 657), it was held, that, where there is no doubt as to the validity of an award, the court will not grant a rule under the statute, calling upon the party to pay the sum awarded. In that case, the arbitrator had, although the order of reference gave him no power to do so, directed a verdict to be entered for the defendants (see *Cock* v. *Gent*, 2 D. & L. 364). [Wilde, C. J. There, the objection was apparent on the face of the award. In *Macarthur* v. *Campbell* (2 Ad. & E. 52, 4 N. & M. 208), upon a motion for an attachment for not performing an award, the court declined to discuss objections to the award, not apparent on the face of it,—as, that the arbitrator was partial, or that matters were brought before him (the reference being of all matters in difference) which were not disposed of by the award. You are coming now with affidavits which the other side can have no opportunity of answering.] The court will not enforce by attachment a void award. [Wilde, C. J. That is, where the invalidity of the award is properly brought to the notice of the court.] At all events, the authority of the attorney to refer **[762]** being denied, the court will not in this summary way enforce performance of the award, but will leave the plaintiffs to their remedy by action. [Wilde, C. J. If the attorney has improperly referred the matters, is not the client's remedy an action against him?] The fact of his having a remedy by action against his attorney, does not necessarily preclude him from urging the absence of authority as an answer to this rule. [Wilde, C. J. Have you any case where, under circumstances like the present, an attachment has been refused?] The ground of the objection is, that the arbitrator had no authority to make the award. The point was raised in *Flaviell* v. *The Eastern Counties Railway Company* (2 Exch. 344, 17 Law Journ., N. S., Exch. 297). [Cresswell, J. And decided against you. Platt, B., there says: "I think that an attorney who has been duly authorised to appear for a litigant, has incidentally authority to conduct the cause, and to refer it. If he does wrong, he may be responsible to his client; but his client is bound."]

The award is not properly verified by affidavit. [Bramwell, contrà, submitted

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and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

that it was too late, after an enlargement of the rule upon the merits, to take a preliminary objection.]

The award directs that the costs of the reference shall be borne and paid by the defendant, and that one moiety of the costs of the award shall be paid by each party. The master's allocatur includes the whole costs of the award, and there is no affidavit that the plaintiffs have paid the whole. [Wilde, C. J. Must we not accredit the act of the master? We will assume, as in the case of payments made to witnesses, and the like, that the master had proper evidence of the payment before him.] The master has no control over the arbitrator's charge.

[763] Then there has been no sufficient demand of performance of the award. There should have been a personal demand by one of the persons named in the power of attorney: whereas, here was a mere service by a process-server of a written notice, signed by one of the attorneys, requiring the defendant to attend at a certain place to pay the money. [Wilde, C. J. If this were a motion for an attachment, there would be weight in the objection. But, is the same sort of demand indispensable in the case of an application under this statute?] It has repeatedly been held so: *Neale* v. *Postlethwaite* (1 Q. B. 243, 4 P. & D. 643); *Jones* v. *Williams* (8 M. & W. 349, 9 Dowl. P. C. 702); *Doe* v. *Amey* (8 M. & W. 565, 1 Dowl. N. S. 23). In *Wilson* v. *Foster* (6 M. & W. 149, 6 Scott, N. R. 936), where a defendant who was abroad, was directed by an award to pay a sum of money, and it did not appear that he had been served with the award, though a letter from him shewed that he was aware of its effect, this court refused to grant a rule calling upon him to pay the money. So, in *Pearson* v. *Archbold* (11 M. & W. 108), the court of Exchequer declined to grant a rule calling upon a party to pay money found by an award to be due from him, without an affidavit of the service of the award. The like was held in *Abrahams* v. *Taunton* (1 D. & L. 319). There, Lee, for the plaintiff, contended, that, if it was apparent to the court that the party kept out of the way to avoid service, personal service would be dispensed with. But Lord Abinger, C. B., said: "We ought not to apply to this case a different principle from that by which we are guided in granting an attachment. You certainly could not have an attachment against a party merely by shewing that a copy of the allocatur had been left at his house. It is said that the **[764]** prochein amy keeps out of the way to avoid being served; if that is so, the defendant should have moved for a rule to shew cause why the service of the allocatur in a particular way should not be deemed good service. In my opinion, the court ought only to assist a party in applications of this kind, where the same proceedings have been taken as under an attachment." And in *Winwood* v. *Hoult* (14 M. & W. 197, 3 D. & L. 85), personal service was held to be indispensable.

Bramwell was not called upon by the court to support his rule.

WILDE, C. J. This is an application, with a view to the remedies given by the 1 & 2 Vict. c. 110, s. 18, calling upon the defendant to shew cause why he should not make certain payments pursuant to the terms of an award. The first answer attempted to be given to the rule is, that the reference took place without the defendant's authority,—that reference appearing to have been consented to by the defendant's attorney. Generally speaking, the attorney on the record has authority to refer the cause. If he exceeds his authority, the other party is not to be prejudiced: the client has his remedy against his attorney. The main ground, therefore, upon which the resistance to this rule has rested, seems to me to fail. That being so, it is unnecessary for us to consider whether the objection, if established, would be an answer to the rule. I certainly have a strong impression on the subject, though I do not think proper on this occasion to interfere with any of the authorities.

Independently of the objection on the merits, it is said that the formal requisites of an application of this sort have not been complied with. Various authorities **[765]** have been cited for the purpose of shewing that the same formalities must be observed upon moving for an order upon the party to pay money awarded, as upon moving for an attachment. The case of *Hawkins* v. *Benton*, however, shews that the courts will dispense with the strict observance of the rule requiring the demand to be personal, where it is made evident to them that the party has been evading service. The affidavits in the present case are extremely strong to shew how industriously the defendant has been hunted from place to place for the purpose of making a personal demand on him. I therefore think this is a case in which the strict rule may, on the authority of *Hawkins* v. *Benton*, be dispensed with.

It is further objected that the sum demanded is composed, in part, of an uncertain amount, as, a moiety of the sum paid for the award. The order of reference provides that the costs of the cause shall abide the event, and the costs of the reference and award be in the discretion of the arbitrator: and the arbitrator has by his award directed that the costs of the reference shall be paid by the defendant, and that a moiety of the costs of the award shall be paid by each party. The affidavits upon which the motion is founded, shew that the master's allocatur includes a moiety of the costs of the award. It is objected, on the part of the defendant, that it is nowhere sworn that the plaintiffs have paid the whole expense of the award. It is not pretended, however, that the plaintiffs have not taken up the award; and it is reasonable to suppose they have paid the whole of the fees; for, it is not to be presumed that the award would be delivered out until the fees were paid. The matter goes before the master, and he allows the plaintiffs a certain sum as and for a moiety of the expense of the award. It is said that the master has improperly allowed that sum. That is an objection to the taxation, **[766]** which is not now before us. But it seems to me that the master has according to the universal practice.

Upon the whole, it appears to me, that no sufficient cause has been shewn against the rule, and therefore that it must be made absolute.

The rest of the court concurring,

Rule absolute.

Ross v. Gandell. May 7, 1849.

The omission to insert in a writ of summons the county of the defendant's residence, is a mere irregularity, which must be taken advantage of within a reasonable time. —Under the 2 W. 4, c. 39, s. 3, the application for leave to enter an appearance, upon the return of the distringas, must, in term time, be made to the court.

A writ of summons in an action on promises issued against the defendant, at the suit of the plaintiff, on the 2nd of March last, in which the former was described as "John H. Gandell, of No. 3 Parliament Street, in the city of Westminster."

On the 27th of March, the plaintiff obtained a distringas, under a judge's order, to compel the appearance of the defendant, upon an affidavit of a clerk of the plaintiff's attorney, stating calls at the office of the defendant, No. 3 Parliament Street, for the purpose of serving the writ of summons, on the 5th, 8th, 12th, 14th, and 16th of March, the last four times pursuant to appointment, and a copy having been left on the fourth call, which copy the deponent was on the last call informed by the clerk to whom he delivered it, had been sent to the defendant's solicitor.

The distringas having been on the 16th of April returned non est inventus and nulla bona, the plaintiff, on the 24th, obtained an order from Maule, J., at chambers, to enter an appearance for the defendant,—the affidavit upon which that order was obtained describing the action to be in debt, instead of on promises. **[767]** An appearance was accordingly entered on the 25th of April: and on the 30th,

Ball obtained a rule calling upon the plaintiff to shew cause why the writ of summons, the service thereof, and all subsequent proceedings, should not be set aside for irregularity. He referred to the 1st section of the 2 W. 4, c. 39, which enacts, that, in every writ of summons issued under the authority of that act, the place and county of the residence, or supposed residence, of the party defendant, shall be mentioned; and that every such writ may be served in the manner theretofore used, in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere: and he submitted, that the writ of summons was absolutely void for omitting to mention the county of the defendant's residence; and, further, that the appearance was entered without authority, the 3rd section of the statute giving no power to a judge at chambers to make an order for that purpose in term time.

Fitzherbert now shewed cause. As far as regards the writ of summons, that which is complained of here is a mere irregularity: for, by the 10th rule of Michaelmas term, 3 W. 4, it is provided, that, "if the plaintiff, or his attorney, shall omit to insert in, or indorse on, any writ, or copy thereof, any of the matters required by the 2 W. 4, c. 39, to be by him inserted therein or indorsed thereon, such writ, or copy thereof, shall not, on that account, be held void, but it may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge."

In *Child* v. *Marsh* (6 Dowl. P. C. 576, 3 M. & W. 433, 1 H. & W. 106), where a writ of summons stated the **[768]** defendant to be resident within the county of Worcester, whereas he in fact resided within the city of Worcester, and was served there, it was held,—upon the authority of *Tyler* v. *Green* (3 Dowl. P. C. 439), and *Edwards* v. *Collins* (5 Dowl. P. C. 228),—that an application to set aside the service should be made within the time limited for entering an appearance. The only case in which process has been held void is, where it was dated on a Sunday (*c*). [Wilde, C. J. It certainly is too late to ask the court to set aside a writ, for irregularity, after an appearance has been entered. Ball. We say there has been no appearance.] The defendant was at all events bound to come within a reasonable time: R. Hilary term, 2 W. 4, r. 33 (*d*). The defendant must be assumed to have had notice of the irregularity, at the latest, on the 16th of March, when the clerk admitted that the copy writ of summons had been sent to the defendant's attorney. The distringas was obtained on the 27th of March; and, on the 16th of April, it was returned nulla bona and non est inventus: the plaintiff obtained leave to enter an appearance for the defendant on the 24th; an appearance was entered on the 25th; and no step was taken by the defendant until the 30th. That objection, therefore, is waived.

The order for the appearance was well warranted by the statute, and its validity was not affected by the clerical error in the affidavit upon which it was founded. The 3rd section of the uniformity of process act, 2 W. 4, c. 39, upon which the question arises, enacts, that, "in case it shall be made appear by affidavit to the satisfaction of the court out of which the process issued, **[769]** or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled to do so without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such distringas shall be executed, &c.; and, if such writ of distringas shall be returned non est inventus and nulla bona, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom any such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit to the satisfaction of the court out of which such writ of distringas issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such court or judge to authorise the party suing out such writ, to enter an appearance for such defendant, and to proceed thereon to judgment and execution." It has, undoubtedly, been usual to apply for the distringas, in term time, to the court: that, however, is mere matter of **[770]** practice; there are no words in the act to exclude the jurisdiction of the judge at chambers, at any time, to make an order for a distringas, or to enter an appearance thereon. In *Smeeton* v. *Collier* (1 Exch. 457),—where a question arose upon the statute 7 G. 2, c. 20 (*b*),—Pollock, C. B., says: "Where the legislature simply gives a power to the court, it is to be taken that the court receives all the ordinary powers necessary for that purpose; and it is intended that the judge should exercise those powers. No distinction exists between powers conferred by statute, and those existing at common law, unless a distinction is to be gathered from the terms of the statute. Many statutes

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(*c*) *Hanson* v. *Shackelton*, 4 Dowl. P. C. 48.

(*d*) "No application to set aside process or proceedings, for irregularity, shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

(*b*) Which authorises the court, in actions concerning mortgages, upon the mortgagor's paying or bringing into court the principal and interest, by rule of court to compel the mortgagee to re-convey the premises, and to deliver up all deeds and evidences of title.

might be pointed out which contain this distinction. Where a motion is to be made in open court in term time, it may be urged that the legislature contemplated that such authority should be confined to the court. This was so in the case of *Jones* v. *Fitzaddams* (1 C. & M. 855), which was cited for the plaintiffs. The view I have been disposed to take is this, that, where an authority is given to the court by an act of parliament, the court may exercise that power in the same manner as it may exercise any other powers, unless there be something in the act itself which imports that the power is conferred with a special limitation." And Alderson, B., says: "I take it to be clear, that, where the legislature gives the court any powers in general terms, and without any express limitation, it is the same as if those powers were given by the common law. The legislature is aware of the powers the court is accustomed to exercise: and, when **[771]** fresh powers are given by the legislature, they are to be exercised in the usual and ordinary way. When, therefore, special limitations are intended to be imposed, the legislature express themselves to that effect. Several statutes have been referred to (*a*), in which the legislature shew that they do not intend to give the same authority to the judge at chambers as they do to the court in banc. Where, however, any power is given to the court in the usual way, the court may exercise it in the ordinary and usual way in which the court is accustomed to exercise its powers." [V. Williams, J. According to your argument, we may strike out of the statute the words, "or, in vacation, of any judge of either of the said courts."]

Ball, in support of the rule. The writ of summons, not being framed in conformity with the 2 W. 4, c. 39, sched. No. 1, is void: it is essential that the county of the defendant's residence should be named therein. The act of parliament assumes that the body of the writ is drawn by the officer of the court. The 10th rule of Michaelmas term, 3 W. 4, which speaks of omissions that may be ground of complaint for irregularity, but which do not avoid the process, has reference only to the memoranda and indorsements which are supposed to be the acts of the plaintiff. In *Richards* v. *Stuart* (10 Bingh. 322, 3 M. & Scott, 774), this court discharged a defendant out of custody, on entering a common appearance, the writ of capias not describing the cause of action strictly according to the form prescribed by the statute 2 W. 4, c. 39, s. 4, sched. No. 4. [Wilde, C. J. Are all the subsequent authorities consistent with that?] In *Garratt* v. *Hooper* (1 Dowl. P. C. 28), **[772]** it was held, that, if a plea in abatement be a nullity, no act of the plaintiff apparently acquiescing in it, will be construed into a recognition of it. [Wilde, C. J. In *Child* v. *Marsh*, there was an incongruity in the process, and yet the court held it to be mere irregularity.]

The words of the statute expressly exclude the jurisdiction of the judge at chambers in term time. [Cresswell, J. It certainly is the uniform practice, in term time, to move for a distringas in court. Fitzherbert. That is so: but applications for leave to enter an appearance are as frequently made at chambers as in court in term time; and the words of the act are the same as to both.] As to this point, Ball was stopped by the court.

Wilde, C. J. The words of the statute giving authority to the court or a judge to order the issuing of a distringas and the entering of an appearance, are precisely the same,—"if it shall be made appear to the satisfaction of the court out of which the process (or, writ of distringas) issued, or, in vacation, of any judge of either of the said courts," &c., "it shall be lawful for such court or judge," &c. And we should not be justified in giving a different construction to the same words in the same clause. The words are plain: the power of the judge in each case exists only in vacation; and no court appears ever to have sanctioned the issuing a distringas under an order made in term time by a judge at chambers. It is said that orders at chambers for entering an appearance on the return of a distringas, are of frequent occurrence. I am not aware of any such instance; and, at all events, none such has ever been brought before the court. There is nothing, therefore, to bind us to adopt the practice, if it has inadvertently obtained. We must have recourse to **[773]** the words of the act. These we find to be distinct and plain, admitting of no doubt. We, therefore, think that the order of my brother Maule for entering the appearance, was not warranted by the statute or the practice of the court, and that so much of the rule as seeks to set aside that order, must be made absolute.

The objection to the writ of summons fails in point of time. The writ is irregular

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(*a*) 43 G. 3, c. 46, ss. 2, 3; 48 G. 3, c. 123, s. 1; 1 & 2 W. 4, c. 58, s. 1.

in not mentioning the county in which the defendant's place of residence was situate. But that is an irregularity only; and that has been waived by a step taken after the defendant must be assumed to have had notice of the defect. It is a general rule of practice, founded upon strict justice, that, where parties have notice of objections which do not amount to a total avoidance of the process or proceedings, they must come promptly to complain, and at all events before the expiration of the time for taking the next step.

The rule, therefore, will be absolute, so far as relates to the order for entering an appearance, and discharged as to the rest.

Fitzherbert, for the plaintiff, submitted that the defendant should not have costs: for that, if the rule had been confined to setting aside the order for an appearance, the plaintiff would probably not have opposed it.

Per curiam. Let there be no costs on either side.

Rule accordingly.

[774] NEWTON v. CHAPLIN. April 18, 1849.

A plaintiff is not entitled to move for costs of the day, unless he is present when the cause is called on.

Issue having been joined in this cause, and notice of trial given for the first sitting in Hilary term last, the defendant obtained a rule for a special jury. The special jury was accordingly nominated and reduced. The cause was called on in its order on the 9th of February, but, no special jurors being in attendance, it was struck out.

Newton, in person, upon an affidavit stating the above facts, now moved for costs of the day. He submitted that the defendant had been guilty of a default, in not procuring the attendance of a jury pursuant to the rule,—citing *Holt* v. *Meddowcroft* (4 M. & Sel. 467), and *Hague* v. *Hall* (5 M. & G. 693, 6 Scott, N. R. 705). [Wilde, C. J. The plaintiff might have obtained an office-copy of the process, and caused the jury to be summoned. The affidavit shews no default on the part of the defendant.] The plaintiff has no means of shewing that the defendant neglected to deliver the distringas to the sheriff. [Coltman, J. You do not seem to have made any inquiry.] The court will hardly assume that the distringas was sent to the sheriff, and that he neglected his duty. [Wilde, C. J. The court will assume nothing. Did the plaintiff appear at the time the cause was called on?] He did not: having received an intimation that no jury had been summoned, it was not thought necessary to attend. All his witnesses were there.

Per curiam,—To entitle him to make this motion, the plaintiff should at all events have appeared when the cause was called on for trial.

Rule refused.

[775] FOLLETT AND OTHERS, Assignees of Lesley Alexander and William Bardgett, Bankrupts, v. DELANY. April 18, 1849.

The court will not, without special grounds, depart from the ordinary form of a commission for the examination of witnesses under the 1 W. 4, c. 22.

This was an action brought by the plaintiffs as assignees of Lesley Alexander & Co., bankrupts, to recover a large sum alleged to be due from the defendant to the plaintiffs as such assignees, for goods sold and delivered, goods bargained and sold, work and labour, commission, money paid, and money due upon an account stated before the bankruptcy.

On the 13th of February last, an order was made by Cresswell, J., upon the defendant's application, for a commission for the examination of Antonio Mascrati and Joseph Barnes White, residing at Trieste, and other material and necessary witnesses on the part of the defendant. In pursuance of that order, the draft of a commission to Trieste was prepared as for the examination of witnesses on the part of the defendant only, and was served on the plaintiffs' attorneys on the 20th. On the 24th, the draft was returned, with the names of commissioners, and an authority for the examination of witnesses upon interrogatories and cross-interrogatories, on the part of the plaintiffs. The joint commission was issued on the 27th of March; but it contained no direction to the commissioners as to whether the witnesses on the part of the plaintiffs or on that of the defendant should be first examined. The interrogatories in chief and cross-interrogatories having been delivered, and the plaintiffs' attorneys having desired that the necessary directions to the commissioners as to the mode of executing the commission should be settled between the [776] parties before the same was sent out, the defendant's attorney accordingly prepared and delivered to the plaintiffs' attorneys a draft containing, amongst other things, an instruction to the commissioners to begin with the examination of the plaintiffs witnesses. The plaintiffs' attorneys declining to agree to this course,

Clark, on the part of the defendant, now moved that the commission might be amended, by inserting therein a direction to the commissioners to begin with the examination of the plaintiffs' witnesses. [Wilde, C. J. It is not usual to vary the form of the proceeding in the manner suggested.] The language of the act (*a*) evidently contemplates a variable form, according to circumstances.

Wilde, C. J. I see no reason for deviating in this case from the ordinary form of commission.

The rest of the court concurring,

Clark took nothing.

[777] Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher, Assignees of William Wood, a Bankrupt, *v.* The Mayor, Aldermen, and Burgesses of Gravesend. April 18, 1849.

On the 4th of February 1840, judgment was signed against the defendants in an action of debt at the suit of A., B., and C., assignees of D., a bankrupt. C. (who was the official assignee under the fiat) died in February, 1848. On the 4th of April, 1849, a writ of elegit was sued out at the suit of A., B., and C., without any sci. fa., or suggestion of the death of C., or of the appointment of his successor,—who was stated in the affidavit to have been duly appointed the official assignee of the estate and effects of D. "on C.'s death:"—Held, that the elegit was regular, in thus following the judgment; and that the affidavit was essentially defective, in not shewing in precise terms that the appointment of the new assignee took place before the issuing of the elegit.

A writ of elegit having been issued in this case, indorsed to levy "1035l. 18s., and 2l. 2s. for the writ, warrant, &c., and interest on 973l. at 5l. per centum per annum from the 4th day of April, 1849, besides, &c.,"

Bramwell, on behalf of the defendants, moved to set aside the writ for irregularity. The affidavit upon which the motion was founded, stated, that, on the 11th of February, 1840, judgment was signed in this action; that the plaintiffs Rolt and Obbard are the creditors' assignees of the estate and effects of Wood, and that Belcher was, at the time of the signing of the said judgment, and up to the time of his death, as thereinafter stated, the official assignee of the estate of Wood; that Belcher died in February, 1848, and that, on his death, one Hatton Hamer Stansfeld was duly appointed the official assignee of the estate and effects of Wood in the place of Belcher, and is now the official assignee of the same estate and effects; that the debt and judgment in this action were and formed part of the estate of Wood, and

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(*a*) 1 W. 4, c. 22, s. 4, which enacts, "that it shall be lawful to and for each of the superior courts at Westminster, &c., and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

that the plaintiffs sued in the capacity of assignees of the same estate; that, on or about the 4th of April, [778] 1849, Her Majesty's writ of elegit was directed to W. M. Smith, Esq., the sheriff of the county of Kent; that, by virtue thereof, the said sheriff did, on the 4th of April, 1849, issue his warrant (a copy of which was annexed), directed to John Arnold, &c., the bailiffs of the said sheriff, commanding them to seize and take the goods and chattels, lands, tenements, and hereditaments of the above-named defendants, and to cause the same to be delivered to the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher, as such assignees as aforesaid, to hold the said goods and chattels unto the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher, assignees as aforesaid, as their proper goods and chattels, and to hold the said lands, tenements, and hereditaments respectively, according to the nature and tenure thereof, to them and their assigns; that, on the 10th of April, 1849, the said John Arnold, by virtue of the said warrant, and as such bailiff of the said sheriff, seized and took certain goods and chattels of the defendants, and remained in possession thereof; that no scire facias had been issued in this action, neither had any suggestion been entered on the roll, of the death of the said Alexander Brymer Belcher, or of the appointment of the said Hatton Hamer Stansfeld as aforesaid; and that the deponent had been unable to obtain a copy or inspection of the writ of elegit, but that he verily believed it was a writ commanding the sheriff to seize and take the goods and chattels, lands, tenements, and hereditaments of the defendants, and to deliver the same to the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher.

The elegit is clearly irregular, without in some way noticing the death of Belcher and the appointment of Stansfeld as assignee in his place. [Wilde, C. J. It must follow the judgment.] There should have been a scire facias or a suggestion. The only provision in the [779] bankrupt acts that tends to throw any light upon the subject is, the 6 G. 4, c. 16, s. 67, which enacts, "that, whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending, may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former (*a*); and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." But that does not exactly apply to this case, inasmuch as here there is no action pending. At common law, wherever a new party intervenes in any stage of the proceedings, his interest must in some way appear. In the notes to *Jeffreson* v. *Morton* (2 Wms. Saund. 6, n. (1), it is said, "that, where a new person, who was not a party to a judgment or recognisance, derives a benefit by, or becomes chargeable to, the execution, there must be a scire facias to make him a party to the judgment or recognisance" (*c*). And in 2 Inst. 471, the rule is stated thus:—"One that is not party to the record, recognisance, fine, or judgment, as, the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a scire facias to enable themselves to the suit: so likewise of the tenant or defendant's part, for, the alteration of person altereth the process: otherwise it is in case of a statute-staple, or [780] merchant, &c., because the process is given by other acts of parliament." [Wilde, C. J. Your affidavit does not shew when the new assignee was appointed: "on the death" of the former assignee, is too indefinite: it does not refer to the time of the appointment; it means no more than "in consequence, or by reason of the death." A party who comes with a technical objection should himself be technically correct.] Even if there was no new assignee, the writ is irregular, for retaining the name of the deceased assignee. [V. Williams, J. Do you controvert the common doctrine, that, one of several plaintiffs dying after judgment, the execution may issue without a scire facias?] No. [Wilde, C. J. The death of one plaintiff does not affect the rights of the other two.] There being a new person interested, it is the same as if all the original plaintiffs had died, and new assignees had been appointed

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(*a*) See *Westall* v. *Sturges*, 4 M. & P. 217; *Bates* v. *Sturges*, 7 Bingh. 585, 5 M. & P. 568.

(*c*) Citing *Pennoyer* v. *Brace*, 1 Ld. Raym. 244, 1 Salk. 319, 320, Carth. 404, Comb. 441; *The Queen* v. *Ford*, 2 Ld. Raym. 768.

in their places. [Coltman, J. The judgment never was part of the estate and effects of the bankrupt.]

Wilde, C. J. I am of opinion that there is no ground for this application. The objection to the writ of elegit is, that it is sued out in the names of the three plaintiffs, one of whom is dead. It is admitted, that, at common law, the judgment survives. In Tidd's Practice (9th edit., vol. ii. p. 1120),—which has always been looked upon as a work of high authority,—I find the rule thus summed up: "It is now settled, that, when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors, without a scire facias (*b*). But the execution **[781]** in such case should be taken out in the joint names of all the plaintiffs or defendants (*a*); otherwise, it will not be warranted by the judgment." That seems to me to be a distinct authority to shew, that, so far as regards the death of Belcher, there is no irregularity in the form of the elegit in this case. Then, with respect to the appointment of the new assignee, Stansfeld, the affidavit is essentially defective: it shews an uncertain interval of time between the death of Belcher and the appointment of his successor, which, consistently with the affidavit, may have taken place since the issuing of the execution. For anything that appears, therefore, the elegit in this case has issued according to the strict practice.

The rest of the court concurring,

Rule refused.

Ensor v. Griffin. April 21, 1849.

The court will not entertain a motion to discharge a rule for a distringas, on the ground of alleged misstatements in the affidavit upon which it was obtained.

T. Jones moved to discharge a rule for a distringas, on the ground that the affidavit upon which the rule was obtained misrepresented what took place upon the occasion of the calls at the defendant's supposed residence.

Wilde, C. J. We cannot allow the truth of an affidavit to be brought in question in this way.

The rest of the court concurring,

Rule refused.

[782] Smith v. The London, Brighton, and South Coast Railway Company. May 2, 1849.

To a declaration in case against common carriers for the loss of a trunk containing certain articles of jewellery and female apparel, the defendants pleaded, as to part of the goods in the declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, &c., &c., that, at the time of the delivery to them, they were contained in the trunk in the declaration mentioned; that they were so delivered to the defendants after the passing of the statute 11 G. 4 & 1 W. 4, c. 68 (the carriers' act); that the said goods consisted of articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured state, &c. (enumerating the several articles mentioned in the 1st section of the act), and that their value exceeded 10l.; that, at the time of the receipt of the goods by them, the defendants had duly affixed the notice required by s. 2 of the act; and that the plaintiff gave them no notice of the nature or value of the goods, nor did she pay or tender the increased rate of charge demandable under the act:—Held, that the plea was bad, for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act.

The declaration stated that the defendants, before and at the time of the com-

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(*b*) Citing *Isam's case*, F. Moore, 367; *Anonymous*, Noy, 150; *Law* v. *Toothill*, Carter, 112, 193; *Pennoyre* v. *Brace*, ubi supra; *Brace* v. *Pennoyre*, 5 Mod. 338; *Howard* v. *Pitt*, 1 Show. 402; *Withers* v. *Harris*, 3 Salk. 319; 7 Mod. 68, 1 Ld. Raym. 806.

(*a*) *Pennoyre* v. *Brace*, ubi supra.

mitting of the grievance thereinafter mentioned, were common carriers of passengers and their luggage in and along a certain railway, by certain carriages of the defendants, from a certain place, to wit, from Brighton, to a certain other place, to wit, to London, for hire and reward to them the defendants in that behalf; that the plaintiff, theretofore, to wit, on the 25th of November, 1847, at the request of the defendants, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby, together with her luggage, on a certain journey, to wit, from Brighton aforesaid to London aforesaid, for certain rewards then paid by the plaintiff to the defendants in that behalf, and the defendants then received the plaintiff as such passenger as aforesaid, together with her luggage, to wit, a certain trunk of the plaintiff containing divers [783] goods, to wit, fifty articles of jewellery, fifty dresses, ten shawls, four fur cuffs, two boas, two mantles, fifty pieces of music, fifty pairs of gloves, fifty pairs of mittens, two fans, two porte-bouquets, fifty pocket-handkerchiefs, one hundred pieces of linen, one hundred yards of ribbon, one hundred yards of lace, twenty pairs of cuffs, one work-basket and contents, twenty aprons, two veils, twenty berthes, ten pairs of shoes, one Indian box, two bags, five Maltese chains, five other chains, one hundred books, twenty yards of silk, fifty bottles of eau de Cologne, one smelling-bottle, of the plaintiff, of great value, to wit, of the value of 100l.; that thereupon it became and was the duty of the defendants to use due and proper care that the plaintiff and her said luggage should be safely and securely carried and conveyed by and upon the said railway as aforesaid, from Brighton aforesaid to London aforesaid: Breach, that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said railway, from Brighton aforesaid to London aforesaid, but wholly neglected so to do, and then so carelessly and negligently conducted themselves with respect to the said luggage of the plaintiff upon the said occasion, that the same, by and through the carelessness and negligence and default of the defendants in that behalf, then became and was and remained wholly lost to the plaintiff, &c.

Pleas,—first, not guilty,—secondly, that the plaintiff was not a passenger, with her luggage, as alleged in the declaration.

Thirdly,—"and for a further plea, so far as relates to part of the said luggage and goods in the said declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, the said fur cuffs, the said boas, [784] one of the said mantles, divers, to wit, twelve of the said pairs of mittens, the said ribbon, the said lace, two of the said aprons, one of the said veils, two of the said berthes, one of the said bags, four of the said chains, and the said silk of the plaintiff, in the said declaration respectively mentioned, the defendants say that the plaintiff ought not to maintain her aforesaid action thereof against them, because they say that the whole of the said several articles, goods, and chattels in the introductory part of this plea mentioned, at the time when they were delivered to and received by the defendants for the purpose in the declaration mentioned, were comprised and contained in the said trunk therein also mentioned, and together with the said trunk and divers other articles and things therein, formed one parcel; and that the said several articles, goods, and chattels in the introductory part of this plea mentioned, were so delivered to and received by the defendants, for the purpose aforesaid, after the passing of a certain act of parliament made and passed, &c. [11 G. 4 & 1 W. 4, c. 68 (*a*)], intituled 'An act for the

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(*a*) The 1st section of which enacts that "no mail-contractors, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles of property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Bank of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger, more **[785]** effectual protection of mail-contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof;' and that, before and at the said time when the defendants so as aforesaid received the said articles, goods, and chattels in the introductory part of this plea mentioned, for the purpose aforesaid, they the defendants were common carriers of goods by land, for hire, by certain public conveyances, to wit, the said carriages of the defendants in the said declaration mentioned, in and upon the said railway, and from and to the said places therein in that behalf also mentioned, and that they the defendants so received the said last-mentioned articles, goods, and chattels, and the same were delivered to them, as such carriers, for the purpose aforesaid: And the defendants further say that the said last-mentioned articles, goods, and chattels, at the time of such delivery and receipt thereof, consisted of, and then were, articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured **[786]** state, precious stones, jewellery, trinkets, gold or silver plate or plated articles, silks in a manufactured or unmanufactured state, furs, lace; and that the value thereof, then, and always since, exceeded the sum of 10l.: And the defendants further say, that, before the said time when they so received the said last-mentioned articles, goods, and chattels, for the purpose aforesaid, they the defendants had, in pursuance of and according to the said act of parliament, notified, by a notice affixed in legible characters, and which notice at that time remained and was affixed in such legible characters, in a public and conspicuous part of a certain railway-station at the said place, to wit, Brighton, in the declaration first mentioned (the same station before that time and then being a receiving-house where parcels and packages then were, and still are, received by them the defendants, as such carriers as aforesaid, for the purpose of conveyance, and also the receiving-house where the said last-mentioned articles, goods, and chattels were so received by them for the purpose aforesaid), an increased rate of charge demanded by them for the carriage of articles and property of the description above specified, exceeding the value of 10l., and in which said notice were then and there stated and set forth, in such legible characters as aforesaid, the increased rates of charge required by them the defendants to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of (amongst other things) valuable articles and things of any of the descriptions above mentioned and specified: And the defendants further say, that, at the time of the delivery to and receipt by them, for the purpose aforesaid, of the said trunk, with the contents thereof (such contents being, amongst other things, the said articles, goods, and chattels in the introductory part of this plea mentioned, which were **[787]** articles and property of some or one of the descriptions aforesaid, and of a value exceeding the sum of 10l.), neither the value nor nature of the said last-mentioned articles, goods, and chattels was then, or at any other time before the said alleged loss thereof, declared by the plaintiff, or by the person sending or delivering the same, to the defendants, or the person who received the same on their behalf, nor was the said increased rate of charge so notified by, and stated and set forth in, the said notice as aforesaid, or any increased rate of charge over and above the ordinary rate of carriage, or any engagement to pay the same, respectively, then, or at any other time, offered to or accepted by the defendants, or

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in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10l., unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

And s. 2 enables the coach-proprietor, &c., to demand an increased rate of charge on any such packages; such increased rate to be specified in a notice affixed in the office or warehouse, &c.

by the person receiving the same articles, goods, and chattels for the purpose aforesaid, or by any other person or persons on behalf of the defendants: And this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to maintain her aforesaid action against them as to the premises in the introductory part of this plea mentioned."

The plaintiff demurred specially to the third plea, assigning for causes,—that the said last plea is uncertain, and does not certainly and positively shew that the said articles, goods, and chattels, were articles and property of any of the descriptions in the said act of parliament mentioned; on the contrary, the said last plea describes the said articles, goods, and chattels argumentatively, alternately, hypothetically, and uncertainly, and states that they were gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, trinkets, gold or silver plate or plated articles, silks in a manufactured or unmanufactured state, furs, lace, and that they were of the said descriptions, or of some or one of such descriptions; and no certain issue can be taken on the said last plea; **[788]** and a verdict found in the language of the said last plea, as to the description of the said articles, goods, and chattels, would be uncertain and bad; and, if the defendants' evidence is as uncertain as the statement in the said last plea, they will not be entitled to a verdict and judgment thereon;—and that the said last plea is also uncertain, in this, to wit, that it does not state or set forth the increased rate of charge demanded by the defendants; and, by reason of the said uncertainty, the plaintiff cannot tell whether the rate of charge paid by her was such increased rate of charge, and cannot safely reply to the said plea; and the increased rate of charge ought to be stated in the said last plea, to enable the court to judge whether the same was a reasonable rate of charge in that behalf. Joinder.

T. Jones, in support of the demurrer (*a*)[1]. The third plea is clearly bad, for not alleging with certainty and precision that the articles enumerated in the declaration, were articles of some one of the descriptions mentioned in the statute, so that a certain issue might have been taken upon it. In *The King* v. *Brereton* (8 Mod. 330), **[789]** upon an information for a libel, it was objected "that the fact is laid very uncertain, for, it is that the defendant scripsit, fecit, et publicavit, seu scribi fecit, et publicari causavit, which is very uncertain, and no proper defence can be made, because it is in the disjunctive" (*a*)[2]. Sir Philip Yorke answered that "it is true, a man ought not to be punished where there is any uncertainty in the crime committed; but a disjunctive does not always make a different crime, but sometimes it is explanatory (*Lambe's case*, F. Moore, 813); and therefore writing a libel, or causing it to be writ, is the same offence; and, if so, this information is good; it is like an indictment on the statute 5 Eliz. c. 4, that a man exercised artem sive mysterium, and that was held no fault. There is no uncertainty in the fact; for, to 'write or cause to be written,' is the same offence." But the court said: "'writing' and 'causing to be wrote,' are two different acts; there is no information like this. An indictment for erecting cottagium sive tenementum is ill. As to the indictment on 5 Eliz. c. 4, it is good, because that is not the charge. If the crimes were the same, yet the indictment ought to be certain." So, in *The King* v. *Morley* (1 Y. & J. 221) an information stating that the defendant imported *or* caused to be imported foreign silks, was held bad for uncertainty. And in *Davy* v. *Baker* (4 Burr. 2471), which was an action on the bribery act, 2 G. 2, c. 24, it was moved in arrest of judgment, that the charge

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(*a*)[1] The points marked for argument on the part of the plaintiff, were,—first, "that the plea does not positively state that the goods and chattels as to which it is pleaded, were of any of the descriptions mentioned in the carriers' act, but states the description of the goods in the alternative;"—secondly, "that a plea stating a defence in the alternative is bad, because it appears thereby that the defendants' evidence is uncertain and alternative, upon which no positive or certain verdict can be given;"—thirdly, "that the plea does not state the increased rate of charge demanded by the defendants for carrying the goods in question;"—fourthly, "that the plaintiff cannot reply payment or tender of the increased rate of charge, without alleging and proving the amount of such increased rate of charge, which is a fact which ought to be pleaded and proved by the defendants."

(*a*)[2] An indictment for a forcible entry into "two closes of meadow or pasture," is void for uncertainty: *The King* v. *Stocker*, 5 Mod. 138, 1 Salk. 342, 371.

was too loose and general—"that the defendant did receive a gift *or* reward;" without specifying what he received or took as a reward, whether money or what particular species of reward: to which **[790]** it was answered that "the declaration is in the very words of the act of parliament; and the charge is found by the jury to be true, 'that he did receive a gift or reward,' and is therefore within the act." But Lord Mansfield, and Yates, J., held that the declaration was clearly bad; for, the offence ought to have been laid with sufficient certainty, so as to be pleadable in bar of another action. In Stephen on Pleading (5th edit. p. 426, rule iv.) it is said,—and the rule is similarly laid down in Chitty on Pleading (7th edit. vol. i. p. 260),—"Pleadings must not be hypothetical, or in the alternative. Thus, in an action of debt against a gaoler, for the escape of a prisoner, where the defendant pleaded, that, if the said prisoner did, at any time or times after the said commitment, &c., go at large, he so escaped without the knowledge of the defendant, and against his will; and that, if any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c.,—the court held the plea bad; for, he cannot plead hypothetically, that, if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no escape, or that there has been one, two, or ten escapes, after which the prisoner returned: *Griffith* v. *Eyles* (1 Bos. & Pull. 413). So, where it was charged that the defendant wrote and published, *or* caused to be written and published, a certain libel, this was considered as bad for uncertainty:" *The King* v. *Brereton* (8 Mod. 330).

Bramwell, contrà (*e*). The alternative condition of the several articles enumerated, is introduced by the **[791]** legislature for the purpose of obviating doubt. If the allegation here had been in the conjunctive, instead of the disjunctive, it would unquestionably have been good; and the plea would have been proved, if it had been shewn that the trunk contained any one of the species of goods enumerated in the act. That is, in effect, giving the same force to the words as if they had been disjunctively alleged. The goods in question are stated to have been delivered to the defendants in a trunk. They could not know its contents: but the plaintiff did. It is a well-known rule in pleading, that "no greater particularity is required than the nature of the thing pleaded will conveniently admit" (Stephen on Pleading, 5th edit. p. 404); and that (ib. 407) "less particularity is required where the facts lie more in the knowledge of the opposite party, than of the party pleading." This rule is well illustrated by the case of *Gale* v. *Reed* (8 East, 80). There, by indenture between A. and B. and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C., during his life, 2s. on every cwt. of cordage which they should make, on the recommendation of C., for any of his friends and connexions, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust: and C. covenanted not to carry on the business of a ropemaker during his life (except on government contracts); and that all debts contracted or to be contracted in his or **[792]** their names, pursuant to the indenture, should be the exclusive property of A. and C.; and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage, on any pretence whatsoever:—and it was held, that breaches assigned generally against C., for having made cordage for divers persons other than for government, and for employing other persons than A. and B. to make cordage for his friends, &c., were well assigned, though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.,—such facts lying more particularly within C.'s knowledge. [V. Williams, J. To have named all the parties in that case, would have rendered the plea obnoxious to the rule against prolixity in

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(*e*) The defendant's points for argument were as follows:—"The defendants will contend that they are protected from liability by the carriers' act, 11 G. 4 & 1 W. 4, c. 68, if the goods enumerated in the last plea can be proved to be of any one of the descriptions specified in the act, and therefore that they have a right to plead in the form adopted; and that it is unnecessary to mention in the plea the increased rate of charge, because, the defendants having notified them to the public as required by the said act, the plaintiff must be taken to have had full knowledge of them, and was bound to take notice of them."

pleading.] That is not the ground upon which Lord Ellenborough puts it. He says: "The answer given by the plaintiffs' counsel, viz. that, as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conversant of his own dealings, than of the plaintiffs, there was no occasion to state them with more particularity,—is in our opinion a sufficient answer in point of law." [Cresswell, J. There was no difficulty in the way of making this plea more precise. The plaintiff having minutely described in her declaration all the articles for the loss of which she seeks compensation, the defendants had all the information they could need to make this a perfectly good plea. Probably they will amend.] The information in *The King* v. *Morley* stated in the alternative two descriptions of offence: that case, therefore, has no bearing upon the question In truth, the expressions in this plea that are supposed to create uncertainty and ambiguity, are mere surplusage: and, **[793]** the matter referred to lying more in the knowledge of the plaintiff than in that of the defendants, it is submitted that less particularity is required than would have been looked for under a different state of circumstances.

Jones, in reply. The defendants were bound to make out that the articles enumerated in the declaration fell within the description of goods they were not bound to pay for, unless informed of their nature and value, and paid accordingly. The argument on the other side, if it amounts to any thing, is, that the defendants were not bound to describe the goods at all. The rules cited from Stephen, pp. 404, 407, do not apply here. [Cresswell, J. Suppose the words "or some or one of them" had been omitted, or the word "respectively" inserted, would that have made the plea sufficient?] Probably it would. It may be that the rule upon which the question turns, is practically useless: but so are most of the rules of pleading.

Wilde, C. J. It appears to me that this case may be disposed of, without holding that the rule referred to is so useless as has been suggested. I must confess I very reluctantly give judgment against this plea. It is too uncertain. It ought to have been more specific.

Bramwell asked leave to amend.

Wilde, C. J. I am for adhering strictly to the general rule, not to allow an amendment after judgment.

Cresswell, J. If you had only taken the hint, when we paused to deliberate, you would perhaps have **[794]** been in time. But now, I agree with my lord in thinking that your prayer comes too late.

The rest of the court concurring,

Judgment for the plaintiff.

Doe d. the Earl of Cardigan and Others *v.* Bywater. April 28, 1849.

Attachment will not lie on a rule of court, unless for disobedience of some express direction.—An order was made by consent, in an action of ejectment, "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the lessor of the plaintiff to pay 5l. towards the defendant's costs, and to grant a lease of the premises for 21 years, at the rent of 1s. a year, on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish, were held."—The defendant having declined to accept a lease and execute a counterpart,—the court refused to grant an attachment against him.

This was an action of ejectment brought to recover the possession of certain cottages, tenements, and premises situate in the parish of Batley, in the West Riding of the county of York. On the 10th of July, 1846, the following order was made by Erle, J., in this cause:—

"Upon hearing the attorneys or agents on both sides, and by consent, I do order that the defendant withdraw the plea pleaded herein, and that all further proceedings herein be stayed,—the defendant to pay his own costs of the former action of ejectment, and the Earl of Cardigan to pay 5l. towards the defendant's costs of this action, and to grant a lease of the premises in question in the defendant's occupation, for twenty-one years from the 1st of July instant, at the rent of 1s. a year, on the same conditions as the other parts of the Earl of Cardigan's estate in the parish of Batley, in the county of York, are held."

[795] This order having been made a rule of court,

F. Thompson, on the part of the lessors of the plaintiff, moved for an attachment against the defendant, for disobedience thereof. The affidavit upon which the motion was founded, stated, that, in April, 1847, a draft of a lease from the Earl of Cardigan to the defendant, of the cottages, tenements, and premises in question, in conformity with the terms of the order, was delivered to the defendant for perusal, and was returned on the 8th of September, 1848, by the defendant's solicitor, without objection; that, on the 18th of the same month, the sum of 5l. was paid, on behalf of the Earl of Cardigan, to the defendant's solicitor, towards the costs of the defendant, pursuant to the terms of the order; that the defendant was personally served with a copy of the rule; and that a lease of the cottages and premises, in conformity with the rule, duly executed by the Earl of Cardigan, was tendered to him, and he was required to execute a counterpart thereof; but that he refused so to do. [Wilde, C. J. The order contains no direction as to the acceptance of the lease by Bywater, and the execution of a counterpart.] It is necessarily implied. [Wilde, C. J. I am not aware of any case of an attachment for disobedience of an implied direction.] The lessors of the plaintiff have no other remedy. [Wilde, C. J. The order having been made by consent, cannot the bargain be enforced in equity?] Whether that be so or not, it is submitted that the party is subject to the summary jurisdiction of this court.

Wilde, C. J. I am of opinion that an attachment ought not to be granted in this case. I have always understood that an attachment for contempt goes only where the party has been called upon to do, and has **[796]** wilfully omitted to do, some specific act. Such motions occur the most frequently in cases of awards. The direction contained in the award becomes, upon the award being made a rule of court, in effect, the direction of the court. But the court always takes especial care to see that the award is express and distinct in directing the particular matter to be done, before it will attach the party for disobedience of it. The same strictness is usually observed by the court, in enforcing performance of its own ordinary rules. The party, in the present case, is sought to be attached for not accepting a lease of certain premises, and executing a counterpart. Referring to the judge's order, I do not find that it directs him to do either of these things. It is said, that, although the order does not in terms direct the defendant to accept the lease and execute the counterpart, yet that this is necessarily to be implied. Looking at the whole rule, however, it seems to me that the granting of the lease by the Earl of Cardigan is a boon to the defendant, which the latter may be at liberty to decline. The ground of the motion, therefore, in my judgment, fails.

The rest of the court concurring,

Rule refused.

[797] EWBANK *v.* NUTTING AND ORD. April 20, 1849.

[Adopted, *Coulthurst* v. *Sweet*, 1866, L. R. 1 C. P. 655. Principle applied, *Barwick* v. *English Joint Stock Bank*, 1867, L. R. 2 Ex. 266. Referred to, *Notara* v. *Henderson*, 1872, L. R. 7 Q. B. 236. Explained and distinguished, *Weir* v. *Bell*, 1878, 3 Ex. D. 244. See *Wagtaff* v. *Anderson*, 1880, 4 C. P. D. 288; 5 C. P. D. 178.]

Trover lies against a ship-owner for a sale by the master of goods, at a place short of their port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner.—A cargo of salt was shipped by the plaintiff at Liverpool, for Calcutta, under a bill of lading making the same deliverable to A. & Co., on payment of freight there, "as per charter-party." The ship sustained damage in quitting the harbour at Liverpool, and ultimately became so leaky that the master was compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, and being unable to forward the salt to its destination, he sold it by public auction,—remitting the proceeds to his owner, who tendered the amount, after making deductions for general average and expenses, to the plaintiffs:—Held, that the master and owner were jointly liable for the conversion;—that it was not necessary for the plaintiff to give the charter-party in evidence;—and that the jury were warranted in estimating the damages at the cost price of the salt and the sum which the plaintiff had paid on account of freight.—The two defendants severed in pleading, and appeared by different attorneys and different counsel,—quære whether each counsel was entitled to address the jury?

Trover, for 1000 tons of salt, 1000 tons of stoved salt, 1000 tons of other salt, 1000 mats, 1000 tons of dunnage wood, and 1000 tons of other wood,—the count alleging for special damage that the plaintiff "not only lost and was deprived of the said goods and chattels, but lost and was deprived of the profits which he would otherwise have made of the said goods and chattels, and by the sale thereof in a certain place beyond seas, to wit, at Calcutta, to wit, to the amount of 2000l. and also lost and was deprived of divers moneys which the plaintiff had paid and expended in and about the carrying and conveying of, and procuring the carrying and conveying of, the said goods and chattels from England unto and towards the said place beyond seas," &c.

The defendants, who appeared by different attornies, severally pleaded,—first, as to parcel of the goods and chattels in the declaration mentioned, that is to say, as to two tons of the said dunnage wood in the de-**[798]**-claration mentioned, and as to so much of the declaration as related thereto, payment into court of 40s., and no damages ultra,—secondly, as to the residue of the goods and chattels in the declaration mentioned, and as to so much of the declaration as related to the said residue, not guilty,—thirdly, as to the said residue, &c., not possessed,—fourthly, as to the said residue, &c., leave and licence.

The plaintiff joined issue on the defendants' second and third pleas respectively, to the first replied damages ultra, and to the last de injuriâ.

The cause was tried before Wilde, C. J., at the sittings in London after last term. The facts were as follows:—The plaintiff is a merchant in London; the defendant Nutting is a ship-owner, and was, at the time of the transaction in question, sole owner of the ship "Triton," of which the defendant Ord was master.

On the 3rd of October, 1845, the plaintiff chartered the "Triton" to carry out to Calcutta a cargo of salt, and there take in a cargo of general merchandise for England. The salt in question,—the invoice price of which was proved to be 471l. 6s. 9d., was shipped under the following bill of lading:—

313 tons common } salt.
351 ,, stoved }

44 doz. mats } for dunnage.
989 foot of slabs }

"Shipped in good order and condition, by Leech, Harrison, & Forward, of Liverpool, in and upon the good ship or vessel called the 'Triton,' whereof Ord is master for this present voyage, and now lying in the port of Liverpool, and bound for Calcutta, 313 tons of common, and 351 tons of stoved salt, loose, and in 400 sacks, 44 dozen mats, and a quantity of wood for dunnage, being marked and numbered as per margin; and to be delivered in the like good order and condition at the aforesaid port of Calcutta (the dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted), unto Messrs. Aylwin & Co., or to their assigns. Freight for the said goods to be paid there as per charterparty. In witness whereof, the master or purser of the said ship or vessel has affirmed to five bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void. Dated, in Liverpool, the 31st day of October, 1845.

(Signed) "JOHN ORD."

"Weight unknown to ."

[799] A bill was drawn by the defendant Nutting upon, and accepted by, the plaintiff, for 254l. 10s. 8d., being one third of the outward freight; which bill was paid at maturity.

The "Triton" sailed from Liverpool on the 1st of November, 1845. On going out of the harbour, she ran foul of the abutment of the pier-head, and, a few hours after she got out to sea, it was discovered that she leaked so much that it was necessary to keep the pumps constantly going. A gale coming on, the captain bore up for Falmouth, but from stress of weather was unable to get in there. He then attempted to make Lisbon, but, not succeeding, he shaped his course for Bahia, where the vessel arrived on the 15th of December, on which day the captain addressed and sent the following letter to the plaintiff:—

"Barque 'Triton,'
"Bahia, Dec. 15, 1845.

"Sir,—I am extremely sorry that I cannot address you under more favorable circumstances. At the same time, I have much reason to be thankful that I am spared to do so; for, shortly after leaving the Channel, the 'Triton' sprung a leak, when I should have put back, but was prevented by strong easterly winds: nor was it practicable to reach a port in Spain or Portugal, although the ship was at times making two feet per hour. We had several times nearly foundered. After reaching the latitude of Madeira, the weather became more settled, and the leaks decreased to eight and ten inches per hour, when I determined, if possible, to reach this port, in which I anchored last midnight, after a deal of hard pumping, and a passage of forty-three days. I shall have the necessary survey held as soon as possible. It will, no doubt, be necessary to lighten the ship, in order to ascertain what repairs will **[800]** be required to enable her to proceed. You may rely upon my utmost endeavours for the general interest of all concerned. I shall advise you as early as possible of my further proceedings. In the interim, I beg to remain, &c."

(Signed) "JOHN ORD."

This letter was received by the plaintiff on the 11th of March, 1846, which was after the sale of the cargo, as hereinafter mentioned.

On the day after the ship's arrival at Bahia, she was surveyed, when it was found necessary to lighten her, in order to ascertain the amount of damage she had sustained. Part of the cargo was accordingly taken out, and a second survey held on the 24th of December, when the vessel was reported unfit to carry a cargo of salt to Calcutta; and certain repairs were recommended, to enable her to return to Europe.

Several other surveys were held; and, in the result, it was judged advisable to abandon the voyage, to repair the ship, and to send her back to England with a cargo of light goods. Accordingly, the remainder of the salt was landed, and, on the 12th of February, 1846, sold by the direction of Ord, by public auction.

On the 17th of February, the captain wrote and sent to the plaintiff the following letter:—

"Barque 'Triton,'
"Bahia, Feb. 17, 1846.

"Dear Sir,—After having had the necessary surveys held on the 'Triton,' I have, in conformity with the same, been obliged to abandon the voyage; and, having done so, it became my next duty to forward your cargo to its destination: but, there being no British vessels in port disengaged, I have not been able to do so; and, as, to store it, and await your instructions, or until a **[801]** vessel could be procured, would at once be more than a total loss, as the expense, lighterage, landing, storing, and re-shipping at some future period, would amount to at least 20s. per ton, I have, after most serious consideration, conceived it to be for the interest of whom it may concern, to sell the cargo at once by public auction; and which was accordingly done in presence of the vice-consul of this city, to the highest bidder. The gross proceeds of the sale will be about 13s. per ton; and, as soon as the account-sales are made out, I shall forward them to you. In this business, I have had a most unpleasant and difficult duty to perform. I have been compelled to act, or else abandon my post: but, having chosen the former, however unpleasant, and, being conscious of having faithfully discharged my duty for the general interest of all concerned, to the best of my judgment, I trust that I shall at least have credit for my good intentions, and doubt not but all concerned will be perfectly satisfied with the whole of my proceedings. I shall write by next conveyance. In the interim, I beg to remain, &c.,"

(Signed) "JOHN ORD.

"N.B.—I was much surprised on turning out more than fifty tons of salt over and above the bill of lading. "J. O."

On the 18th of the following month, the captain addressed and sent to the plaintiff the following letter, inclosing account-sales of the salt:—

"Barque 'Triton,' March 18, 1846.

"Dear Sir,—I beg leave to remit you the inclosed copy of account-sales of salt ex 'Triton.' I hope to sail hence for your port on the 25th instant. Trusting that on my arrival all matters relating to the above [802] will be brought to an amicable adjustment, I remain, &c.," (Signed) "JOHN ORD."

It appeared that the "Triton," after having been repaired at Bahia, took on board a return cargo for London, by which she earned a considerable amount of freight. On her arrival, an average statement was made out on behalf of the owner, by which the plaintiff was declared liable to contribute towards a general average; and, after deducting the amount of that average, and the charges incurred in respect of the salt, a sum of 199l. 13s. 4d. only remained, which was tendered by Nutting to the plaintiff before the commencement of this action, and refused.

On the part of the plaintiff, it was insisted that the captain was not justified by the necessity of the case in selling the cargo; and that, when he found the vessel so leaky as to be incapable of performing the voyage, it was his duty to return to Liverpool, which it appeared that he might at first have done. And the tender of the alleged balance by Nutting, the owner, was relied on as a recognition of the acts of the captain, so as to make him a joint tort-feasor.

For the defendants it was objected that the plaintiff was bound to produce the charterparty, to shew the terms upon which the cargo was to be carried (*a*). This objection being overruled, it was contended, on the part of Nutting, that, the sale of the salt at Bahia not being justified by the circumstances, the captain had acted beyond the scope of his authority, and for this the owner was not responsible.

Byles, Serjt., for the defendant Ord, who insisted that the sale was justified by the circumstances in which the captain found himself at Bahia, claimed to be en-[803]-titled to address the jury on his behalf, inasmuch as his defence was totally distinct and independent of that of the defendant Nutting.

The lord chief justice, however, refused to permit this: and he left it to the jury to say whether the conduct of the master, under the circumstances, amounted to a conversion, and whether his acts had been recognised and adopted by the owner; and he told them they might estimate the damages by the invoice price of the salt and the amount paid for freight.

The jury accordingly returned a verdict for the plaintiff, against both defendants, damages 725l. 17s. 5d.

Talfourd, Serjt., pursuant to leave reserved to him at the trial, now moved to enter a verdict for Nutting or for a new trial, on the ground of misdirection, and that the verdict was against evidence, there being no evidence to fix Nutting as a joint tort-feasor, and no proof of the terms of the dealing, inasmuch as the charterparty was not in evidence at the trial; and also on the ground that the jury had assessed the damages upon an erroneous principle.

This action is brought for the wrong done by the captain in selling the cargo at Bahia, under circumstances which did not justify such a step. The owner is clearly not liable for an act done by the master entirely beyond the scope of his authority. To some purpose, the captain is agent of the owner of the goods, as well as of the owner of the vessel. In *Shipton* v. *Thornton* (9 Ad. & E. 314, 1 P. & D. 216), it was doubted whether, where goods are shipped under a bill of lading in a general ship, which is prevented from completing the voyage in consequence of damage occasioned by tempest, the master is bound, if he has an opportunity, to forward the goods by some other conveyance to the place of destination: but it [804] was held, that, at any rate, he was at liberty to do so, by a conveyance equally cheap, if he should think fit; and that, if the goods arrive at the place of destination by such other conveyance, the master is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for, though the freighter was named as consignee in the original bill of lading, and the bill of lading under which the goods are shipped by the second conveyance makes another party consignee, and though by the second conveyance the goods are carried for less than the freight originally contracted for. The owner is not responsible for the master's wrongful act. [Wilde, C. J. It is only when the captain does wrong that the owner can be liable.] Surely the owner is not responsible for a

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(*a*) It was unstamped.

matter that is out of the contemplation of both parties. [Wilde, C. J. The law will in a certain event dissolve the relation between the owner of the ship and the captain: that is, where circumstances arise which by law make the captain the agent of the owner of the goods. Here, the jury have found that no circumstances existed to dissolve that relation, and therefore that the act of the master was the act of the owner.] The act of the captain in selling the cargo at Bahia, being unjustified by any necessity, the owner was clearly not responsible for it as a tort-feasor. [Coltman, J. Does not the authority of the master extend to acts such as he, in the exercise of an honest judgment, thinks the best for the interest of the owner of both ship and goods?] It is submitted that he has no such unlimited discretion.

The tender of the proceeds of the sale was no adoption of the captain's wrongful act. Having received the money, the owner could not keep it. The tender was rather a repudiation than a recognition: *Wilson* v. *Tumman* (6 M. & G. 236, 6 Scott, N. R. 894).

[805] It could only be upon some construction of the contract contained in the charterparty referred to in the bill of lading, that the defendant Nutting could be made a tort-feasor. The charterparty therefore, ought to have been produced. [Cresswell, J. The bill of lading states what was to be done with the goods: they were received, to be delivered in good order and condition at Calcutta, on payment of freight as per charterparty.] The bill of lading refers to the charterparty. [Cresswell, J. For one particular purpose. What right have you to import any of the terms of the charterparty into the bill of lading? Wilde, C. J. The bill of lading alone contains a perfect contract for the carriage of the salt. Suppose a carrier's servant sells goods that are entrusted to him, would not his master be responsible?] No doubt he would: but the relation between the parties in that case is totally different from that which exists here.

As to the damages, the proper question was, what was the value of the cargo at Bahia, under the then-existing circumstances. The way in which the jury were directed to consider that question clearly was not the proper mode of estimating the damages in an action of tort: it might have been different if this had been an action founded upon the contract to carry. [Cresswell, J. Suppose the conversion had been by throwing the cargo overboard, what would have been the measure of damage in that case? What would the cargo have been worth to the owner?] What it would have sold for at the port of destination, minus the freight. [Cresswell, J. May we not reasonably conclude that the goods would be worth the invoice price and the cost of carriage?] That might or might not be. [Wilde, C. J. It would not be more than an actual indemnity.]

[806] Byles, Serjt., for the defendant Ord, adopting the arguments already urged on behalf of Nutting, presented the following additional ground for a new trial. The case of the captain was totally distinct and different from that of the owner. He was entitled to be heard. As between him and his owner, the question was whether he acted to the best of his skill and judgment. He was not bound to be infallible. It was exclusively a part of the captain's case, that the ship was so damaged at starting, as to be unseaworthy. [Wilde, C. J. How could the master justify selling the cargo, because he chose to sail in a ship that was not seaworthy? The whole of your case was discussed by my brother Talfourd.] In Roscoe on Evidence (6th edit., p. 180), the rule is thus laid down:—"In an action for goods sold, in which the defendants appeared and pleaded non assumpsit by separate attorneys and counsel, but relied on the same defence, viz. payment, it was ruled by Gibbs, C. J., that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint, and not separate. 'It cannot be left in the power of defendants whose interests are the same, to make twenty cases out of one.' *Chippendale* v. *Masson* (4 Campb. 174). And, in ejectment, where the defendants defended in the same right, but by different attorneys and counsel, Lord Tenterden ruled that only one counsel could address the jury: *Doe* v. *Tindal* (M. & M. 314). So, in trover, and a joint plea: *Perring* v. *Tucker* (M. & M. 392). So, in *Mason* v. *Ditchbourne* (1 M. & Rob. 463, n.), in debt on bond, plea non est factum, Lord Abinger refused to allow two counsel to address the jury, for, 'there could not be a verdict for one and against the other defendant.' But, in an action ex de-**[807]**-licto, where defendants have pleaded and appeared by separate attorneys and counsel, a separate cross-examination and address have been permitted by Abbott, C. J.: *King* v. *Williamson* (3 Stark. N. P. C. 162): and by Tindal, C. J., *Massey* v. *Goyder*

(4 C. & P. 162), and *Southey* v. *Tuff* (C. P. sittings after T. T. 1834, MS.): and, even in assumpsit, under similar circumstances, the same course was allowed, and was approved of in banc: *Ridgway* v. *Philip* (1 C. M. & R. 415); in which case, however, it appears by another report (3 Dowl. P. C. 154) that one of the defences was, misjoinder of defendants as partners."

Wilde, C. J. My brother Talfourd has asked for a new trial in this case, on behalf of the defendant Nutting, upon three several grounds. My brother Byles, who appears for the defendant Ord, referring to these grounds, has urged a fourth, viz. that I improperly refused to allow him to address the jury.

1. This is an action of trover for the conversion of a cargo of salt, by selling it at Bahia, instead of carrying it to Calcutta, its port of destination,—the sale having taken place under circumstances which the jury found to be unjustifiable. On the part of the defendants, it is objected, that, inasmuch as the alleged conversion was in part made out by shewing under what circumstances the goods came to the hands of the defendants, viz. under a bill of lading referring for the amount of freight to a charterparty entered into between the ship-owner and the freighter, the charterparty ought to have been produced,—not because the particular rate of freight could have any bearing on the question at issue in the cause, but because the charterparty might have contained some contract giving a dif-**[808]**-ferent character to the transaction. It is clear, however, that the bill of lading proved a perfectly good contract to carry the salt from Liverpool to Calcutta. It is not incident to any such contract that authority should be given to the ship-owner, or to the master, to deal with the goods in a manner clearly inconsistent with their safe conveyance to their place of destination, viz. to sell them elsewhere. The object of the contract simply was, the carriage of the goods from one place to another. If there had been any collateral contract modifying that disclosed by the bill of lading, the party who relied upon it might have produced it: it clearly was not necessary for the plaintiff to do so. I think the plaintiff produced all the evidence that was required to sustain the action, and consequently that the first ground of objection fails.

2. The second question is open to more consideration, though, when it comes to be considered, it does not strike me as presenting any very great difficulty. It is, whether the owner of the ship is liable for the conversion jointly with the captain. I do not say that the owner is liable for every conversion of which the master may be guilty: I desire to be understood as confining my attention to the facts of this particular case. The captain, acting bonâ fide, and meaning to execute the duties of his employment of master, has been guilty of a mistake which in law amounts to a conversion. That which he did, he did as the servant or agent of the owner: and he was not less the agent of the owner, because, meaning to act bonâ fide in that character, he has fallen into a mistake. I think an act amounting to a conversion is, under such circumstances, a joint conversion by master and owner; more particularly where, as here, the latter has done no act to repudiate or sever the relation. So far from having done so, he seems, as the jury have found, to have adopted the master's act. **[809]** That question was left to the jury; and their finding upon it removes all doubt. I am clearly of opinion that this action is maintainable against both defendants.

With regard to the damages,—no evidence was given on the part of the defendants to control them. The only materials that were laid before the jury, were, proof of the cost price of the salt here, and of the sum paid by the plaintiff on account of freight. With this evidence before them, the question for the jury was, what was the amount of damage the plaintiff had sustained by the unauthorised sale of the salt at Bahia. They found that the value of the salt to the plaintiff at the time of the sale was, the invoice price, and the freight paid for its carriage. I cannot say that they have done wrong. As far as the defendants are concerned, it meets the justice of the case: and, indeed, it hardly amounts to an indemnity to the plaintiff, for, he loses the interest of his money. The verdict certainly passed upon an understanding that no action would be brought upon the charterparty: I therefore think it should stand only upon the plaintiff's entering into an undertaking to that effect.

As to the point made by my brother Byles on behalf of the defendant Ord, although I entertain no doubt upon it; yet, as it is a point of such general interest, and I have no very distinct recollection of the authorities bearing upon it, I should like to take time to consider it.

COLTMAN, J. I am of opinion that it was not necessary for the plaintiff in this case to produce the charterparty. This is not like the ordinary case, where it comes out from the plaintiff's evidence that there is a contract in writing not produced. Here, a contract in writing embodying all the terms upon which the goods were to be carried, except the rate of freight, **[810]** was produced. If, in order to sustain this action, it had been essential to ascertain the amount of freight agreed to be paid, it would have been necessary to produce the charterparty. Or, if the charterparty contained any collateral agreement which had any bearing upon the contract to carry, the defendants might have produced it.

As to the conversion, it appears to me, that, although the act of the master in disposing of the cargo at Bahia, was at variance with the authority given him by the owner of the cargo, it was not without the general scope of the authority conferred upon him by the owner of the ship. The master is to act, in a case of sudden emergency and difficulty, according to the best of his judgment. The owner appoints the captain: and he is bound to choose a man of sound judgment and discretion.

With regard to the damages, I must confess I do not see that a more reasonable and equitable measure could have been adopted: and I think the justice of the case will be answered, if the plaintiff gives the undertaking suggested.

CRESSWELL, J. I am entirely of the same opinion. The bill of lading was the proper evidence of the delivery of the goods to the defendants for the purpose of being carried from Liverpool to Calcutta. The charterparty, if produced, would not have proved a contract to carry. And it was not essential to the plaintiff's case to shew the rate of freight.

As to the master's discretion, I agree with my brother Coltman, that the owner gives the master a general discretion to act, in cases of emergency, in such a way as to bind him. Here, the master has exercised that discretion bonâ fide, but erroneously. I think both owner and master are responsible for the consequences.

[811] I also think the jury were well warranted in giving the damages they did. I do not very well see how else they could estimate the value of the goods to the shipper, than by taking the cost price, and adding thereto the expense incurred in getting them towards the merchant. What the cargo fetched by a forced sale at Bahia, clearly was no fair test. The plaintiff did not want the goods there.

V. WILLIAMS, J. I am of the same opinion. Without producing the charterparty, the plaintiff made out a perfect case against Ord. And, as soon as the relation of master and owner was made out between Ord and Nutting, the latter became liable for the act of the former. With respect to the damages, I entirely agree with the rest of the court.

Cur. adv. vult.

On a subsequent day, the lord chief justice intimated that the court were desirous of conferring with the rest of the judges upon the point reserved, before they decided upon granting a rule.

Byles, Serjt., in the following term, intimated to the court that he was instructed to abandon the additional point upon which he had asked for a rule on behalf of Ord. Consequently, there was

No rule.

[812] TARLETON *v.* SHINGLER. April 20, 1849.

A bill at three months, drawn by A., and accepted by B., for A.'s accommodation, was indorsed and sent by post by A. to C. for value. C. returned the bill, insisting upon having one at two months instead. A. thereupon altered the bill, by making it payable at two instead of three months, and again sent it to C. There was no evidence that B. knew of the alteration at the time; but there was evidence to shew that he subsequently assented to its being treated as a two months' bill:—Held, that the bill was well declared on as a two months' bill, and that it was not avoided by the alteration.

This was an action upon a bill of exchange, by indorsee against acceptor. The bill was declared on as a bill for 46l. 10s., drawn on the 2nd of October, 1847, by one Gourlay, payable, two months after date, to Gourlay or order, indorsed by Gourlay to one Gardner, and by Gardner to the plaintiff.

The defence was, that the bill had been altered in a material part after it was issued (*a*). Gardner, who was called to explain the circumstances under which the alteration took place, made the following statement:—

Gourlay, the drawer, was a surgeon residing at Maidley, in Shropshire. The defendant was a tradesman at Iron Bridge, a few miles distant from Maidley. The witness, Gardner, was an apothecary residing in Birmingham. Gardner was the holder for value of a former bill, for the same amount as the bill in question, which had been accepted by the defendant, for Gourlay's accommodation, but which had not been paid at maturity. The bill declared on was drawn, accepted, and indorsed as a bill at three months' date, and sent by Gourlay to Gardner, in lieu of the former bill, by post. Gardner, having expected to receive an acceptance at two months, returned the bill to Gourlay, insisting upon having a bill at the shorter date: and **[813]** in the course of a post or two he received the bill back altered to a two months' bill.

In order to shew that the alteration had been assented to by the defendant, several letters were put in, in which he asked for time, and which treated the bill as a two months' bill.

Coltman, J., before whom the cause was tried at the last assizes at Stafford, left it to the jury to say whether the alteration had been assented to by the defendant, reserving to him leave to move to enter a nonsuit, in the event of the jury finding that question in the affirmative, on the ground that the stamp had already been exhausted.

The jury returned a verdict for the plaintiff, damages 1s., the bill having been paid before the trial.

Talfourd, Serjt., in pursuance of the leave reserved to him, now moved to enter a nonsuit. The bill was a complete instrument before it was transmitted to Gardner, and the efficacy of the stamp exhausted: the subsequent alteration, therefore, was altogether inoperative. The only case that approaches this is, *Downes* v. *Richardson* (5 B. & Ald. 674). There, three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill, which was afterwards issued for value to J. S. Previously to its being so issued, its date had been altered: and it was held, that, the acceptor having assented to the alteration when he was informed of it, it was no answer to an action against him on the bill, that the bill had been so altered without the consent of the drawer and first indorser; and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law, for, that an accommodation bill is not issued until it is in the hands of some person **[814]** who is entitled to treat it as a security available in law. But, in that case, the alteration took place before the bill was issued; whereas, here, the bill had been indorsed and transmitted to a holder for value. [Wilde, C. J. Was it a complete bill,—a security available in law,—before Gardner agreed to take it?] It is submitted that it was a complete and valid instrument the moment it passed out of the hands of Gourlay.

WILDE, C. J. I think this is a very clear case. It was no more than if all the three,—Gourlay, Shingler, and Gardner,—had met, and, before the bill had passed out of the hands of the payee, the alteration had been made with the acceptor's assent.

The rest of the court concurring,

Rule refused.

TIMOTHY *v.* FARMER. April 20, 1849.

A plea of not possessed to an action of trespass, takes the case out of the jurisdiction of the new county-courts.

This was an action of trespass brought against the defendant, for, amongst other things, placing a ladder in the fore-court of and belonging to a messuage at Peckham, in the county of Surrey, in the plaintiff's occupation. The defendant pleaded not guilty and not possessed. And at the trial, at the last Surrey assizes, the plaintiff obtained a verdict for 40s., Wightman, J., the presiding judge, declining to certify.

Manning, Serjt., now moved for leave to enter a suggestion, under the 9 & 10

(*a*) This defence was not specially pleaded. As to the necessity for so doing, see Byles on Bills, 5th edit. 243, 244, and the authorities there referred to.

Vict. c. 95, to deprive the plaintiff of costs, on the ground that the action should have been brought by plaint in the county-**[815]**-court. [Cresswell, J. Is not this within the proviso in s. 58, that the county-court shall not have cognisance of any action in which the title to any corporeal or incorporeal hereditaments shall be in question?] The title was not necessarily in question here; and the affidavits shew that in fact it was not brought in question at the trial. [Cresswell, J. The defendant pleaded not possessed.] It will be a fearful penalty on the parties, if by pleading that plea, they are to be deprived of the benefit of the statute.

WILDE, C. J. By pleading not possessed, you put the plaintiff to proof of his title. How does he prove a trespass without proving his title?

The rest of the court concurring,

Rule refused.

BATHER *v.* BRAYNE AND ANOTHER. April 21, 1849.

The court refused to set aside as frivolous, a demurrer to a replication to a plea of liberum tenementum, in trespass for mesne profits, setting up the judgment in ejectment by way of estoppel.

Trespass for mesne profits, after a recovery in ejectment. Plea, liberum tenementum in one of the defendants. Replication, setting up the judgment in ejectment by way of estoppel. To this replication, the defendants demurred.

Talfourd, Serjt., moved that the demurrer might be set aside as frivolous. He submitted, that, it having been distinctly settled, in *Aslin* v. *Parker* (2 Burr. 665 (1 Smith's Leading Cases, 264)), *Doe* v. **[816]** *Wright* (10 Ad. & E. 763, 2 P. D. 672), and *Doe* v. *Huddart* (2 C. M. & R. 316, 5 Tyrwh. 846), that the judgment in ejectment is an estoppel, the court would not now throw doubt upon those decisions by allowing the matter to be argued again. [Cresswell, J. *Doe* v. *Wright* was argued at very great length. If we decided the same way, and a writ of error were brought, it would be difficult to say that the writ of error was frivolous. I am far from wishing to throw doubt on the case of *Doe* v. *Wright*. But the defendants have a right to have the matter put in a course for decision by a court of error.] If the court think the demurrer ought to stand, it may probably be allowed to stand for an early day.

WILDE, C. J. The decision in *Doe* v. *Wright* not having been affirmed in error, I think we ought not to deprive the defendants of the opportunity of questioning it by writ of error. We cannot say that the demurrer is altogether frivolous and without any pretence. Nor do I see any thing in this case to warrant us in taking it out of the ordinary course.

The rest of the court concurring,

Rule refused (*e*).

[817] M'LEAN *v.* PHILLIPS. April 23, 1849.

[S. C. 6 D. & L. 697. Explained, *Rumbelow* v. *Whatley*, 1851, 16 Q. B. 400.]

Payment of money into court generally upon the whole declaration does not disentitle the defendant to the general costs of the cause, where he afterwards obtains judgment as in case of a nonsuit.

Assumpsit, for goods sold and delivered, work and materials, and money due upon an account stated.

Plea, to the whole declaration, payment into court of 180l., and no damages ultrà.

Replication, damages ultrà.

Issue was joined on the 7th of April, 1848, and, in the following Hilary term, the defendant obtained judgment as in case of a nonsuit, the plaintiff having failed to proceed to trial, pursuant to a peremptory undertaking he had entered into to try at the sittings after Trinity term, 1848.

Upon the taxation of costs, the master allowed the plaintiff his full costs up to the time of taking the money out of court, setting them off against the defendant's subsequent costs.

(*e*) See the argument of the demurrer, post, vol. viii.

Kingdon, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the master should not review his taxation. He insisted, upon the authority of *Crosby* v. *Olorenshaw* (2 M. & Sel. 335) and *Postle* v. *Beckington* (6 Taunt. 158), that the defendant was entitled to his full costs from the commencement of the suit; and that, if the plaintiff was entitled to any costs at all, the utmost he could be entitled to would be, costs as upon an immaterial issue.

[818] Hance now shewed cause. The point has never been distinctly decided. By paying money into court, the defendant admits that the action was rightly brought. The policy of the law, therefore, clearly is, to give the plaintiff his costs up to that time. It was only in the further prosecution of the action that the plaintiff was wrong; and to that extent only should he be visited with costs. *Seamon* v. *Bridge* (8 T. R. 408) and *Lorck* v. *Wright* (8 T. R. 486) are distinct authorities to shew that the plaintiff is entitled to costs up to the time of the payment into court.

Kingdon was not called upon to support his rule.

Wilde, C. J. If the plaintiff had terminated the cause in an early stage, he would undoubtedly have been entitled to costs up to the time of the payment into court. But, as he has not thought fit to adopt that course, and has allowed the defendant to obtain judgment as in case of a nonsuit, I think the latter is entitled to costs as if the cause had proceeded to trial, and he had obtained a verdict or a nonsuit. The rule for reviewing the taxation must, therefore, be made absolute.

The rest of the court concurring,

Rule absolute.

[819] Winn *v.* Nicholson. May 3, 1849.

[S. C. 6 D. & L. 717; 18 L. J. C. P. 231. Commented on, *Grafham* v. *Turnbull*, 1875, 44 L. J. Ch. 540.]

By an order of reference made by consent, it was stipulated, amongst other things, that certain items in an account annexed to the order should be taken as admitted between the parties. The arbitrator having made his award,—the court refused to amend the order, and refer the matter back, upon affidavits shewing a mistake by the clerk of the plaintiffs' attorney in the copying of one of the admitted items.

By an order made by consent at chambers, this cause and all matters in difference in a suit pending between the parties in Chancery, were referred to a barrister; and it was, amongst other things, provided, that, "upon the said reference, the said parties respectively shall admit before the said arbitrator, and the said arbitrator, upon the said reference, and in making his said award, shall take and receive, the account hereunto annexed, and marked A., to be a correct account and statement (except as hereinafter is excepted) of the accounts between the said parties; and that the said arbitrator, in making his said award, shall (except as aforesaid) view and consider and award upon the rights and liabilities of either of the said parties with reference to the several items in the said account specified and set forth, in precisely the same manner as he would have done had the same been legally proved before him upon the said reference: provided, nevertheless, that the several items in the said account marked A. B. C. D. E. F. G. H. I. K. L. shall not be taken to be included in the said admission, nor shall the said arbitrator take or consider the same as admitted; and that it shall be open and admissible for the plaintiff in the said action to call upon the defendant for proof of, and to contend that the defendant is not entitled to recover or have credit in the said action or suit for, the said several items in the said account marked respectively F. G. H. I. K. L., and for the defendant in the said action to call upon the plaintiff for proof of, and to contend that the plaintiff is not entitled to recover or have credit in the said **[820]** action or suit for, the said several items in the said account marked respectively A. B. C. D. E.: and that, in case the validity of any award, or any such altered or amended or supplemental award, as are hereinafter mentioned, made by the said arbitrator, shall be disputed or impeached by either of the said parties, in the whole or in part, in any of Her Majesty's courts of law or equity, the same shall not be set aside, but the same shall from time to time be referred back by the court in which the same shall be so impeached, upon such terms as it shall think just and reasonable, to the said arbitrator, who shall thereupon from time to time, within such time as the said court shall order, have power to alter or amend the said award, or to make a fresh or supplemental award, with or without hearing or receiving further or additional evidence: and the said award so altered or amended, and any fresh or supplemental award to be made as aforesaid, shall be deemed and taken as an award made under and by virtue of this order, and be binding upon the said parties respectively."

Among the items on the debtor side of the account, were the two following:—

"1842.	Feb.	Balance of accounts for money received by the defendant for the plaintiff . .	£758 2 8
1843.	Feb.	Ditto ditto . .	460 11 4"

The clerk to the plaintiff's attorneys, in making a copy of the account to annex to the order of reference, by mistake inserted therein 450l. 11s. 4d. as the balance due in February, 1842, instead of 758l. 2s. 8d. And the arbitrator, when he made his award, acting upon the erroneous statement furnished to him, credited the plaintiff with the 460l. 11s. 4d., instead of 758l. 2s. 8d.

[821] Wells, upon an affidavit of these facts, moved for a rule to shew cause why the order of reference and the accounts annexed thereto should not be amended, and the award referred back to the arbitrator, for the purpose of correcting the error. [Wilde, C. J. What authority have you for that?] It must be conceded that there is no case exactly parallel in its circumstances with the present: but there are cases which afford a very close analogy to it. In *Price* v. *James* (2 Dowl. P. C. 435), where the christian and surname of one of the parties were transposed by mistake in an order of reference, the court allowed it to be amended. *Pearman* v. *Carter* (2 Chitt. Rep. 29) also shews that there may be cases in which the courts will grant this indulgence. [Wilde, C. J. The order in *Price* v. *James* purported to be made in a cause which did not exist, and the mistake was the act of the officer of the court. *Pearman* v. *Carter* is rather a strong authority against you.] In *Evans* v. *Senor* (5 Taunt. 662), it was held that the court will amend an order of reference at nisi prius, made a rule of court, by inserting such omitted matters as are incident to the substance of the agreement between the parties. There, the parties had, by their respective counsel, agreed at nisi prius to enter into a rule of court, that the defendant should sell certain premises to the plaintiff at a valuation: an order of nisi prius was accordingly drawn up, but it contained no agreement that the defendant should make a good title to the premises, or execute any conveyance. The defendant afterwards disclaimed the agreement, and refused to make a title. A rule nisi was obtained to amend the order of nisi prius, by inserting the words "that the defendant should make a good title, and execute a conveyance of the premises." And Gibbs, C. J., **[822]** said: "We think the amendment may be made: the court are in possession of the order, by its having been made a rule of court. They cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assent to; and we do not think we make a very wide stretch of authority, in saying, that, if the rule is that the plaintiff shall become a purchaser of the premises upon payment of the price named, it involves the term that the vendor shall convey to him that for which he is to pay the money." [Wilde, C. J. That which was added there, was something that was essential to make the order of reference available at all. It has not much bearing upon this case: and I cannot help thinking there is a little inaccuracy in the report. The strongest case I remember is that of *Hall and Hinds, In re* (2 M. & G. 847, 3 Scott, N. R. 250). There, certain disputes and differences between A. and B. were referred to the arbitrament of three merchants. A. admitted before the arbitrators that a sum of 143l. 15s. 11d. was due from him to B., but the latter claimed a larger sum; and the arbitrators found, that, in reality a further sum of 75l. 4s. 7d. was due from A. to B. Instead, however, of adding these two sums together, and directing A. to pay the aggregate amount to B., the arbitrators by mistake deducted the latter sum from the former, and, by a further mistake, directed that B. should pay the difference to A. Upon an affidavit of these facts by two of the arbitrators (the third declining to join in the affidavit), the court set aside the award, on the ground that the arbitrators had evidently failed to express in the award the intention of their own minds, and that the mistake and act of carelessness were so gross as to amount, in the judicial sense of the term, to misconduct on the part of the arbitrators.] **[823]** That case was cited in *Phillips* v. *Evans* (12 M. & W. 309), but did not receive much approbation. In *Howett* v. *Clement* (8 Scott, N. R. 851), an arbitrator having made an award in which the plaintiff was described by a wrong christian name, the court sent it back to him to correct,—the order of reference containing a clause for referring it back for amendment. The present case is certainly one in which the court would feel disposed to assist the party by an amendment, if at all consistent with precedent.

Wilde, C. J. It appears to me that the court has no power to accede to this application. No authority has been shewn for it. The only case that is at all analogous, is that of *Evans* v. *Senor;* and that is very distinguishable. There, the defendant had entered into a rule of court whereby he contracted to sell certain premises to the plaintiff, and he afterwards refused to convey. An application was made to the court to amend the order of reference, by inserting therein words amounting to an undertaking on the defendant's part to convey. I observe that the remarks of Lord Chief Justice Gibbs are confined to so much of the application as relates to the execution of a conveyance. He says that the court "cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assented to: and we do not think we make a very wide stretch of authority, in saying, that, if the rule is that the plaintiff shall become a purchaser of the premises upon payment of the price named, it involves the term that the vendor shall convey to him that for which he is to pay the money." Nothing whatever is said about making title. The court thought they were only adding that which was already substantially em-**[824]**-bodied in the order, or necessarily consequential to what was expressed in it, and essential to render the order effectual. That which we are asked to do here, is altogether different: it is, to vary the order. The defendant agrees to refer an account containing an item by which he admits himself to be indebted in a sum of 460l. 11s. 4d. We are asked to vary that, by making him admit himself indebted in the sum of 758l. 2s. 8d. If this had been a reference by bond, it is quite clear that the court could not have interfered. Nor can we, I apprehend, on principle, interfere on this occasion. It is true that a court of equity, where the jurisdiction for the correction of mistake and fraud is very extensive, might, upon a proper state of facts, interfere to set aside the award. That, however, is not the application that is now before us: that which we are asked to do is, not to set aside the award, but to alter the contract into which the parties have entered. There is no warrant for such a proceeding. I therefore think there should be no rule.

Coltman, J. I should certainly have felt glad to afford the relief prayed, if any authority for so doing could have been produced. No case, however, has been found bearing any very near resemblance to this. No doubt, the court will correct the mistake of its own officer. In a case like this, there can be no relief but in a court of equity.

Cresswell, J. I am of the same opinion. I cannot help feeling surprised that advantage should be taken of such an error. But, at the same time, I feel that we have no power to assist the plaintiff.

V. Williams, J., concurred.

Rule refused.

[825] Hudson *v.* Haslam. May 6, 1849.

In an action upon an agreement whereby, in consideration of the plaintiff's staying the proceedings in an action against J. S., the defendant promised to pay him a certain sum out of the proceeds of the sale of a chattel deposited with him by J. S. for that purpose, the declaration alleged that the plaintiff, relying upon the promise of the defendant, countermanded the notice of trial in the action against J. S., and stayed the proceedings:—Held, that a plea, that, after the alleged countermand of notice of trial, the plaintiff further continued the proceedings against J. S., concluding with a special traverse, was an issuable plea.—Plea—that the plaintiff was not ready and willing to accept and receive the 40l. out of the purchase-money for the said picture, in manner and form, &c.:—Held, bad, as putting in issue an immaterial allegation.

The declaration stated that the plaintiff, before and at the several times thereinafter mentioned, was, and continued to be, an attorney of Her Majesty's superior courts of common law at Westminster; that the plaintiff, to wit, on, &c., was retained, as such attorney, by one Eliza Jung, to effect for her an arrangement with her creditors, and to do and perform for her other business as such attorney as aforesaid, and the plaintiff did then, to wit, on the day and year aforesaid, and on divers other days and times, do and perform, under the said retainer of the said Eliza Jung, and for her, and at her request, work and labour as such attorney as aforesaid, in and about the endeavouring to effect an arrangement with her said creditors, and also in and about other the affairs and business of the said Eliza Jung, and did then also find and provide, and use and apply in and about the said work and labour, certain materials and necessary things, at the like request of the said Eliza Jung, and did then also, under the said retainer, pay, lay out, and expend for the said Eliza Jung, and at her request, and for her benefit, divers moneys of him the plaintiff, for and in respect of which said several premises the plaintiff then reasonably deserved to have of the said Eliza Jung a certain sum of money, to wit, 35l. 1s. 11d.; that the plaintiff not having been paid any portion of the last-mentioned sum, or any money whatever, by the said Eliza Jung, and not having been in any manner paid or rewarded for his said work and labour, materials, **[826]** and advances, and not being able to obtain any payment, compensation, or reward whatever therefor from the said Eliza Jung, although repeated applications were made to her by the plaintiff in that behalf, he, the plaintiff, on the 27th of May, 1847, caused to be issued out of the court of our lady the Queen of the Bench a certain writ of summons, directed to the said Eliza Jung, in an action of debt, &c. The declaration then set out the proceedings in that action down to notice of trial, and averred, that the now defendant was, and during all the time aforesaid continued to be, an attorney of Her Majesty's superior courts of law at Westminster, and that he, the now defendant, did in fact act as, and was, the legal and professional adviser of the said Eliza Jung in and throughout the said proceedings of and in the said action so brought against her by the now plaintiff as aforesaid: that, the said action being and remaining so pending against the said Eliza Jung as aforesaid, and the said issue therein joined as aforesaid being so about to be tried at the said next assizes for the county of Surrey, as aforesaid, and the defendant, as such legal and professional adviser of the said Eliza Jung as aforesaid, to wit, on, &c. last aforesaid, and on divers other days and times before the day next hereinafter mentioned, having applied to and requested the plaintiff to stay the proceedings of and in the said action, and to come to a settlement of the same, he, the defendant, on those several occasions acting on the behalf of the said Eliza Jung, the said Eliza Jung, to wit, on the 27th of July, 1847, caused to be sent and delivered to the defendant a certain painting or picture of hers, in frame, accompanied by a certain letter written by her the said Eliza Jung, to the defendant, whereby she informed the defendant that that letter would accompany a painting of hers, in frame, being a copy of the celebrated Murillo, of "The **[827]** Infant St. John and the Lamb," the original of which was in the National Gallery; that she had to request the defendant to use his best endeavours to find a purchaser for it at the price of forty guineas, or any sum beyond that, which he the defendant should think that she the said Eliza Jung ought to have for it, for, that she, the said Eliza Jung, was assured by good judges that she ought to have 50l. or 60l. for it; and that, if the said picture should be sold, the defendant should pay 40l. out of the purchase-money to the plaintiff, on her account; and that, in the meanwhile, the defendant should hold the said picture, not to be parted with to her the said Eliza Jung, or to any other person, except upon payment to the plaintiff of the said sum of 40l., or upon her the said Eliza Jung producing to the defendant the plaintiff's receipt for that amount; that she the said Eliza Jung sent the defendant a copy of that letter, and should feel much obliged if the defendant would do her the favour to write at the foot of such copy a few lines to the plaintiff, just to say that the picture above referred to had been by her the said Eliza Jung sent to the defendant, and that he the defendant consented to hold the same upon the terms mentioned in the letter of which the above was a copy, and, in the event of a sale, would pay over such sum as above directed,—as by the said letter of the said Eliza Jung would appear. Averment, that the defendant, then, to wit, on the day and year last aforesaid, accepted and received the said picture and letter into his possession, and thereupon, to wit, on the 28th of July, 1847, in pursuance of and in accordance and compliance with the said letter of the said Eliza Jung, and the said request therein in that behalf contained, the defendant wrote and addressed to the plaintiff a certain letter, in which he informed the plaintiff that he the defendant had received from the said Eliza Jung the said picture, and which he con-[828]-sented and agreed to hold upon the terms mentioned in the said letter of the said Eliza Jung to him the defendant,—of which letter he inclosed the plaintiff a copy,—until such time as a party, to be mutually agreed upon between the plaintiff and the defendant, could be met with, who would dispose thereof upon the terms mentioned in the said letter of the said Eliza Jung,—as by the said letter of the defendant would appear: that the plaintiff then, to wit, on the day and year last aforesaid, received the said letter so written and addressed to him by the defendant as aforesaid, and also the said copy of the said letter so written by the said Eliza Jung to the defendant as aforesaid: that thereupon, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiff, at the defendant's request, had then promised the defendant to accept, abide by, observe, and perform the terms and conditions in the defendant's said letter, and in the said letter of the said Eliza Jung, on his, the plaintiff's part to be accepted, abided by, observed, performed, and fulfilled, and would accept the said sum of 40l. out of the purchase-money of the said picture, when sold, in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung, and also of the costs of the said action so by him commenced against her as aforesaid, and also that he the plaintiff would then forthwith countermand the said notice of trial of the said action so depending against the said Eliza Jung as aforesaid, the defendant then promised the plaintiff to observe, perform, and fulfil the said terms and conditions in his said letter to the plaintiff, and in the said letter of the said Eliza Jung to him the defendant, contained on his, the defendant's, part to be observed, performed, and fulfilled; that, although, after the making of the defendant's said promise, he, the plaintiff, relying upon the said promise [829] of the defendant, and confiding therein, did, to wit, on the 29th of July, 1847, countermand his said notice of trial in the said action against the said Eliza Jung, and stayed the proceedings therein; and although, after the making of the defendant's said promise, and before such time as a party, to be mutually agreed upon between the plaintiff and the defendant, could be met with, who would dispose of the said picture on the terms of the said letter of the said Eliza Jung, and before the commencement of this suit, a reasonable time for the defendant to use his best endeavours to find a purchaser for the said picture, at the price of forty guineas, elapsed; and although the plaintiff had always been ready and willing to accept and receive the said sum of 40l. out of the purchase-money thereof, in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung, and of the said costs of the said action,—whereof the defendant had continually had notice: yet the defendant, disregarding his said promise, did not nor would, within such reasonable time as aforesaid, use his best endeavours, or any endeavour whatever, to find a purchaser for the said picture, at the said price of forty guineas, or any other price whatever, but had wholly neglected and refused so to do; and although, after the making of the defendant's said promise, and within a reasonable time in that behalf, he, the plaintiff, was ready and willing to agree with the defendant upon a party who would dispose of the said picture upon the terms of the said letters and the defendant's said promise,—of which the defendant, within such reasonable time as last aforesaid, had due notice; and although the plaintiff did, within such reasonable time as last aforesaid, to wit, on the day and year last aforesaid, nominate and appoint certain persons, to wit, Messrs. Christie & Manson, of, &c., auctioneers, to dispose of the said picture, the [830] last-mentioned persons being fit and proper persons in that behalf, and ready and willing to dispose of the same,—of all which the defendant then had due notice, and was then requested by the plaintiff to agree upon the said persons so by him nominated and appointed as aforesaid; and although a reasonable time for his, the defendant's, so agreeing as last aforesaid, or himself nominating some other fit and proper person to dispose of the said picture according to the terms aforesaid, and his said promise, had elapsed before the commencement of this suit: yet the defendant did not nor would agree upon the said persons so by the plaintiff nominated and appointed as aforesaid to dispose of the said picture as aforesaid, nor did nor would the defendant nominate or appoint, nor had he nominated or appointed, any other person or persons whatever to dispose of the said picture, but had wholly neglected and refused so to do, and the said picture had, in consequence of the defendant's said breach of promise, remained, and still did remain, in the defendant's possession, undisposed of; whereby the plaintiff had not only lost the said sum of 40l. so to be paid to him out of the purchase-money of the said picture if and when the same had been so disposed of according to the defendant's said promise, but he the plaintiff had also, by reason of the premises, and of his relying upon and confiding in the defendant's said promise, been hindered and delayed in his said action against the said Eliza Jung, and had also been put to unnecessary costs, charges, and expenses in the said action, in and about countermanding the said notice of trial, and otherwise; and the plaintiff had also been unavoidably put to great costs, charges, and expenses, to wit, amounting to 50l., in and about performing his, the plaintiff's, part of the said terms and conditions in the said letters contained, and in and about performing, and endeavouring to perform, his **[831]** said promise, and also in and about endeavouring to compel the defendant to observe, fulfil, and perform his said promise, and otherwise in and about the premises, &c.

The defendant, who was under terms to plead issuably, pleaded, amongst other pleas, the following:—

That, after the making of the alleged agreement between the plaintiff and the defendant, and after the alleged countermand of notice of trial in the said action against the said Eliza Jung in the declaration mentioned, and whilst the said action was still pending and undetermined, the plaintiff further continued the proceedings in the said action against the said Eliza Jung, and then, to wit, on the 1st of March, 1848, gave a further notice of trial to the said Eliza Jung, of the said issue so joined in the said action, for the then next assizes to be holden at Kingston, in and for the county of Surrey; without this that the plaintiff stayed the proceedings in the said action, in manner and form as in the declaration alleged,—concluding to the country.

The plaintiff, treating this as a non-issuable plea, signed judgment.

Hugh Hill, on a former day in this term, obtained a rule nisi to set aside the judgment for irregularity.

Bovill now shewed cause. The plea in question is a special traverse of the allegation in the declaration that the plaintiff stayed the proceedings in the action against Eliza Jung. There was no express stipulation on the plaintiff's part that the proceedings should be absolutely stayed: and, if any such stipulation was to be implied from the terms of the agreement, the staying the proceedings was not a condition precedent; the omission to stay them could only go to part of the consideration, and might possibly render the plaintiff **[832]** liable to a cross action. In *Stavers* v. *Curling* (3 N. C. 355, 3 Scott, 740), it is said by this court, that "the rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the contract, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention, has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie* v. *Atkinson* (10 East, 295), to be this,—'that, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.'" The defendant's liability to perform his agreement arose immediately on the countermand of notice of trial in the action against Mrs. Jung. The alleged continuance of the proceedings by the plaintiff, might have been long after the breach of the undertaking by the present defendant.

Hugh Hill, in support of the rule. The plaintiff, in his declaration, alleges that he did stay the proceedings in the action against Eliza Jung. The declaration would clearly have been bad, unless it had expressly or impliedly alleged an absolute stay of the proceedings: staying the proceedings for an uncertain time, or for a little time, would be no consideration. The plea objected to is a mere traverse of that allegation. In **[833]** *Zulueta* v. *Miller* (ante, vol. ii. p. 895), it was held that a plea framed fairly to raise the question whether the action is not rendered unmaintainable by reason of the non-performance of an alleged condition precedent, is an issuable plea.

Wilde, C. J. The court is of opinion that the question raised by this plea is one which it is competent to the defendant to raise upon the record, and that the plaintiff was not justified in treating it as a non-issuable plea, and signing judgment as for want of a plea. It is not a plea that is palpably pleaded for delay, or without pretence.

We, however, offer no opinion as to the validity of the plea. The rule for setting aside the judgment must be made absolute, the costs being costs in the cause.

Rule absolute accordingly.

June 19.—The above plea was afterwards withdrawn, under a judge's order, and the following plea substituted:—

"And, for a further plea in this behalf as to the breach of promise first above assigned, the defendant says that the plaintiff was not ready and willing to accept and receive the said sum of 40l. out of the purchase-money for the said picture, in manner and form as in the declaration is alleged; and of this the defendant puts himself upon the country."

The plaintiff demurred specially to this plea, assigning for causes, amongst others, that it traversed an immaterial allegation of the declaration; that the plaintiff's readiness and willingness to accept the sum of 40l. out of the purchase-money of the said picture formed no condition precedent or concurrent to the [834] performance by the defendant of his express promise to use his best endeavours to find a purchaser for the said picture; that, until the purchase-money of the said picture was realised, the plaintiff's readiness and willingness to accept the said sum of 40l. out of it, was a state of things which could not exist, since the plaintiff could not be ready and willing to accept 40l. out of a non-existing sum, and an inquiry into the plaintiff's state of mind on the subject was wholly beside the question; and that the plea traversed only a part of the consideration for the defendant's promise.

The defendant joined in demurrer; and the argument took place at the sittings after Trinity term, 1849, before Maule, J., Cresswell, J., and V. Williams, J.

Needham, in support of the demurrer. The plea traverses an allegation that is totally immaterial. Until the picture was sold, there was no duty on the defendant to pay, or upon the plaintiff to receive, the stipulated sum. The declaration would have been perfectly good without the averment of readiness and willingness. Thus, in *Wilks* v. *Smith* (10 M. & W. 355, 2 Dowl. N. S. 215), a declaration alleging, that, by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120l., which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5l. per cent. half-yearly until paid, and averring that the four years had not expired, that the 120l. had not been paid, and that 12l. had become due for interest,—was held good, for, that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready [835] and willing to convey it: "It is enough," said Parke, B., "if he is ready and able to convey at the time when the title is to be made out." So, here, it was enough if the plaintiff was ready and willing to receive the 40l. when the defendant had put himself in a position to pay it, and had actually offered it. The acceptance by the plaintiff of the 40l. is a condition subsequent, the performance of which need not be averred: Comyns's Digest (title Pleader (C. 51)-(C. 55)). *Lacy* v. *Lacy* (Cro. Eliz. 249) very closely resembles the present case. There, the plaintiff declared in assumpsit, that whereas the defendant was possessed of a lease for years, the reversion to the Queen, in consideration of 10l. paid by the plaintiff to him in hand, and of 10l. to be paid to him upon the procuring of a new lease to the plaintiff, the defendant did promise to surrender his lease, and to procure a new lease to the plaintiff before the end of Trinity term: and that he had not performed it. Upon non assumpsit pleaded, it was found for the plaintiff. And it was said, in arrest of judgment, that the declaration was not good, "because he did not allege he was ready to pay the other 10l. at the end of Trinity term. Sed non alloeatur; for, it was not to be paid till the defendant procured the lease, so he was to do the first act." And the plaintiff had judgment. In *Giles* v. *Giles* (9 Q. B. 164), the declaration stated, that, by agreement between the plaintiff and defendant, two brothers, the defendant, in consideration of natural affection, and for other considerations him moving, agreed to permit the plaintiff to occupy lands of the defendant to the 29th of September, the plaintiff paying a sum named as rent on that day, as he thereby agreed to do, and then to deliver up the premises to the defendant; and, upon [836] the plaintiff so quitting the premises, paying the rent, and releasing the defendant from all claims under their father's will, and quitting claim to all lands which were of the father,—which the plaintiff agreed to do,—the defendant would pay the plaintiff 200l., with interest from the 29th of September: and it was agreed that all deeds and releases to be required by defendant, should be prepared by his attorney at his expense. The declaration, after averring mutual promises, alleged that the plaintiff, on the 29th of September, was ready and willing to deliver up the premises to the defendant, and to pay the rent, and was at all times from the making of the agreement ready and willing to release, &c.; and that, although the 29th of September, and a reasonable time from thence for the payment of the 200l. had elapsed, and no release was prepared by the defendant's attorney, the defendant had not paid the 200l. with interest. And a plea traversing the plaintiff's readiness and willingness to release, was held bad on special demurrer. [V. Williams, J. It is laying it down too broadly to say that readiness and willingness need not be averred, where the first act is to be done by the other party.] Readiness and willingness is immaterial, until such time as the duty of performing the act is cast upon the party.

Farrer, contrà. The plea is good. The allegation traversed by it, is a continuously concurrent condition. The defendant is in the situation of a trustee. He undertakes to keep the picture, and to use his best endeavours to find a purchaser for it, paying to the plaintiff 40l. out of the purchase-money. The readiness and willingness of the plaintiff to receive the 40l. was important, in this, that, if he did any act to shew that he would not accept the 40l. if offered to him, he would thereby discharge the defendant from the per-**[837]**-formance of his part of the contract. Suppose, for instance, he had given the defendant notice that he was going on with the action against Eliza Jung, that clearly would have discharged the defendant. If any state of things may be assumed in which the plaintiff's readiness, and willingness to receive the 40l. might be material, the plea is a good one. The defendant is not the person to do the first act. The plaintiff is to countermand the notice of trial, and stay the proceedings, before any act is to be done by the defendant.

Needham was not heard in reply.

Maule, J. This is a decidedly bad plea. The declaration alleges that the plaintiff undertook to use his best endeavours to find a purchaser for a certain picture which had been deposited with him, and to pay to the plaintiff 40l. out of the purchase-money, in discharge of certain claims which the plaintiff had against one Eliza Jung; and it then avers that the plaintiff performed the agreement in all things on his part to be performed, and that he had always been ready and willing to accept and receive the said sum of 40l. out of the purchase-money of the picture, in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung; and assigned for breach, that the defendant did not use his best or any endeavours to find a purchaser for the picture. The plea traverses the allegation of the plaintiff's readiness and willingness to receive the 40l.; and the question is whether that is a material and traversable allegation. I am clearly of opinion that it is not. By the terms of the agreement, there are two acts to be done by the defendant, viz. the sale of the picture, and the payment of 40l. to the plaintiff. All that the plaintiff is to do is, to receive the money when offered to him. He unnecessarily **[838]** avers in his declaration, that, if the money had been forthcoming, he would have accepted it. That is a mere allegation of something that is floating in his mind. His readiness and willingness to receive the money could not be material until it was offered to him. Whether he was ready and willing, or not, the duty of the defendant was still the same. The plaintiff might have accepted the money when offered, however unwilling he might have been before. The allegation was an idle one, and not a fit subject for a traverse.

Cresswell, J., and V. Williams J., concurring,

Judgment for the plaintiff.

[839] Richards v. The London, Brighton, and South Coast Railway. May 6, 1849.

[S. C. 6 Railw. Cas. 49; 18 L. J. C. P. 251; 13 Jur. 986. Applied, *Butcher* v. *London and South Western Railway*, 1855, 16 C. B. 22. Commented on, *Stewart* v. *London and North Western Railway*, 1864, 3 H. & C. 139. Referred to, *Talley* v. *Great Western Railway*, 1870, L. R. 6 C. P. 50. Adopted, *Cohen* v. *South Eastern Railway Company*, 1876, 1 Ex. D. 222. Commented on, *Bergheim* v. *Great Eastern Railway*, 1878, 3 C. P. D. 226. Referred to, *Patscheider* v. *Great Western Railway*, 1878, 3 Ex. D. 156. Approved, *Great Western Railway* v. *Bunch*, 1888, 13 App. Cas. 42.]

Where a railway company employ porters at their stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty.—In case against a railway company for the loss of a package, the first count of the declaration stated that the defendants were the owners and proprietors of a railway for the carriage and conveyance of passengers and their luggage, &c., from A. to B., for hire; that the defendants were common carriers for hire in and upon the said railway; that the wife of the plaintiff, at their request, became a passenger in and upon the railway, to be carried and conveyed therein and thereby from A. to B., together with her luggage, consisting of a dressing-case, &c., also to be carried and conveyed by the defendants as such carriers in and upon the railway from A. to B., and there, to wit, at the station or terminus at B., safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach alleged was, that the defendants, not regarding their duty, did not use due and proper care in and about the carriage and conveyance of the dressing-case from A. to B., but took so little and such bad care in and about the carrying and conveying the same, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the dressing-case was lost.—It was proved that the plaintiff's wife became a passenger by a first-class carriage, to be conveyed from A. to B.; that the dressing-case was placed in the carriage, under the seat; that, on the arrival of the train at B., the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway carriage to the hackney-carriage which was to convey her to her residence; and that, on her arrival there, the dressing-case was missing:—Held, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney-carriage; and that the evidence entitled the plaintiff to a verdict upon the first count.

This was an action upon the case against the London, Brighton, and South Coast Railway Company for the loss of a dressing-case containing certain articles of jewellery belonging to the plaintiff.

The first count of the declaration stated that the defendants, before and at the time of the delivery of the dressing-case, goods, and chattels to them, and the committing of the grievances as thereinafter next mentioned, were the owners and proprietors of a certain railway, to wit, a railway from a certain place or rail-[840]-way station called Woodgate Station, in the county of Sussex, to a certain railway-station or terminus of the defendants in the borough of Southwark, in the county of Surrey, and of certain engines and carriages used by them for the carriage and conveyance therein and thereon of passengers and their luggage, and of goods and chattels, in, upon and along the said railway from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and from the said station or terminus at Southwark aforesaid to Woodgate Station aforesaid, for hire and reward to them the defendants in that behalf, and the defendants were during all the time aforesaid common carriers for hire in and upon the railway aforesaid, and between the places aforesaid; that the defendants being such owners and proprietors as aforesaid of the said railway, and the said engines and carriages, for the purpose aforesaid, and such common carriers as aforesaid, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, one Charlotte Susanna Richards, the wife of the plaintiff, at the request of the defendants, became and was a passenger in, upon, and along the said railway of the defendants, and the defendants then received into one of their said carriages in and upon their said railway the said Charlotte Susanna, as a passenger in, upon, and along the said railway, to be carried and conveyed therein and thereby from Woodgate Station aforesaid, to the said station or terminus at Southwark aforesaid, together with the luggage, consisting of a certain dressing-case, and certain other goods and chattels of the plaintiff, to wit, 100 rings, 100 broaches, 10 watches, 10 chains, 20 seals, 50 ear-rings, 20 necklaces, 20 bracelets, 100 studs, 100 buttons, 20 buckles, 20 trinkets, and 100 other articles of jewellery, of great value, to wit, of the value of 200l., also to be carried and conveyed by the defendants, as such carriers as aforesaid, [841] in, upon, and along the said railway from Woodgate Station aforesaid, to the said station or terminus at Southwark aforesaid, and there, to wit, at the said station or terminus at Southwark aforesaid, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf. Yet that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the said dressing-case, goods, and chattels of the plaintiff from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, but took so little and such bad care in and about the carrying and conveying of the said dressing-case, goods, and chattels, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the said dressing-case, goods, and chattels, being of the value aforesaid, then became and were wholly lost to the plaintiff.

The second count stated, that the defendants, theretofore, and before and at the time of the delivery to them of the dressing-case, goods, and chattels in that count mentioned, and of the committing of the grievances as thereinafter next mentioned, were the owners and proprietors of a certain railway, railway-station, offices, and buildings, in the borough of Southwark and county of Surrey, and of certain engines and carriages used by them for the carriage and conveyance of passengers, goods, and chattels, in, upon, and along their said railway, called the London, Brighton, and South Coast Railway, which said railway terminated at one end thereof at the station aforesaid; that the defendants were during all the time aforesaid common carriers for hire from all parts of their said railway to that or those part or parts of their said station, offices, and buildings where hackney cabs and carriages are used and accustomed, by the licence and permission of the defendants, **[842]** to come and ply for hire; that the defendants, being such common carriers as aforesaid, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, then received and accepted as such carriers of and from the plaintiff, and the plaintiff then delivered to the defendants as such common carriers as aforesaid, a certain dressing-case and certain other goods and chattels of the plaintiff, to wit, of the like number, quantity, quality, and description as the said goods and chattels in the said first count mentioned, and of great value, to wit, of the value of 200l., to be safely and securely carried and conveyed by them the defendants, as such carriers, from a certain carriage of the defendants, then being in and upon their said railway, and at the terminus of the said railway, and within the said station, offices, and buildings, to a certain other part of the said station, offices, and buildings, being the part of the said station where hackney cabs and carriages were so used and accustomed as aforesaid to come and ply as aforesaid, and to a certain hackney-carriage then and there plying and being within the said station, offices, and buildings, by the leave, licence, and permission of the defendants, and then and there engaged and hired for and by the plaintiff, and then and there, to wit, at the said other last-mentioned part of the said station, and at the said hackney-carriage there being, to be safely and securely delivered for the plaintiff: yet that the defendants, disregarding their duty in that behalf, did not use due or proper diligence and care in and about the said carrying, conveying, and delivering the said dressing-case, goods, and chattels of the plaintiff in that count mentioned, but, on the contrary thereof, took so little and such bad care in and about the said carrying, conveying, and delivering the said last-mentioned dressing-case, goods, and chattels of and for the plaintiff, that, by and through the care-**[843]**-lessness, negligence, and improper conduct of the defendants in the premises, the said last-mentioned dressing-case, goods, and chattels, being of the value aforesaid, then became and were wholly lost to the plaintiff.

The third count stated that the plaintiff, at the request of the defendants, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiff, a certain dressing-case and certain other goods and chattels of the plaintiff, to wit, of the like number, quantity, quality, and description as the goods and chattels in the first count mentioned, and of great value, to wit, of the value of 200l., to be taken care of, and carried and conveyed by the defendants from a certain carriage of the defendants at the terminus of the said railway, and within the precincts of a certain railway-station of the defendants, situate and being in the borough of Southwark and county of Surrey, to a certain hackney-carriage then and there being and plying for hire, in another part, and within the precincts, of the said station, by and with the permission and licence of the defendants, and there, to wit, at the hackney-carriage aforesaid, to be safely and securely delivered by the defendants for the plaintiff; that thereupon it then became and was the duty of the defendants to take due and reasonable care of the said last-mentioned dressing-case, goods, and chattels, whilst they so had charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the carrying, conveying, and delivering thereof as aforesaid: yet that the defendants, not regarding their duty in that behalf, did not take due or reasonable care of the said dressing-case, goods, and chattels in that count mentioned, whilst they had the charge thereof for the purposes aforesaid, nor did they take due or **[844]** reasonable care in and about the conveyance and delivery thereof as aforesaid, but, on the contrary thereof, the defendants, whilst they had the charge of the said dressing-case, goods, and chattels in that count mentioned, for the purposes aforesaid, took so little and such bad and improper care of the said dressing-case, goods, and chattels in that count mentioned, and such bad and unreasonable care in and about the carriage, conveyance, and delivery of the same as aforesaid, and so carelessly and negligently conducted themselves in the premises, that the said dressing-case, goods, and chattels in that count mentioned, being of the value aforesaid, became and were wholly lost to the plaintiff,—to the damage of the plaintiff of 200l., &c.

The defendants pleaded,—first, not guilty, to the whole declaration.

Secondly,—to the first count,—that they were not the owners or proprietors of the said railway, engines, or carriages, or common carriers for hire, as in that count was alleged; concluding to the country.

Thirdly,—to the first count,—that the said Charlotte Susanna Richards did not become, nor was she, nor did the defendants receive her, as such passenger as in that count was mentioned, together with her said luggage, consisting of the said dressing-case and other goods and chattels therein also mentioned, or any part thereof, to be respectively carried or conveyed or delivered as therein was alleged; concluding to the country.

Fourthly,—to the first count, except so far as related to the dressing-case therein mentioned,—that the whole of the said other goods and chattels of the plaintiff therein mentioned, at the time they were received by the defendants as and for the purposes therein also mentioned, were comprised and contained in the said dressing-case, and together therewith formed one parcel, and that the same were so received by the defendants **[845]** after the passing of a certain act of parliament made and passed at the session of parliament holden at Westminster, in the 11th year of the reign of King George the Fourth, and the 1st year of the reign of the late King William the Fourth, intituled "An act for the more effectual protection of mail-contractors, stage-coach proprietors, and other common carriers for hire against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof;" and that, before and at the time when the defendants so as aforesaid received the said other goods and chattels of the plaintiff, they the defendants were common carriers of goods by land for hire, by certain public conveyances, to wit, the said carriages in the said first count mentioned, in and upon the said railway, and between the places therein in that behalf also mentioned; and that they so received the said goods and chattels of the plaintiff, as such carriers, for the purposes aforesaid; that the said goods and chattels of the plaintiff in the said first count mentioned, consisted of, and then were, articles and property of the descriptions following, or some or one of such descriptions (*a*), that is to say, gold or silver in a manufactured state, precious stones, jewellery, a watch, trinkets, gold or silver plate, and that the value thereof then and always since exceeded the sum of 10l.; that, before the said time when the defendants so received the said other goods and chattels of the plaintiff for the purposes aforesaid, they the defendants had, in pursuance of and according to the said act of parliament, notified, by a notice affixed, in legible characters, in a public and conspicuous part of the said railway station called Woodgate Station, in the **[846]** said first count mentioned (the same station before that time and then being a receiving-house where parcels and packages then were and still are received by them, the defendants, for the purpose of conveyance, and also the receiving-house where the said other goods and chattels of the plaintiff were received by them for the purposes aforesaid), an increased rate of charge demanded by them for the carriage of articles and property of the description above specified, exceeding the value of 10l., and in which said notice was then and there

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(*a*) See *Smith* v. *The London, Brighton, and South Coast Railway Company*, ante, p. 782.

stated and set forth in such legible characters as aforesaid, the increased rates of charges required by them, the defendants, to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of, amongst other things, valuable articles of any of the descriptions above mentioned and specified; and that, at the time of the delivery to and receipt by them as aforesaid of the said dressing-case with the contents thereof (being the said other goods and chattels of the plaintiff in the said first count mentioned, and articles and property of some or one of the descriptions aforesaid, and of a value exceeding the sum of 10l.), neither the value nor nature of the said other goods and chattels of the plaintiff was then, or at any other time declared by him, or by the person sending or delivering the same to the defendants, to the person receiving the same on their behalf, nor was the said increased rate of charge, so notified by and stated and set forth in the said notice as aforesaid, or any increased rate of charge over and above the ordinary rate of carriage, or any engagement to pay the same respectively, then, or at any other time, offered to or accepted by the defendants, or by the person receiving the same goods and chattels for the purposes aforesaid, or by any other person and persons on behalf of the defendants—verification.

Fifthly,—to the second count,—that the defendants **[847]** were not the owners or proprietors of the said railway, railway-station, offices, or buildings, engines, or carriages, or common carriers for hire, as in that count was alleged; concluding to the country.

Sixthly,—to the second count,—that the defendants did not receive or accept of and from the plaintiff, nor did the plaintiff deliver to them, the said dressing-case and other goods and chattels in that count mentioned, or any of them, or any part thereof, to be carried, conveyed, or delivered, as in that count was alleged; concluding to the country.

Seventhly,—to the second count,—the same as the fourth plea.

Eighthly,—to the third count,—that the plaintiff did not cause to be delivered to the defendants, nor did the defendants accept or receive of and from the plaintiff, the said dressing-case and other goods and chattels in that count mentioned, or any of them, or any part thereof, for the purposes therein above mentioned, or any or either of them; concluding to the country.

Ninthly,—to the third count,—the same as the fourth plea.

The plaintiff joined issue on the first, second, third, fifth, sixth, and eighth pleas, and replied de injuriâ to the fourth, seventh, and ninth pleas respectively; whereupon issue was joined.

The cause was tried before Wilde, C. J., at the sittings in London, after Hilary term, 1848. The facts were as follows: On the 10th of November, 1846, Mrs. Richards, the wife of the plaintiff, accompanied by a female servant, took places for London in a first-class carriage on the London, Brighton, and South Coast Railway, at the Woodgate Station, near Bognor, in Sussex, bringing with them a considerable quantity of luggage, which was weighed, and the excess beyond the quantity allowed to first-class passengers paid for. On their **[848]** arrival at the terminus at London Bridge, the lady who was an invalid, was assisted to a hackney-coach, into and upon which the luggage was placed by certain porters of the company, who, upon the maid attempting to remove the small articles from the railway carriage to the coach, desired her not to trouble herself, as they would see to the luggage. Upon reaching the residence of Colonel Richards, in Cambridge Terrace, Edgeware Road, it was for the first time discovered that part of the luggage, viz. a dressing-case, containing trinkets and jewellery, which had been placed by the driver of the fly which contained Mrs. Richards and her servant from Bognor to the Woodgate Station, under the seat of the railway carriage, was missing; and, notwithstanding the most searching inquiry, no trace of it could be discovered.

On the part of the defendants, it was insisted that the dressing-case in question, and its contents, never came into their custody, and, consequently, that they were not responsible for the loss; and that, if the defendants ever did receive the articles, they were exempted from liability under the carriers' act 11 G. 4 & 1 W. 4, c. 68 (vide ante, p. 784 (*a*)), the 1st section of which protects common carriers from liability for the loss of articles of the description mentioned in the declaration, unless specified and paid for accordingly.

His lordship left it to the jury to say whether the defendants had received the dressing-case into their custody for the purpose of conveying and delivering it, and whether they had performed that contract.

The jury returned a verdict for the plaintiff, damages 150l.

Talfourd, Serjt., pursuant to leave reserved to him, in Easter term last, obtained a rule nisi to enter a verdict [849] for the defendants, upon the grounds urged at the trial.

Byles, Serjt., and Bovill, now shewed cause. The first question is, whether there was any evidence to go to the jury, that the defendants became responsible at all for the safe conveyance and delivery of the dressing-case. The main reliance of the defendants at the trial was, that it appeared to have been placed in the railway carriage by the driver of the fly which brought Mrs. Richards from Bognor to the Woodgate Station, and not by any servant of the company. To render the defendants liable, it was not necessary that the article should have actually come into the possession of one of their servants, or even that it should have been seen by them. [Cresswell, J. Suppose, as was suggested when the rule was moved for, the passenger puts the thing in his pocket, and his pocket is picked?] The case is not ad idem: and it might be said that an article in the pocket of a passenger, has the peculiar protection of the person. An inn-keeper is responsible for the safe custody of goods of a guest, although he does not know the guest has them, and although the key of the chamber in which they were placed has been given up to the guest; *Calye's case* (8 Co. Rep. 32 a.). There are many cases where it has been held that a stage-coach proprietor is responsible for the loss of a passenger's luggage, though it were under the passenger's own eye. Thus, in *Robinson* v. *Dunmore* (2 Bos. & Pull. 416), it was held, that, if A. sends goods by B., who says "I will warrant that they shall go safe," B. is liable for any damage sustained by the goods, notwithstanding A. sends one of his own servants in B.'s cart to look after them. Chambre, J., there says: "This is a very clear case. The defendant [850] is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case: the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him, and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that, if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. In this case, the plaintiff, for greater caution, sends his servant with the goods, who pays for watching them, because he apprehends danger of their being stolen. So, the man who travels in a stage has some care of his own property, since it is more for his interest that the property should not be lost, than that he should have an action against the carrier."

Then, are the three counts, or is either of them, proved? The first count states that the defendants are owners of the railway and carriages, and common carriers thereon for hire between Woodgate Station and the terminus at Southwark; that Mrs. Richards at their request became a passenger in and upon the railway, to be carried and conveyed therein from Woodgate Station to the terminus at Southwark, together with her luggage, consisting of (amongst other things) a dressing-case, also to be carried and conveyed by the defendants, as such carriers, in and upon the railway, from Woodgate Station to the terminus at Southwark, and there, to wit, at the terminus at Southwark, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach assigned is, that the defendants did not use due and [851] proper care in and about the carriage and conveyance of the dressing-case from Woodgate Station to the terminus at Southwark, and so the same was lost; or, in other words, that the defendants failed to perform their contract safely to carry and deliver the dressing-case. The words "to" and "from" are sometimes exclusive, and sometimes inclusive: *Pim* v. *Curell* (6 M. & W. 234); *The North and South Shields Ferry Company* v. *Barker* (2 Exch. 136). The breach here means that the defendants did not carry and convey the luggage to the terminus, according to the duty before alleged. The transit was not ended on the arrival of the train at the terminus: it continued until the luggage was delivered to the owner or placed in the hackney-carriage. In *Bourne* v. *Gatliffe*, goods were brought from Belfast under a bill of lading making them deliverable to the consignee at the port of London. On the arrival of the vessel, the goods were landed at Fenning's Wharf, where they were on the same night destroyed by an accidental fire. In an action against the ship-owners for non-delivery of the goods, it was insisted, on the part of the defendants, at the trial, that a delivery of the goods upon Fenning's Wharf was in point of law a sufficient delivery. The learned judge, however, declined so to direct the jury, and the Exchequer Chamber, upon the argument of a bill of exceptions, upheld that ruling (*c*): and the House of Lords confirmed their decision (7 M. & G. 850, 8 Scott, N. R. 604). [Cresswell, J. There, the breach was, non-delivery of the goods: it differs from the present case.] There is sometimes a great degree of nicety in ascertaining when the duty of the carrier is at an end. In Story on Bailments (§§ 538, 539), it is **[852]** said, that, "as soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility, as such, ceases. If a carrier between A. and B. receives goods to be carried from A. to B., and thence to be forwarded by a distinct conveyance to C.; as soon as he arrives with the goods at B., and deposits them in his warehouse there, his responsibility as carrier ceases; for, that is the terminus of his duty as such. He then becomes, as to the goods, a mere warehouseman, undertaking for their further transportation." "And the like result would be, if the goods were destined to B. only, if it is not by the custom of the business the carrier's duty to deliver the goods to the consignees there, but simply to deposit them in the warehouse. But, if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by such a deposit; but he is chargeable for any loss with occurs, until an actual delivery to the party." An allegation that the defendant contracted to carry a parcel, or a passenger, from London to Bath, or to Blackheath, is supported by evidence of a contract to carry from Westminster to Bath or Blackheath: *Beckford* v. *Crutwell* (1 M. & Rob. 187), *Ditcham* v. *Chivis* (4 Bingh. 706, 1 M. & P. 735). [Cresswell, J. When the company contract to deliver the passenger and her luggage, where do they contract to deliver them?] Each at the usual place for the delivery of each. In *Walker* v. *Jackson* (10 M. & W. 161), a similar question to this arose in the case of a ferry, and it was held to be properly left as a question of usage. The declaration stated that the defendants were possessed of a ferry across the river Mersey, from Woodside to Liverpool, **[853]** and that the plaintiffs delivered to them certain goods, to wit, a phaeton, and certain jewellery and watches contained in it, to be by the defendants, for reward to them in that behalf, taken care of and carried in a certain steam-boat, from Woodside to Liverpool, and there landed for the plaintiffs; that the defendants accepted and received the said carriage so containing the said jewellery and watches from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, and landing of the same as aforesaid: and alleged for breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, and landing of the same, that they were injured. The defendants pleaded that the plaintiffs did not deliver to them, nor did they accept and receive from the plaintiffs, the goods in the declaration mentioned, to be by them carried and conveyed in the said steam-boat from Woodside to Liverpool, and there landed for the plaintiffs, for reward to them in that behalf, modo et formâ. And it was held, that a contract to carry and land the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry: but that it was a question for the jury whether there was in fact a contract between the parties, either express, or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river. The evidence was, that one of the plaintiffs went on board the defendant's steam-boat, with his horse and carriage, paying the defendants' charge for a "light four-wheeled phaeton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the **[854]** defendants. The carriage was taken safely across the river, and, on the arrival of the boat at the pier-head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but, in doing so, were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured. And it was held, that the

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(*c*) *Bourne* v. *Gatliffe*, 3 M. & G. 643, 3 Scott, N. R. 1.

plaintiff's right of action for this injury was not affected by their not having communicated the fact of the jewellery and watches being contained in the carriage; and that it was a further question for the jury (supposing a contract to land were established), whether the landing was complete under the above circumstances.

The second count alleges the defendants to be common carriers for hire, "from all parts of their said railway to that or those part or parts of their said station, offices, and buildings, where hackney-cabs and carriages are used and accustomed, by the licence and permission of the defendants, to come and ply for hire;" and it then proceeds to allege that the dressing-case in question was delivered to the defendants "to be safely and securely carried and conveyed by them the defendants, as such carriers, from a certain carriage of the defendants, then being in and upon their said railway, and at the terminus of the railway, and within the said station, offices, and buildings, to a certain other part of the said station, offices, and buildings, being the part of the said station where hackney-cabs and carriages were so used and accustomed as aforesaid to come and ply as aforesaid, and to a certain hackney-carriage then and there plying and being within the said station, offices, and buildings, by the leave, licence, and permission of the defendants, and then and there engaged and hired for and by the plaintiff, and then and there, to wit, at the said other last-mentioned part [855] of the said station, and at the said hackney-carriage there being, to be safely and securely delivered for the plaintiff:" and the count then alleges for breach the loss of the dressing-case through the defendants' negligence. It appeared in evidence that the company employ porters for the removal of passengers' luggage from the railway carriages to the carriages hired for their conveyance from the station. The company are clearly responsible for the negligence of their servants in the performance of this duty, according to the principle laid down in *Hyde* v. *The Trent and Mersey Navigation* (5 T. R. 389), *Muschamp* v. *The Lancaster and Preston Junction Railway Company* (8 M. & W. 421), *Pickford* v. *The Grand Junction Railway Company* (12 M. & W. 766), and *Machin* v. *The London and South-Western Railway Company* (2 Exch. 415, 17 Law Journ., N. S., Exch. 271).

The third count charges the defendants with that degree of responsibility which the law imposes upon gratuitous bailees. The evidence here was amply sufficient to justify the jury in finding the defendants guilty of such gross negligence as to charge them in that character.

Talfourd, Serjt., and Bramwell, in support of the rule. The dressing-case in question never was in the custody of the defendants as carriers at all. It was placed by the driver of the fly, at Woodgate Station, into the railway carriage, and there left under the special and immediate care of Mrs. Richards herself, or of her servant. The company, consequently, never incurred any responsibility whatever in respect of it. If the dressing-case was delivered to the defendants, it was delivered to them for the purpose of being conveyed to London, as alleged in the first count: and that [856] duty they had completely discharged at the moment the carriage arrived at the terminus in Southwark. They had then no further duty to perform towards the plaintiff's wife or her luggage. The cases referred to on the other side are altogether inapplicable to a state of facts like the present.

There was no evidence of any custom, or of any duty such as that alleged in the second count, viz. to carry the luggage of the passenger from the railway to the hackney-carriage. That which is done by the servants of the company in that respect, is mere courtesy or over officiousness on their part. Suppose the porters, in carrying the lady herself to the hackney-carriage, from inebriety or carelessness, had let her fall, and injured her, would the company have been responsible for that? A question somewhat analogous to this arose in *Cox* v. *The Midland Counties Railway Company* (18 Law Journ., N. S., Exch. 65), where it was held that it is not incident to the employment of a guard or superintendent of a railway station, to enter into a contract with a surgeon to attend a passenger injured by an accident on such railway, and therefore that the railway company are not liable to the surgeon for services rendered to such passenger under a contract so entered into. There must be some limit to the liability of the company for acts done by their servants beyond the ordinary scope of their authority.

As to the third count,—there was nothing to warrant the jury in finding the defendants guilty of gross negligence; as there might have been, if it could have been shewn that they knowingly employed persons to assist in removing luggage, whom they knew to be dishonest. [Cresswell, J. In *Bourne* v. *Gatliffe*, it was left to the jury to say whether a delivery of the goods **[857]** at Fenning's Wharf was a delivery according to the contract. Was any such question left here?] It was not. [Byles, Serjt. If any such question ought to have been left, it was the duty of the defendants to ask the judge so to leave it.]

Wilde, C. J. It appears to me that the plaintiff in this case has proved enough to entitle him to a verdict upon the first count, and therefore it is unnecessary to enter into any very minute consideration of the other two counts.

The first count alleges, that, on a certain day, one Charlotte Susanna Richards, the wife of the plaintiff, at the request of the defendants, became and was a passenger in, upon, and along the railway of the defendants, and the defendants then received into one of their said carriages in and upon their said railway the said Charlotte Susanna as a passenger in, upon, and along the said railway, to be carried and conveyed therein and thereby from Woodgate Station to the station or terminus at London Bridge, together with the luggage, consisting of a certain dressing-case and certain other goods and chattels, of the plaintiff, to wit, &c., of great value, &c., also to be carried and conveyed by the defendants, as such carriers as aforesaid, in, upon, and along the said railway, from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and there, to wit, at the said station or terminus at Southwark aforesaid, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf. That is the allegation of the defendant's duty: and the breach assigned is, that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the said dressing-case, goods, and chattels of the plaintiff, from Woodgate Station aforesaid to the said **[858]** station or terminus at Southwark aforesaid, but took so little and such bad care in and about the carrying and conveying of the said dressing-case, goods, and chattels, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the said dressing-case, goods, and chattels became and were lost to the plaintiff. The duty of common carriers, by the common law, is perfectly well understood: it is a warranty safely and securely to carry; whether they be guilty of negligence or not, is immaterial; the warranty is broken by the non-conveyance or non-delivery of the goods intrusted to them. The insertion in the count of superfluous matter will not affect the plaintiff's right to recover, provided a good cause of action is alleged and proved. It is not unusual, in actions for breach of warranty, to charge fraud. But that is altogether immaterial and unnecessary: it is enough to prove the warranty, and the breach or non-performance of it. The result upon the first count here is, that the plaintiff's wife was received by the company as a passenger, to be carried with her luggage from Woodgate Station and safely and securely delivered at the terminus in London; and that, by the improper conduct of the servants of the company, a part of the luggage was never delivered. Does that disclose a good cause of action? I am of opinion that it does, and that the defendants have shewn nothing which in point of law releases them from the general obligation which the law casts upon them. On the part of the defendants, it is contended that the goods were carried. But the allegation is, that they were received by the company to be carried and conveyed and delivered at the terminus in London; and they were not delivered. I think it was clearly established that the dressing-case was delivered to the company. The facts are simple. The lady comes to the station in a fly. The dressing-**[859]**-case is put into the carriage to be conveyed to London with her. Nothing is more common. No doubt this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence. Suppose a passenger to get into a carriage with a pocket-book in his pocket, and, on arriving at the terminus, to take it out of his pocket, and ask a porter to carry it to a cab; it may be, that, under such circumstances the company would not be responsible if the pocket-book were lost in the transit. Taking the case as denuded of any facts which could warrant any question of fraud being left to the jury, and there being no other circumstances to exonerate the company from the liability which ordinarily attaches to common carriers, it seems to me that the evidence sustains the first count; and that that count discloses a perfectly good cause of action, though accompanied by superfluous and unnecessary matter. The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference.

CRESSWELL, J.(a). I am of the same opinion. There was abundant evidence to shew that the dressing-case in question came into the custody of the defendants under such circumstance as to make them responsible for its safe conveyance and delivery. They could not be said to have fulfilled their contract without delivery: and, if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was [860] the sort of delivery the defendants took upon themselves to pay. In *Bourne* v. *Gatliffe*, a question arose as to the mode of delivery of goods brought into the port of London by steam-vessels: but that is quite beside the present case. The defendants here were bound to deliver Mrs. Richards's luggage. Did they do so? It seems to me that they did not. Their contract, therefore, was not performed. A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the King's enemies,—even though the jury expressly find that they were destroyed without any actual negligence in the defendant: for, a carrier is not in the nature of an insurer. This was laid down in *Forward* v. *Pittard* (1 T. R. 27), and *Garside* v. *The Trent Navigation* (4 T. R. 581); and it has never been disputed since. Here, there is in the first count an allegation, that, by and through the carelessness, negligence, and improper conduct of the defendants, the dressing-case and its contents became and were wholly lost to the plaintiff. That is, in substance, an allegation that the loss was occasioned by the default of the defendants, in not having performed what they were bound to do.

V. WILLIAMS, J. I am of the same opinion. Upon the facts proved, I think the defendants were clearly liable for the loss of the dressing-case in question. It was in their custody, as common carriers, at the time of the loss. I must confess I think the transit was at an end before the loss. I express no opinion as to whether or not the defendants could be compelled to do more than deliver the luggage on the platform. But, if the company choose to provide a more convenient mode of delivering luggage to passengers, by employing porters [861] to carry it across the platform, to the vehicles by which it is to be taken away, I think the liability as carriers continues until the porters have discharged their duty. I feel some difficulty in applying the facts to the pleadings. I do not think either the second or the third count made out. But I am not disposed to quarrel with the somewhat liberal view the rest of the court take as to the first count, or with the copious rejection of immaterial matter which they think themselves authorised to make. Upon the whole, I agree that the defendants failed to deliver the articles in question, within the terms of the first count.

Rule—Verdict for the plaintiff on the issues taken on the first count; for the defendants on all the other issues, except those upon the carriers' act.

HAMBER *v.* JAMES ROBERTS. May 8, 1849.

In an action by a messenger of the court of bankruptcy, against J. S., for fees due from him as petitioning-creditor under a fiat,—Held, that the plaintiff proved a primâ facie case, by putting in the proceedings under the fiat, without shewing the identity of the defendant with the J. S. named therein as the petitioning-creditor.—It is no ground for a new trial of an action before the secondary or under-sheriff, that the particulars of demand are not annexed to the writ of trial.

This was an action by a messenger of the court of bankruptcy, against a petitioning-creditor, for his fees. At the trial before the secondary of London, on the 2nd of May instant, it appeared from the proceedings under the fiat, which were put in, that the name of the petitioning-creditor was "James Roberts:" but it was objected, on the part of the defendant, that there were no particulars of demand annexed to the writ of trial; and, further, that, in the absence of some evidence [862] to identify him with the person so named, there was nothing to go to the jury.

The secondary, however, thought otherwise; and the jury returned a verdict for the plaintiff for the amount claimed.

(a) Coltman, J., not having heard the whole argument, took no part in the decision.

Prentice now moved for a new trial, on the ground of misdirection. There being no evidence to identify the defendant with the James Roberts whose name appeared on the proceedings as petitioning-creditor, there was nothing to go to the jury. [V. Williams, J., referred to *Sewell* v. *Evans*, and *Roden* v. *Ryde* (4 Q. B. 626), where it was held, that, to prove the execution by the defendant of an instrument on which he is sued, if it be shewn that such instrument is executed by a person bearing the defendant's name, it is not necessary to give evidence strictly identifying the person whose signature is proved, with the party on whom process has been served, unless facts appear which raise a doubt of the identity. Thus, in an action for goods sold against W. S. Evans, it appeared, that, about five years before action brought, W. S. Evans had been a customer, and had written a letter, acknowledging the receipt of the goods: the witness who proved these facts did not know whether the defendant was the same W. S. Evans; nor was any further evidence given of the fact: and it was held a sufficient primâ facie case. So, in an action against H. T. Ryde, as acceptor of a bill of exchange, it appeared that a H. T. Ryde had kept cash at the bank where the bill was made payable, and had drawn cheques, which the cashier had paid: the cashier knew the party's handwriting, by the cheques, and swore that the acceptance was in the same handwriting; but he had not paid any cheques for some time, did not **[863]** know the party personally, and could not further identify him with the defendant; and it was held a sufficient primâ facie case.] Here, there was no proof that the signature of the petitioning-creditor was in the handwriting of the defendant. In Roscoe on Evidence (6th edit. 208), it is laid down, on the authority of *Whitelocke* v. *Musgrove* (1 C. & M. 511), and *Jones* v. *Jones* (9 M. & W. 75), that, in an action against the acceptor of a bill of exchange, "some evidence of the identity of the defendant and the person who accepted the bill, is necessary, and it is not sufficient merely to prove that a person calling himself by the same name, accepted it." In *Jones* v. *Jones*, which was an action by an indorsee against the maker of a promissory-note, the defendant pleaded,—first, that he did not make the note, secondly, that he made it for the accommodation of the plaintiff: there was an attesting-witness to the note, who, on being called at the trial, stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that this was a common name in the neighbourhood where the note was made: and it was held that there was no evidence to go to the jury of the identity of the defendant with the maker of the note; and that the second plea could not be called in aid for that purpose. [Cresswell, J. *Greenshields* v. *Crawford* (9 M. & W. 314, 1 Dowl. N. S. 439) is rather at variance with *Jones* v. *Jones*. There, in an action by an indorsee against the acceptor of a bill of exchange, it appeared that the bill was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford:" it was proved that this signature was the handwriting of a gentleman **[864]** of that name, formerly a clerk in the East India House, who had left it five years before: and it was held that this was sufficient evidence of the identity of the defendant with the person whose handwriting was proved.] There, the bill was directed to a person at a particular place. [Cresswell, J. There was no proof that the defendant had ever been a clerk in the East India House.]

The particulars of demand were not annexed to the writ of trial, as the rule of court (Trinity term, 1 W. 4, r. 6) requires. [Wilde, C. J. The proper remedy for that was, to take out a summons to compel their annexation.] The defendant had no means of knowing that they were not there, until he appeared at the trial; inasmuch as the writ of trial only goes down on the day of trial. This is a clear irregularity; and there must be some mode of taking advantage of it.

Wilde, C. J. I think the evidence given on this occasion proved a primâ facie case: and I think it would be productive of much mischief to give rise to a doubt by granting a rule. The omission to annex the particulars of demand to the record, clearly is no ground of motion for a new trial.

The rest of the court concurring,

Rule refused.

[865] SHACKEL v. JOHNSON. May 8, 1849.

A defendant arrested on a capias under the 1 & 2 Vict. c. 110, deposited with the sheriff the amount indorsed, with 10l. for costs, pursuant to the 43 G. 3, c. 46, and shortly afterwards embarked with his family for Australia, without putting in bail above, or leaving any attorney or agent to act for him. The court granted the plaintiff a rule nisi for taking the money out of court, subject to any deduction from the 10l., upon taxation,—which rule was made absolute upon service by sticking up such rule nisi in the office.

The defendant having been arrested upon a capias issued under the 1 & 2 Vict. c. 110, indorsed for bail for 60l., in lieu of giving bail to the sheriff, deposited with the officer the sum of 60l., together with 10l. to answer costs, pursuant to the statute 43 G. 3, c. 46, which sums respectively had been paid into court. The time for putting in bail above having expired, and no bail having been put in,

Byles, Serjt., on a former day in this term, obtained a rule calling upon the defendant, "upon notice of the rule being given to him or his attorney, to shew cause why the several sums of 60l. for debt and 10l. for costs, paid by the defendant on his arrest in this action, into the hands of the sheriff of Kent, and by the said sheriff paid into the hands of the masters of this court, pursuant to the statute 43 G. 3, c. 46, should not be paid out of court to the plaintiff or to his attorney, the said defendant not having duly put in and perfected bail in this action,—such payment to be made subject to any deductions, if any, from the said sum of 10l. deposited and paid to answer the costs as aforesaid, as upon taxation of the plaintiff's costs, as well of the action as of this application, might be found reasonable." The affidavit upon which the motion was founded,—that of the plaintiff's attorney,—stated, that the only residence or dwelling-place of the defendant known to the deponent, was situate at Ealing, in the county of Middlesex, where the defendant lately carried on the business or profession of a surgeon, down to about the 23rd of [866] April last; that the deponent had been informed by Mr. J. T. of Ealing aforesaid, a neighbour of the defendant,—and verily believed such information to be true,—that the defendant had departed from his said residence at Ealing, and left this country, with his family, for Port Philip, in Australia; that the deponent had also been informed by Mr. J. A. of Gravesend, in the county of Kent, officer to the sheriff of Kent,—and verily believed such information to be true,—that the defendant left Gravesend, on board the ship "Medway," bound for Port Philip aforesaid, on the 27th of April last; and that the deponent did not know, nor did he believe, that the defendant had consulted or employed on his behalf, any attorney in this action.

Byles, Serjt., now moved to make the rule absolute,—no one appearing to shew cause,—upon an affidavit by the plaintiff's attorney, stating, that, on the 4th instant, he called at the late dwelling-house of the defendant, situate at Ealing, where the defendant had carried on his business of a surgeon, and there saw a Mr. G., who informed the deponent,—and which information the deponent believed to be true,—that he (Mr. G.) had bought the defendant's practice, that he (Mr. G.) believed the defendant was gone with his wife and family to settle at Port Philip, that the defendant had not any attorney that he had ever heard of, and that, in all the transactions between himself and the defendant, the latter had acted entirely for himself; that Mr. G. informed him, the deponent, that he did not know any body who was authorised to act for the defendant, and referred him to No. 16 Prince's Street, Cavendish Square, as a place where he might obtain some information respecting the defendant; that the deponent accordingly proceeded to No. 16 Prince's Street, Cavendish [867] Square, where he saw a lady, who informed him that the defendant had gone abroad to settle with his family, but said she knew of no attorney in England who was authorised to act for him, or take in any papers for him; that the deponent, on the same day, called at the office of the owner of the ship "Medway," and was informed by a clerk there, that the defendant was on board that vessel with his wife and family, that the vessel had left Gravesend about a week, and that he knew of no attorney or other person who acted for the defendant or took in any papers for him; that the deponent, on the same day, called at the office of the agents of the "Medway," where he obtained similar information; that the deponent did not know, nor did he believe, that the defendant had consulted or employed on his behalf any attorney in this action; that he had made diligent inquiries to find out some attorney or other person on whom he could serve the rule nisi, but without effect; and that he had, on the said 4th of May instant, stuck up a copy of the rule in the office of this court.

WILDE, C. J. It seems to me that the plaintiff has done all that he could reasonably be expected to do, to serve the rule, and therefore that he is entitled to have it made absolute.

The rest of the court concurring,

Rule absolute.

[868] JOHNSON *v.* WARD. May 8, 1849.

The affidavit to found a motion for a suggestion to deprive a plaintiff of costs under the county-courts act, 9 & 10 Vict. c. 95, s. 129, must allege with certainty and precision that the plaintiff did not, at the time of the commencement of the action, dwell more than twenty miles from the defendant.

This was an action of debt, tried before the under-sheriff of Middlesex, on the 12th of April last, when the plaintiff obtained a verdict for 12l.

Ball, on a former day in this term, obtained a rule nisi to enter a suggestion under the county-courts act, 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs, on the ground that the action was brought to recover a debt for which a plaint might have been levied in the Mary-le-bone county-court of Middlesex.

The affidavit on which the motion was founded, stated "that, before and at the time this action was brought, he, this deponent, dwelt at 33 John Street, Portland Town, in the county of Middlesex, within the district of Mary-le-bone, in the county of Middlesex, and within the jurisdiction of the Mary-le-bone county-court, holden under the provisions of the said act; and that the said cause of action arose wholly, or in some material point, within the jurisdiction of the said county-court of Mary-le-bone aforesaid; and that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles from this deponent (the defendant), that is to say, that the defendant dwelt at 33 John Street, Portland Town, in the county of Middlesex, and within twenty miles of the Mary-le-bone county-court as aforesaid:" and it then proceeded to negative the other exceptions in the act.

Joyce, who shewed cause, insisted that the affidavit was insufficient, inasmuch as it did not, in distinct and [869] positive terms, allege that the plaintiff dwelt within twenty miles from the defendant, so as to sustain an indictment for perjury if the fact were otherwise.

Ball, in support of his rule, submitted that there was a clear and positive statement in the affidavit, that, at the time of the commencement of the action "the plaintiff did not dwell more than twenty miles from the defendant," the rest being mere surplusage; and that, if the fact were that the plaintiff did reside more than twenty miles from the defendant, the deponent would not escape an indictment for perjury.

WILDE, C. J. I think, if you were his counsel, you would hardly consider you did him justice if you omitted to take the objection. It appears to me that the affidavit is clearly insufficient,

The rest of the court concurring,

Rule discharged (*a*).

End of Easter Term.

(*a*) And see *Dodd* v. *Wigley*, ante, p. 106; *Shiels* v. *Rait*, ante, p. 116.

Under the 13 & 14 Vict. c. 61,—the act for extending and amending the 9 & 10 Vict. c, 95,—it is no longer necessary for a defendant to move for a suggestion to deprive the plaintiff of costs.

The 11th section of that act enacts, "that, if, in any action commenced, after the passing of this act, in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20l., or if, in any action commenced, after the passing of this act, in any of Her Majesty's superior courts of record, in trespass,

[871] Cases Argued and Determined in the Court of Common Pleas, in Trinity Term, in the Twelfth Year of the Reign of Victoria.

The judges who usually sat in banco in this term, were Wilde, C. J., Coltman, J., Cresswell, J., V. Williams, J.

Coleman and Davis v. Biedman. May 22, 1849.

[S. C. 7 D. & L. 121.]

The payee of a promissory note, having paid the amount to the indorsees, on default of the maker, sued the latter in the names of the indorsees, but without any authority from them, and obtained a verdict. The defendant having paid the debt, the court, upon his application, stayed the proceedings, without costs on either side, and each party bearing his own costs of the rule.

This was an action upon a promissory note for 50l., made by Biedman, on the 31st of October, 1848, payable two months after date to one Marshall, or his order, and indorsed by Marshall to the plaintiffs.

The note having become due on the 3rd of January, 1849, and not being paid by Biedman, Marshall on the 4th paid 45l., on account, to the plaintiffs; and on the 8th Biedman paid to the plaintiffs 35l.; whereupon [872] the plaintiffs handed over the note to Marshall, together with 30l.

On the 24th of January, Marshall caused a writ to be issued against Biedman, in the names of the plaintiffs, to recover the balance due upon the note. The defendant pleaded to the action,—first, that he did not make the note,—secondly, payment. The cause was tried at the last assizes at Hertford, when a verdict was found for the plaintiffs for 15l. 2s. 6d. debt, damages 1s., costs 40s., and a certificate was given for speedy execution for the debt, which was accordingly paid.

Bovill, in the last term, on behalf of the defendant, obtained a rule calling upon Marshall, and his attorney, Lewis, to shew cause why all further proceedings in the action should not be stayed, and why Marshall and his attorney, or one of them, should not pay to the defendant his costs of the action and of this application, as

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trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5l., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs; nor shall any such plain-[870]-tiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise."

The 12th section provides and enacts, "that, if the plaintiff shall, in any such action as aforesaid, recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county-court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs, that he would have had if this act had not been passed."

And the 13th section provides and enacts, "that, if, in any such action, whether there be a verdict in such action or not, the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the recited act [9 & 10 Vict. c. 95], or for which no plaint could have been entered in any such county-court, or that the said cause was removed from a county-court by certiorari, then, and in any of such cases, the court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed."

between attorney and client. The motion was founded upon affidavits, shewing that the action had been brought by Marshall in the names of Coleman and Davis, without their authority or sanction.

Byles, Serjt., for Marshall, produced an affidavit shewing that Marshall had some ground for believing that he had the authority of Davis for bringing the action in the names of Coleman and Davis. He submitted that Marshall, not being a party to the record, or an attorney of this court, the court had no jurisdiction to fix him with costs. [Wilde, C. J. If a party assumes to sue out the process of the court in the name of a third person, it does not lie in his mouth to say he is not a suitor, or that the court has no authority to visit him with costs.] The parties whose names were used do not complain; nor is it suggested that the defendant was at all prejudiced, in respect of any defence he might have had, or otherwise, by the action **[873]** being brought in the names of Coleman and Davis instead of being brought in that of Marshall.

Lush, on behalf of Lewis, submitted that he had been guilty of no such impropriety as ought to subject him to costs; for, that it was by no means unusual for the holder to sue as trustee for an indorser who has been called upon to pay on the default of the drawee.

Bovill, in support of his rule, relied upon the affidavits on which he moved, as shewing that the use made of the plaintiffs' names was unauthorised.

WILDE, C. J. In this case, some of the facts are quite clear and free from doubt or dispute. The plaintiffs gave no authority to Marshall to bring the action in their names. But it is not quite so clear that Marshall was aware that they had not given him such authority. It is not pretended that Marshall had any communication with the plaintiffs upon the subject, except at the time when he paid them the 45l. The fair result of the affidavits on the one side and on the other, seems to me to be, that the action was commenced and prosecuted in the names of the plaintiffs without any authority. Marshall certainly has acted carelessly in the matter. And his attorney has not used that degree of caution and circumspection which the court has a right to expect from its officers. The case is presented to us under somewhat peculiar circumstances. No injustice seems to have been done to the defendant; he has lost no defence by the action having been brought in the names of Coleman and Davis, instead of in that of Marshall. At the same time, the process of the court has been used in a manner not warranted by law. When actions are brought in the names of third persons not interested in the subject-matter, difficulties frequently arise in shewing that the **[874]** use of their names was duly authorised. In such cases, it behoves the attorney to place himself in a situation to shew that he has not acted without authority. Where it is distinctly made out that an improper use has been made of the process of the court, the parties so acting must be made to suffer to some extent. Under the circumstances, I think the plaintiffs' costs ought not to be allowed. At the same time, I am not disposed to give costs to the defendant, it not appearing that he has sustained any loss or inconvenience from the course pursued. It seems to me, therefore, that the justice of the case will be met, by making the rule absolute to stay the proceedings, without costs on either side, each party paying his own costs of this rule.

COLTMAN, J., concurred.

CRESSWELL, J. I must confess I feel at some loss to understand the precise ground upon which we are deciding. It may be that it is not reasonable to allow Marshall to continue to use the names of the plaintiffs. It certainly has been usual for applications of this sort to originate with the parties whose names have been improperly used. I am not, however, disposed to differ with the rest of the court; though I cannot help thinking the defendant has been rather fortunate in having an action brought against him in the names of Coleman and Davis, instead of in that of Marshall.

V. WILLIAMS, J., concurred.

Rule absolute accordingly (*a*).

(*a*) Vide *Doe d. Vine* v. *Figgins*, 3 Taunt. 440; *Doe d. Hammck* v. *Fillis*, 2 Chitt. Rep. 170; *Thames Haven Dock and Railway Company* v. *Hall*, 5 M. & G. 274, 6 Scott, N. R. 342.

[875] TATE v. HITCHINS AND OTHERS. May 22, 1849.

[S. C. 7 D. & L. 123; 18 L. J. C. P. 256; 14 Jur. 20.]

Assumpsit against several defendants for work and labour by the plaintiff as an attorney, with counts for money paid, &c. Plea, —by one of the defendants,—to the whole declaration, that the action was commenced, after the 6 & 7 Vict. c. 73, for the recovery of fees, charges, and disbursements due to the plaintiff as an attorney, as in the first count mentioned, and that no signed bill had been delivered to the defendant, or sent by the post to, or left for him at, his counting-house, office of business, dwelling-house, or last known place of abode: —Held, on special demurrer, that the word "disbursements" applied to the count for money paid; and that the plea sufficiently negatived the delivery of a bill of costs within the terms of the statute.

Assumpsit on an attorney's bill. The first count of the declaration stated that the defendants were indebted to the plaintiff in the sum of 50l. for the work and labour, care, diligence, and attendance of the plaintiff as the attorney of the defendants and otherwise, and upon their retainer prosecuting and defending suits, &c., and for fees due and of right payable in respect thereof, and also for divers journeys and attendances, &c., made and given in and about the business of the defendants, and for them and at their request. There was also a count claiming 50l. for money paid, laid out, and expended by the plaintiff for the defendants; and a count for 50l. alleged to be due from the defendants to the plaintiff upon an account stated.

The defendant severed in pleading. The defendant Hitchins pleaded,—first, non assumpsit to the whole declaration,—secondly, as follows:—And for a further plea in this behalf, the defendant says that the said action was and is commenced after the passing of an act of parliament made and passed in a session of parliament holden in the sixth and seventh years of the reign of Victoria [6 & 7 Vict. c. 73], intituled "An act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales," and that the same is now maintained by the plaintiff against the said defendant for the recovery of certain [876] fees, charges, and disbursements claimed by the plaintiff to be due to him from the said defendant, and in respect of certain business theretofore done by the plaintiff as an attorney and solicitor for the said defendant, as in the first count in that behalf mentioned: And the defendant further says that the plaintiff did not, one calendar month before the commencement of this suit, deliver unto the said defendant, he being the party to be charged therewith, or send by the post to, or leave for him at, his counting-house, office of business, dwelling-house, or last-known place of abode, or at either of such places, any bill of such charges, fees, and disbursements, subscribed with the proper hand of the plaintiff, either with his own name, or with the name or style of any partnership of which the plaintiff is or was at any time a member, or inclosed in, or accompanied by, any letter subscribed in like manner, referring to any such bill as aforesaid, as by the statute in such case made and provided is required: And the defendant further says that the account in the said last count mentioned was stated by the defendant of and concerning, and included in, the sum in the first count mentioned, and that the said two sums are one and the same debt—verification.

Special demurrer to the second plea, assigning for causes,—that the said plea is pleaded to the whole declaration, and shews no answer whatever to the second count thereof,—that, if the same was intended to apply to the first and last counts only, it ought so to have been alleged in the commencement of the said plea,—that the said plea merely states that the plaintiff did not deliver to the defendant Hitchins, or send by the post to, or leave for him at, his counting-house, office of business, dwelling-house, or last-known place of abode, any bill of charges, subscribed by the plaintiff, as directed by the act of parliament, and it is consistent [877] with that allegation, that a bill of charges, subscribed by the plaintiff as the act directs, was delivered to one of the other defendants, and that the defendant Hitchins and the other defendants jointly retained the plaintiff,—that the said plea ought to have alleged that no bill of charges had been delivered to either of the defendants, or it should have expressly alleged that no joint retainer was given by the defendants to the plaintiff,—and that the said plea is no answer to the last count of the declaration, or, at all events, that it is an argumentative denial of the statement of an account.

The defendant Hitchins joined in demurrer.

Barnard, in support of the demurrer. The plea, referring to the first count of the declaration, states that the action is brought for the recovery of fees, charges, and disbursements claimed by the plaintiff to be due to him in respect of business as an attorney and solicitor; and then it goes on to allege that the account in the last count mentioned was stated by the defendant of and concerning the sum in the first count mentioned. The pleader has entirely overlooked the count for money paid: whereas, each count being apparently for a different cause of action, each should be answered: *Rayner* v. *Wright* (2 Dowl. N. S. 418). [Cresswell, J. The first count says nothing about disbursements: the plaintiff could not recover them under that count. The money the plaintiff claims to have disbursed for the defendants is, money disbursed by him as attorney, as mentioned in the first count. If he had said that the action was brought for that, and for nothing else, you would hardly have objected to that.] It does not follow that the plaintiff does not, in his second count, go for money paid other than in the way of professional disbursements.

[878] The plea alleges the non-delivery of a signed bill pursuant to the 6 & 7 Vict. c. 73, s. 37 (ante, 746 (*a*)), to the defendant Hitchins. It is perfectly consistent with the plea, that a signed bill may have been duly delivered to one of the other defendants. [Wilde, C. J. There is a plea of non assumpsit by Hitchins. Then he says, you have delivered me no bill according to the statute. He has no means of knowing whether or not the plaintiff has delivered a signed bill to one of the eight or ten other persons with whom he is improperly joined.] The plea admits that the work was done for all the defendants jointly. [Cresswell, J. For the purpose of the particular plea only (*b*).] The words of the 37th section of the 6 & 7 Vict. c. 73, are, so far as regards this question, similar to those of the 2 G. 2, c. 23, s. 23. Under the last-mentioned act, such a plea as this would clearly have been bad on special demurrer: *Kiteley* v. *Scofield* (6 Jurist, 1059). A delivery to one of several joint-contractors is sufficient: *Crowder* v. *Shee* (1 Campb. 437). [Cresswell, J. In *Kiteley* v. *Scofield*, the plea merely negatived a delivery to the defendant personally.] That is all that is alleged here.

Phipson, contrà. [Cresswell, J. What is there to prevent a man from stating an account with an attorney, without any delivery of a bill?] It has been held to be a good plea to a count on an account stated, that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered: *Eicke* v. *Nokes* (1 M. & Rob. 359); *Brooks* v. *Bockett* (9 Q. B. 847); *Scadding* v. *Eyles* (9 Q. B. 858). [Williams, J., referred to *Jeffreys* v. *Evans* (14 M. & W. 210), where it was held that it is no **[879]** answer to an action on a promissory note, that it was given on account of an attorney's bill not delivered pursuant to the 6 & 7 Vict. c. 73.]

It is said that the second count is unanswered, for that the word "disbursements" in the plea refers only to disbursements as an attorney. "Disbursements" means the same as "money paid," and can only apply to the second count. And there is no demurrer on the ground of ambiguity. The demurrer assumes that the plea is not pleaded to the second count at all. *Rayner* v. *Wright* has no application: there, the identity of the sums claimed in the several counts, was not sufficiently shewn; here it is—*Mee* v. *Tomlinson* (4 Ad. & E. 262, 5 N. & M. 624).

It is further insisted that the plea is insufficient, inasmuch as it merely negatives the delivery of a bill to the defendant, Hitchins, personally, or a delivery at his dwelling-place or place of business. In *Vincent* v. *Slaymaker* (12 East, 372), a party in a cause having changed his attorney in the progress of it, a judge's order was obtained by the second attorney, for the delivery of a signed bill by the first attorney, under the 2 G. 2, c. 23, s. 23; which delivery was accordingly made to the second attorney in the cause: and it was held by Grose, J., Le Blanc, J., and Bayley, J., against the opinion of Lord Ellenborough, that this was a sufficient delivery of the bill to the party to be charged therewith, within the words and meaning of the statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. Bayley, J., there says: "The act does not say that the delivery shall be to the client in person, but leaves that at large, according to what shall be deemed a delivery to the party in point of law; and then, by the general rule of law, a **[880]**

(*b*) Vide post, 880 (*d*).

delivery to an agent authorised to receive it, is a delivery to the party himself." *Warren* v. *Cunningham* (Gow's N. P. C. 71) is an authority to the same effect. So, here, when the plea says that there was no signed bill delivered to or left for Hitchins, it means that there has been no such delivery as the law requires. If it be true that a delivery of a bill to one of several joint-contractors, may enure as a delivery to one who pleads the non-delivery in the words of the statute, it is matter of evidence, and the plaintiff should have traversed the plea: *Eggington* v. *Cumberledge* (*b*). [Wilde, C. J. A delivery to one of several joint-employers, is a delivery to all. V. Williams, J., referred to *Oxenham* v. *Lemon* (2 D. & R. 461), where it was held, that, where an attorney is retained jointly by several parties to defend a suit against each, delivery of a bill to one is sufficient to entitle him to maintain a joint action against all for his costs, under the 2 G. 2, c. 23, s. 23 (*d*).] It is a question of evidence, and not of pleading. In *Finchett* v. *How* (2 Camph. 277), Lord Ellenborough says: "The act (2 G. 2, c. 23, s. 23) does not require personal service; and a delivery of the bill to an agent or joint-contractor, may be a delivery to the party or parties to be charged. If the person to whom the bill was delivered, had not meddled with the business, though jointly liable with others who took the entire direction of it, I should hold that there was no delivery as to them. But the case is different where the bill is delivered to the person authorised by the other parties to act for them. One may reasonably suppose that he has authority to receive it; and that, when received, **[881]** he will communicate it to the others." [Wilde, C. J. How can a defendant negative a delivery of a bill to persons with whom he alleges that he is improperly joined?] He clearly cannot.

Barnard, in reply. The meaning of this plea is, that no bill has been personally delivered to the defendant Hitchins. The plaintiff would have great difficulty in taking issue on such a plea. Suppose a bill has been delivered to J. S., one of the other defendants, and the plaintiff were to reply that: it might be that a delivery to J. S. would not be a delivery to Hitchins within the meaning of the statute. [Wilde, C. J. For the purpose of this plea, the defendant must be taken to admit the joint-contract (*a*). He says, in effect, I had no signed bill delivered to me in any sense that will satisfy the statute. The statute says that the bill shall be delivered "unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode." It was not intended to alter the law as to what should be a delivery to the party. The statute has been held to be satisfied by a personal delivery of the bill to one of several co-contractors, or by leaving it at the common place of business. Why is that? Because it is a delivery to each and every of the co-contractors. What is a delivery to a co-contractor? Is not a delivery at the house of a co-contractor, a delivery to the co-contractor? And, if so, do not all the legal consequences follow? I do not see by what authority you introduce the word *personally* here.] A delivery at the common place of business, would be a delivery to all the joint-contractors: a delivery at the place of business of one, would not. [V. Williams, J. Would a de-**[882]**-livery at the separate place of residence of one suffice?] It would not. [Wilde, C. J. What sort of delivery do you say may have taken place, which this plea does not traverse?] A delivery at the last known place of abode of the defendants. [Wilde, C. J. Surely, if there is a common residence of all the co-contractors, it is not the less the place of residence of Hitchins, because he possesses it in common with the others. When he says no bill has been delivered to him, he means there has been no such delivery as the statute requires.] Suppose all the co-contractors lived at No. 1 Bridge Street, at the time the business was done, and afterwards, with the knowledge of the plaintiff, Hitchins left that house, and went to live at No. 2, and afterwards, with the like knowledge of the plaintiff, went to reside elsewhere,—a delivery of a signed bill at No. 1 Bridge Street

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(*b*) 1 Exch. 271. And see *Blandy* v. *De Burgh*, ante, vol. vi. p. 623; *Edwards* v. *Lawless*, ante, vol. vi. p. 329.

(*d*) Upon this demurrer, the plea, which admits a joint contract, must be regarded as the only plea pleaded. The case cited shews that a delivery to a person a delivery to whom is not here expressly negatived, would be good.

(*a*) The plea of non assumpsit,—by which alone the point of misjoinder could be raised,—is not set out in the demurrer-book, and could not be noticed if it were.

would satisfy the terms of this plea, but clearly it would not satisfy the statute; it would not be a delivery at the last known place of abode of the defendants. The difficulty cast upon the plaintiff here is, that he must, in his replication, state the particular mode of delivery, seeing that the general replication de injuriâ is inapplicable to such a case as this. [Wilde, C. J. I think there would be nothing unreasonable in it, if you were compelled so to do.

Wilde, C. J. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The statute 6 & 7 Vict. c. 73, points out several modes in which a party may entitle himself to maintain an action in respect of the delivery of a bill. The first branch of the 37th section requires that the bill be delivered to the party to be charged therewith. But, in order to relieve the attorney from the difficulties that frequently stand in the way of a personal delivery, the statute goes on to provide that the delivery may be by sending the bill by post, or by leaving it for the **[883]** party at his counting-house, office of business, dwelling-house, or last known place of abode. Every case of delivery of an attorney's bill must satisfy one or other of these alternatives; and a plea of non-delivery, in order to be a bar to the action, must negative a delivery according to the statute. This is an action against several co-contractors. It may be that the statute has not had in its contemplation all possible modes of delivering an attorney's bill. If so, it follows, that, in every case not provided for, the delivery must be personal. The plea alleges that no bill was delivered to the defendant. It does not necessarily mean that he was the only person sought to be charged with the bill. There has been no compliance with the other provisions of the statute dispensing with personal delivery: the plea has, therefore, followed the terms of the statute, and negatived each and every of the several modes of delivery that would entitle the plaintiff to maintain his action. The plaintiff insists that the plea is bad; for, that there are modes of delivery of an attorney's bill, which will entitle him to maintain the action, which do not fall within either of the modes negatived: there might be a delivery within the first branch of the section, though not personal in the strict sense intended by the statute; or it might be (possibly) by a sending by post to a co-contractor; or, by a delivery at the place of business of the joint-contractors. Suppose there has been such a delivery as will satisfy the statute, under which branch of the section does it fall? Would it be a personal delivery, or a delivery by sending by post, or by leaving at the party's place of business? It must be one of these: and all are negatived by the plea. It would seem, therefore, that a replication might be framed upon one of those modes of delivery. If there has been such a delivery as surmised, it must be a good delivery either on the ground that the bill was left at the last known place of abode or the place of **[884]** business of the defendant, within the meaning of the statute. It seems to me that the plea has negatived every delivery which could by possibility be such a delivery as to satisfy the statute. Suppose the bill were sent somewhere by the direction of one of the co-contractors, and a joint-action brought, and all the defendants were to plead no signed bill delivered according to the statute, and the delivery did not enure as a delivery as against all,—could there be a verdict for the plaintiff in the one case, and for the defendants in the others? I apprehend not: it seems to me that the plaintiff would fail altogether. The plea traversing such a delivery as will satisfy the statute, I am of opinion that it is a good answer to the action, and therefore that the defendant must have judgment.

Coltman, J. I am of the same opinion. The plea is to be construed with reference to the terms of the statute. The delivery may be personal, or by sending by post, or by leaving at the counting-house, office of business, dwelling-house, or last known place of abode of the party. It seems to me to be sufficient if the plea negatives these several modes of delivery. In the case put by Mr. Barnard,—of a delivery at that which had been the joint place of abode or business of the parties, the defendant pleading having left that place, and gone to another,—either there would be no sufficient delivery, or, if sufficient, it would be so on the ground that it amounted to a delivery within one of the modes provided by the statute. It seems to me that this plea properly negatives all that is required.

Cresswell, J. I am of the same opinion. The defendant Hitchins has, by his plea, negatived any delivery of a signed bill in the modes required by the statute: it negatives that the bill was delivered to the defendant himself, or sent by post to, or left for him at [885] his counting-house, office of business, dwelling-house, or last known place of abode. It has been decided, that a denial of a delivery to the party himself, involves in it a denial of a delivery to any person jointly contracting with him. It was so held in *Kitcley* v. *Scofield*. Suppose a bill had been delivered at a house or counting-house which had been the joint house or counting-house of the defendant and the other joint-contractors, that clearly would be a delivery at his house or counting-house; and that is negatived by this plea. I think it is impossible to escape from this,—that a delivery at the separate house or counting-house of one of the other joint-contractors, would not be a delivery to the defendant within the statute; or, if it would be a delivery within the statute, it must be on the ground that it is in law a delivery to the party pleading; and that is negatived by this plea. I think the plea is a good answer.

V. Williams, J. I also am of opinion that this is a good plea. It does not consist of matter of excuse, and therefore it could not be put in issue by the general replication de injuriâ. If it could have been put in issue in that manner, it would have been open to the plaintiff at the trial to shew any possible mode of complying with the statute. The only difficulty to my mind has arisen from the case suggested, of a bill sent to or left at the house or counting-house of a co-contractor, where the party pleading had resided, or which he had occupied, but which he had quitted, or ceased to occupy. But the answer to that obviously is, that, if such a sending or leaving of the bill is a compliance with the statute, it is on the ground of its being the counting-house or last known place of abode of the party within the meaning of the statute. I therefore think that the plea is good, and the defendant entitled to judgment.

Judgment for the defendant.

[886] Bayley *v.* Wilkins. May 28, 1849.

[S. C. 18 L. J. C. P. 273; 13 Jur. 883.]

One who employs a broker to buy railway shares for him, impliedly authorises him to do all that is needful to complete the bargain.—A. employed B., a broker and member of the Stock-Exchange, to buy shares for him. At the time of the purchase, a call had been made, but was not then payable. The seller having paid the call, in order to enable her to make a transfer of the shares, B., who, by the rules of the Stock-Exchange, was personally responsible for it, paid the money:—Held, that B. was entitled to recover from A. the sum so paid, as money paid to his use.

This was an action of assumpsit for work and labour, money lent, money paid, and money due upon an account stated.

The defendant pleaded non assumpsit.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1848. The facts were as follows:—The plaintiff was a stock-broker, and member of the London Stock-Exchange. The defendant was a publican residing at Swansea, in the county of Glamorgan.

On the 22nd of March, 1847, the defendant addressed a letter to the plaintiff, as follows:—

"Dear Sir,—I see Vale of Neath shares quoted 30s. discount. Will you buy me twenty shares at that price,—one shilling more or less. Do the best you can."

On the 30th of March, the plaintiff purchased on the defendant's account, twenty Vale of Neath shares at 30s. discount, communicating to him the fact of the purchase in the following letter:—

"Dear Sir,—I am in receipt of your favour, and have now the pleasure to report the purchase of twenty Vale of Neath shares, at 1½ discount, which I trust may prove satisfactory. Contract inclosed."

Inclosed in this letter was a memorandum of the contract as follows:—

[887] "Bought, for and on account of E. Wilkins, Esq., twenty shares in the Vale of Neath Railway, for the 31st:—

"£2	0	0	paid			
0	0	0	premium			
1	10	0	discount			
£0	10	0	per share =	£10	0	0
			Commission	1	0	0
				£11	0	0"

The price of the shares and commission (11l.) was remitted to the plaintiff on the 3rd of April; and, on the 5th, the plaintiff acknowledged the receipt of it, and promised to send the scrip as soon as possible.

On the 6th, the plaintiff addressed the defendant as follows:—

"Dear Sir,—Herewith I have the pleasure to wait upon you with the transfer of twenty Vale of Neath Railway shares, 'Bennett to yourself.' I am able to hand you, under separate cover, the certificates, as the office will register the transfer unaccompanied by the certificates. Should you return to me the transfer for registration, I shall have to debit you the fee of 2s. 6d."

At the time the shares were purchased, a call had been made of 2l. per share, payable on the 12th of April, of which no mention was made. On the 7th of April, one Fowler, who had acted as the broker for Miss Bennett, the seller of the shares, applied to the plaintiff for the amount (40l.), which he informed him his principal had paid on the 31st of March. The plaintiff thereupon wrote to the defendant, as follows:—

"Dear Sir,—The seller of the twenty Vale of Neath shares transferred to you, has paid the call of 2l. per **[888]** share due on the 12th instant. Be good enough to transmit it to me, that I may hand it to her. Paid, 31st of March."

The defendant not replying to this application, the plaintiff paid the 40l. to Miss Bennett's broker, on the 9th of April,—in conformity with a rule of the Stock-Exchange (which all members are compelled to observe, on pain of expulsion), which directs, that, if a call has been made on registered shares, the seller may pay the same though not due, and may claim the amount of the purchaser; and, on the 13th, he wrote to the defendant, informing him that he had done so.

On the 17th of April, the defendant wrote to the plaintiff, repudiating the payment made to Miss Bennett, and observing that it was irregular to pay calls when the shares were in the market, and suggesting that he should call on Miss Bennett to return the money; in reply to which letter, the plaintiff, on the 19th, informed the defendant of the rule of the Stock-Exchange above referred to.

After the commencement of the action, viz. on the 4th of November, the defendant wrote to the plaintiff's attorney, offering to pay the 40l., if he would give him time.

Under the direction of his lordship, the jury found for the plaintiff, damages 40l.,—the verdict being taken on the count for money paid only, and leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that money paid would not lie under the circumstances; and to the plaintiff to move to enter a verdict on the account stated, if it should become necessary.

Channell, Serjt., in Easter term, 1848, accordingly obtained a rule nisi, on behalf of the defendant.

[889] Byles, Serjt., and Phinn, now shewed cause. By the 16th section of the 8 & 9 Vict. c. 16, it is enacted, that, "no shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." Miss Bennett, therefore, could not comply with the defendant's demand of a transfer, until she had paid the call of 2l. per share which was made on the 4th of

February, and then due, in the sense of being charged upon the shares: *Shaw* v. *Rowley* (16 M. & W. 810, per Parke, B.). And it was proved at the trial, that, by a rule of the Stock-Exchange, if a call has been made upon registered shares, before the transfer, the seller is authorised to pay the same, although not yet due, and may call upon the purchaser to reimburse him; and that, if the purchasing broker omits to pay, he is liable to be expelled the house. [Wilde, C. J., referred to *Child* v. *Morley* (8 T. R. 610), where it was held that a broker who contracts with others for the sale of stock at a future day, by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, entitle himself to maintain an action on an implied assumpsit against his principal for the amount.] It has since been settled, both in the court of Queen's Bench and in the Exchequer, that one who employs a broker to buy shares for him on the Stock-Exchange must be held to be cognisant of, and bound by, the rules of the establishment. In *Bayliffe* v. *Butterworth* (1 Exch. 425), the defendant, who resided some distance from Liverpool, authorised the plaintiff, a broker there, to sell for him twenty railway scrip shares: the plaintiff sold them to C., another broker of Liverpool: the scrip shares were **[890]** not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price: the plaintiff paid him the difference, and brought an action for money paid, to recover this sum: it was proved to be the usage amongst brokers at Liverpool to be responsible to each other upon these contracts; and there was evidence that the defendant was cognisant of this usage: it was held that the defendant was liable. Parke, B., there says: "I consider it to be clear law, that, if there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way; and, if it be the usage that he should make the contract in his own name, he has authority to do so. Supposing it were necessary to shew that the defendant knew of the particular usage, the point should have been made at the trial; and, in the present case, there was evidence for the jury to find that the defendant did know of it, and that he was responsible. It is not now necessary to decide the point whether the defendant would be bound if he did not know of such a usage. It appears to me, however, that a person who authorises another to contract for him, authorises him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed." And, after referring to *Bartlett* v. *Pentland* (10 B. & C. 760), and *Gabay* v. *Lloyd* (3 B. & C. 793, 5 D. & R. 641), and distinguishing them, the learned judge proceeds: "I have said this, in order to shew my concurrence in the opinions expressed by Lord Denman and Littledale, J., in the case of *Sutton* v. *Tatham* (10 Ad. & E. 27, 2 P. & D. 308), although it is not **[891]** necessary to determine the same point here, as there was sufficient evidence to shew that the defendant knew the usage of the Stock-Exchange at Liverpool, if it were requisite to prove it in order to make him liable." So, in *Pollock* v. *Stables* (17 Law Journ. N. S., Q. B. 352), the plaintiff, a share-broker at Leeds, bought for, and by the orders of, the defendant ten railway shares, to be paid for on delivery: the shares were delivered, and had fallen in price between the time of the sale and the delivery: the defendant not being able to pay at the time of delivery, the vendor demanded the shares back from the plaintiff, who gave them back to the vendor, who sold them at the then market price, and called upon the plaintiff, according to the usage of the Stock-Exchange at Leeds, to pay the difference, which he did: and it was held that the plaintiff was entitled to recover the sum so paid, from the defendant, as money paid to his use, as he must be taken to be cognisant of the usage of the Stock-Exchange which his broker attended. Lord Denman there says: "The case of *Bayliffe* v. *Butterworth* is not, we think, distinguishable in principle from the present. That decision is in accordance, as far as the circumstances are parallel, with the case of *Sutton* v. *Tatham*." [Wilde, C. J. In *Scott* v. *Irving* (1 B. & Ad. 605) an assured residing at Glasgow, employed an insurance-broker in London to recover a loss from the underwriter: the loss was settled in part by the underwriter setting off in account against it, a debt due to him from the broker for premiums, and, as to the residue, by his paying the broker in cash, and the underwriter then erased his name from the policy: the broker became bankrupt, and never paid the loss to the assured: evidence was given of a usage, that, on adjustment, **[892]** payment was generally in a month, and that the practice between the broker and the underwriter was, to set off in account between them the amount of premiums due to the underwriter, against the loss: and it was held that the underwriter was not entitled to treat the set-off in account between him and the broker, as payment to the assured, the latter not being bound by a usage of which he was not shewn to be cognisant. That case has never, that I am aware of, been overruled. Maule, J. *Scott* v. *Irving* is the last of a series of cases, beginning with *Russell* v. *Bangley* (4 B. & Ald. 395), which went upon the ground of the unreasonableness of paying the debt of one with the money of another, as was said by the court in *Todd* v. *Reid* (ibid. 210).] In *Sutton* v. *Tatham*, Littledale, J., says distinctly and without doubt, that "a person who employs a broker, must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." [Wilde, C. J. I rather think Mr. Justice Littledale was not aware that he was overruling a decision of the court after argument.] In paying the amount of the call, the plaintiff acted in obedience to the custom of the Stock-Exchange: he was bound by that custom, and authorised by the nature of his employment by the defendant, to do as he did. [Cresswell, J. Does not this resolve itself into the case of an erroneous account sent by the broker to his principal?] *Dails* v. *Lloyd* (17 Law Journ., N. S., Q. B. 247) was a case of that description. There, the defendants, who were share-brokers at Liverpool, on the 30th of August, 1845, bought for the plaintiff, who was also a share-broker, thirty-eight Tean and Dove Valley Railway shares, at the price, according to the advice-note, of 2l. 8s. 6d. **[893]** per share: the scrip had not then issued, and the 2l. 8s. 6d. was therefore premium: the deposit of 1l. 7s. 6d. per share first appeared in the printed share lists (which were sent daily to the plaintiff) on the 2nd of September, and the amount of such deposits (41l. 5s.) was paid by the defendants to the persons from whom they bought the shares: in an account sent by the defendants to the plaintiff on the 19th of September, they omitted to charge the sum paid for the deposits, and the plaintiff, who purchased for other persons, as broker (though he dealt with the defendants as principal), only charged 2l. 8s. 6d. per share, and had settled accounts with such other persons on that footing before any claim was made for the deposits. The defendants also, on the 18th of September, bought for the plaintiff eighty South Staffordshire Railway shares, at the price, according to the advice-notes, of 4l. 10s. per share: the 4l. 10s. per share did not include the deposit of 2l. 10s. per share, which first appeared in the share lists about the 26th of September; and, in settling with the vendors, the defendants paid them the deposits, amounting to 200l., in addition to the 4l. 10s. per share: but, on the 26th of September, the shares were sold by the defendants for the plaintiff at 7l. per share, which sum included the deposits, and the plaintiff was credited with the full amount: in an account furnished to the plaintiff by the defendants on the second of October, and also in subsequent accounts, the plaintiff was only debited with the 4l. 10s. per share, and he only debited his principals with that amount, and settled with them on that footing. On the 19th of November, the defendants, having received a letter from the plaintiff demanding a balance of 605l. 14s. 10d., examined their books, and discovered the mistake with regard to the deposits, and immediately acquainted the plaintiff with it: and it was held that they were entitled to set off the 200l., and also **[894]** the 41l. 5s. Lord Denman, in delivering the judgment of the court, said: "The precise nature of the dealing between the plaintiff and his principals, does not appear upon the case; nor is it stated that the scrip was ever transferred by the plaintiff; for all that appears, it may have been a mere time bargain, and the scrip may still be in the hands of the plaintiff. If the scrip was actually transferred by the plaintiff, he must have known, or ought to have known, that the price he paid was premium merely, and could not have included any sum paid for deposit. In either view of the case, we think that the defendants are entitled to set off the amount, which, by the course of business, they were bound to pay, in order to procure the scrip, beyond the premium; and that the omission to debit the plaintiff with such payment in their account, does not take away their right. They dealt with the plaintiff as the principal in the transaction, and are not included by having, by mistake, omitted to charge him with a payment of which he has had the benefit, by the actual possession of the scrip, which could only have been obtained by the payment in question. The case of *Sutton* v. *Tatham*, as well as the other cases cited in the argument (*a*),

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(*a*) The cases cited were,—for the plaintiff *Skyring* v. *Greenwood*, 4 B. & C. 281, are consistent with the view we take of the case; and our judgment, therefore, is in favour of the defendants." [Maule, J. *Dails* v. *Lloyd* was a [895] case of estoppel in pais,—like *Brisbane* v. *Dacres* (5 Taunt. 143) and that class of cases.] The defendant was bound to pay the call, and might have been compelled, by a bill in equity, to execute and register the transfer-deed: *Wynne* v. *Price* (12 Law Times, 531). In *Grisewood* v. *Justice* (13 Law Times, 22), one J. agreed to purchase fifty shares in a railway company, at ten guineas a share, the same being a premium of 8l. a share, the sum of 2l. 10s. having been paid for calls: G., the plaintiff, afterwards delivered to the broker fifteen of the shares, upon which such calls had been made, when he refused to accept them, and asked for a return of the purchase-money from the brokers, which they declined, on the ground that the calls had already been paid on the fifteen shares, but not on the remaining thirty-five: by a deed of assignment, the plaintiff had transferred the thirty-five shares to J., but, he not being registered, the plaintiff was obliged to pay 361l. in respect of calls, and the defendant refused other shares as a substitute for the fifteen: it was held that the representative of J. (then deceased) was bound specifically to perform the contract, by taking fifty shares, and paying the amount of calls which had been paid by the plaintiff.

Humble v. *Langston* (7 M. & W. 517) and *Bowlby* v. *Bell* (ante, vol. iii. p. 284) will probably be relied on for the defendant, to shew that the broker was not liable in respect of the call in question. In *Humble* v. *Langston*, the facts were these:—On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7l. 5s. per share, and the usual contract-notes passed between the parties, no time being mentioned for the completion of the purchase: [896] on the 3rd of March the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied on the same day, "we herewith send you transfer of thirty Bristol and Exeter shares in blank:" this was accordingly done, and the purchase-money was paid: calls were subsequently made, which calls, the shares not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, the latter was compelled to pay: in an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls,—it was held, that, under the above circumstances, there was no undertaking implied by law, to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. [Maule, J. That looks very much like an attempt on the part of the broker of the purchaser to accommodate his brother broker at his principal's expense.] Parke, B., there says: "On the 20th of February, 1838, the contract was entered into, which was simply an agreement by the plaintiff to sell, and the defendant to buy, thirty shares, at the price of 7l. 5s. per share, no time being specified for the completion of the purchase; nor was there any such stipulation in the contract as the conveyance itself would have contained if completed, that is, that the vendee should be subject, from the date of it, or any future time, to the conditions upon which the vendor held them. If the case had rested upon this contract, the situation of the parties would have been this:—The plaintiff, after shewing a good title to the defendant, would have had a right to call upon him to complete his purchase in a reasonable time, by preparing a deed in the statutory form; and, if the defendant had done so, the plaintiff might then have executed it, and required the defendant to do the same, and to deliver, or attend with him to [897] deliver, the deed to the company, that a memorial might be entered into and indorsed on the deed of transfer, pursuant to the 169th section. If all this had been done, the plaintiff would have been no longer liable to any call: if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he had omitted

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6 D. & R. 401; *Marriott* v. *Hampton*, 7 T. R. 269 (2 Smith, L. C. 241); *Bramstone* v. *Robins*, 4 Bingh. 11, 12 J. B. Moore, 68; *Shaw* v. *Dartnall*, 6 B. & C. 56, 9 D. & R. 54; *Thomas* v. *Hawkes*, 8 M. & W. 140; *Cox* v. *Prentice*, 3 M. & Selw. 344; *Heane* v. *Rogers*, 9 B. & C. 577, 4 M. & R. 486; *Pickard* v. *Sears*, 6 Ad. & E. 469, 2 N. & P. 488; and *Gregg* v. *Wells*, 10 Ad. & E. 90, 2 P. & D. 296: and, for the defendants, *Fletcher* v. *Marshall*, 15 M. & W. 755; *Sutton* v. *Tatham*, 10 Ad. & E. 27, 2 P. & D. 308; *Bayliffe* v. *Butterworth*, 1 Exch. 425; and *Willoughby* v. *Backhouse*, 2 B. & C. 821, 4 D. & R. 539.

to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount, by way of special damage for the defendant's breach of contract. But, in this case, the plaintiff did not pursue the course which, according to law, he ought to have done." That, therefore, was simply a case of omission on the part of the selling broker, to do that which was necessary in order to enable him to call upon the purchaser to repay him the amount paid for calls. The same remark applies to *Bowlby* v. *Bell*. There, A., a share-broker, on the 28th of July, 1845, contracted to sell to B. certain railway-shares belonging to C. The scrip having been sent to the company's office for registration, and A. being consequently unable to deliver the shares, B., on the 23rd of September, purchased other shares at an advanced price, and claimed the difference from A. A. accordingly paid him the amount, after notice from C. not to do so,—one of the rules of the Hull Stock-Exchange, of which A. and B. were both members, declaring brokers to be personally responsible for the fulfilment of their respective contracts with each other,—and claimed to be recouped the same by C. as money paid to his use. The price of the shares had not been offered to C., nor had any transfer been tendered to him for execution: and it was held that the action was not maintainable. Neither of these cases has any bearing upon the present. [Wilde, C. J. I feel some difficulty in saying that a man who buys shares, buys subject to **[898]** the rules of the Stock-Exchange, of which he may not be cognisant. And there is this further difficulty, that those rules are framed by, and are to receive their construction from, a body that is totally independent of the rules of law, and irresponsible.] *Brittain* v. *Lloyd* (14 M. & W. 762), where all the authorities are collected, is distinct to shew that an action for money paid will lie, under the circumstances of this case: it was there held that that form of action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it.

Channell, Serjt., in support of his rule. The material facts upon which the defendant relies, are these:—The order for the purchase of the shares was given on the 22nd of March. On the 30th, a bought-note was sent to the defendant, making the sum payable by him for the shares and commission 11l. On the 31st, the seller of the shares paid a call of 2l. per share thereon. Down to this time nothing appears to have been paid by the plaintiff. On the 5th of April,—the day on which the transfer was dated,—the plaintiff acknowledges the receipt of the 11l. from the defendant; on the 6th the certificates are sent to the defendant; and it is not until the 7th that any intimation is given to the defendant of the call having been paid by the seller, or of his liability to repay the amount to her. The authority of the broker was clearly at an end before he took upon himself to pay the 40l. to Miss Bennett. The Stock-Exchange had no jurisdiction in the matter. *Bayliffe* v. *Butterworth* and *Pollock* v. *Stables* only shew that the brokers are responsible to each other for differences in the case of unexecuted contracts. *Sutton* v. **[899]** *Tatham* is in substance a case of the same description. Is *Dails* v. *Lloyd*, the question was one of estoppel only,—whether the defendants were bound by the mistake they had made in the account delivered by them. *Wynne* v. *Price* and *Grisewood* v. *Justice* do not tend to throw any light upon the question. In *Shaw* v. *Rowley*, the plaintiff's liability to pay the calls was not directly before the court. *Bowlby* v. *Bell* is a distinct authority to shew that this action is not maintainable. Fowler, Miss Bennett's broker, was not liable to his principal for the 40l. paid by her; nor could he have recovered it from the present plaintiff; and, if so, there is no pretence for saying that the plaintiff could enforce it as against the defendant.

The opinions of Littledale, J., in *Sutton* v. *Tatham*, and of Parke, B., in *Bayliffe* v. *Butterworth*, as to parties unconnected with the Stock-Exchange being bound by its rules, though not shewn to be cognisant of their existence, were altogether extra-judicial; and they are clearly opposed to the doctrine laid down in *Child* v. *Morley*, *Scott* v. *Irving*, *Bartlett* v. *Pentland*, *Gabay* v. *Lloyd*, and many other cases. The question is, whether this court will, in deference to those dicta, overturn a long series of deliberate decisions.

Wilde, C. J. This case is not free from difficulty; but, upon the whole, I think the plaintiff is entitled to retain his verdict. The contract was for the purchase by the plaintiff for the defendant of twenty Vale of Neath Railway shares at 30s. discount. The object of the purchaser was, to obtain the shares, with all the responsibilities that legally attached to them, at a deduction of 30s. from the 2l. which had been paid as a deposit on the original allotment: and he was liable, therefore, to pay such sum beyond the stipulated price as the regulations of the company subjected the shares **[900]** to. He has got what he intended to buy. Supposing the present plaintiff to be the proper person to sue, on what ground is it that the defendant is sought to be charged with the 40l.? He contracted to buy the shares at a certain price. He must, therefore, have contemplated taking them subject to such charges as the rules and regulations of the company authorised, whenever they should happen to be imposed upon them. He calls for a transfer. What was necessary to be done by the former holder of the shares in order to effect a transfer? The call of 2l. per share must be paid either by the purchaser or by the party transferring. It is true, that the call was not payable until the 12th of April, and that the defendant might have delayed the payment of it until that day, by forbearing to require an earlier transfer. Being called upon to make the transfer, Miss Bennett, to enable her to do so, and thus get rid of the transaction, pays the call of 2l. per share. She clearly did not contemplate selling at 10s. per share what she knew she was compellable to pay 40s. per share additional for before she could perform her contract. What did the defendant contemplate he had to pay? Why, at some time or other, all that had already been paid, or that was chargeable upon the shares, except the 30s. discount. I observe, that, in his letter of the 17th of April, the defendant says that it was irregular to make payment of the call whilst the shares were in the market. One does not exactly see what that means: but this is clear, that the defendant does not affect to say that he was ignorant of the fact of a call having been made. The 40l., then was a sum that was necessarily paid by Miss Bennett, in order to enable her to make a transfer of the shares to the defendant. What is the contract the defendant must be understood to have entered into with his broker? What did he authorise the broker to do? To perfect the transaction. **[901]** Less than that would be unavailing. He was to do the needful. The plaintiff, at the defendant's request, makes the purchase for him, dealing as a broker at the Stock-Exchange, and according to the rules of that establishment, where brokers deal with each other as principals. There is nothing in the present case to shew that the defendant contemplated that his name was to be introduced into the transaction. How do parties deal, who do not disclose the names of their principals? Why, upon their own individual responsibility. It is reasonable to suppose that the very consequence should take place which the rules of the Stock-Exchange contemplate. The plaintiff, acting in the usual, and probably the only proper, course of his business as a broker, pays the money. I have looked narrowly to see upon what ground it was that the defendant repudiated the payment. But I do not find that he does repudiate the plaintiff's authority to make the payment. On the contrary, he intimates that he is making arrangements to induce the party to whom he had sold the shares, to pay the call. The letter of the 4th of November, though written after action brought, may be very good evidence to shew upon what footing the parties had previously been dealing. An admission made on the morning of the trial, would be evidence to that extent. I infer from the whole transaction that the defendant intended that the plaintiff should act as his agent. Has, then, the plaintiff paid the money under such circumstances as to disentitle him to recover it back? He dealt with the broker of Miss Bennett as a principal. If he were authorised by the defendant to do so, would not the latter be bound by his acts, independently of any regulations of the place where the business was transacted? Without, therefore, entering minutely into a consideration of the effect of the rules of the Stock-Exchange, when I find parties dealing together as principals, with **[902]** the consent and authority of those who employ them, I take it that all the consequences resulting from such a mode of dealing, must follow from the original authority. It is quite clear that the selling broker might have maintained an action against the buying broker to recover the amount of the call, the payment of which was necessary to enable him to make the transfer: the remedy provided by the rules of the Stock-Exchange to enforce this, is merely cumulative. As between the two brokers, there was evidence that they dealt as principals. The defendant bought the shares subject to all the consequences legally attaching to them. He is now called upon to bear one of those consequences. He resists, on the ground that he was ignorant of the fact of a call having been made at the time he contracted to buy the shares. His broker probably was equally ignorant of the fact. But he knew that calls would be made: and I think the fair result is, that he authorised the plaintiff to act as principal on his behalf, and to incur the liability, and make the payment which he has been compelled to make. I therefore think,—although I am free to admit that I feel the case not to be absolutely void of doubt,—that the plaintiff is entitled to recover.

COLTMAN, J. It seems to me that this case is not attended with any doubt at all. A person who goes into the Stock-Exchange to buy shares, must be supposed to have a knowledge of the usual course of business there, and of the law applicable to it. When a man buys railway shares, he must be assumed to know, that, by the operation of the 8 & 9 Vict. c. 16, s. 16, he cannot obtain a transfer until all calls in arrear have been paid. What was the contract here? The defendant contracted to buy twenty Vale of Neath shares, at 30s. discount. What does that mean? Why, that **[903]** he will pay all the calls already paid or charged upon the shares, subject only to a deduction of 30s. per share from the amount. That the defendant so understood the contract, is clear from the subsequent correspondence: he does not deny his liability to pay the call in question, but only asks for time. Without any reference to the rules of the Stock-Exchange, the plaintiff having, at the request of the defendant, rendered himself liable to be sued for the amount of the call paid by Miss Bennett, he has been compelled to pay money which his principal was bound to pay, and therefore an action well lies to recover it back as money paid to his principal's use.

MAULE, J. I also think the plaintiff in this case is entitled to recover the 40l., as money paid by him to the use of the defendant. The construction of the defendant's order is very plain. He desires the plaintiff to buy for him twenty Vale of Neath shares, at 30s. discount. The meaning of that is, that the purchaser is to become the owner of the shares, upon payment, not of 100l. per share, the nominal value, but of all such sums as the prior holders may have paid or become liable to pay in respect of them, less 30s. The authority, therefore, given to the plaintiff as broker enabled him to buy the shares, and to incur a liability to pay all that had been paid upon them, or that they then stood charged with, less 30s. The defendant does not, throughout the transaction, repudiate or deny that authority. The plaintiff having been employed as broker to do what was necessary to procure a transfer of the shares, and having paid to the vendor a call which she had been compelled to pay before a transfer could be effected, I think he did nothing more than he was bound to do, and was necessarily done, to complete the transaction which the defendant had authorised him to **[904]** enter into on his behalf. If so, a good case as for money paid to the defendant's use is made out. Looking at the correspondence only, it seems to me clearly to establish a good case for money paid. The letter of the 4th of November, if written before action brought, would have been good evidence of an account stated. But, how stands the case with reference to the former part of the correspondence? On the 7th of April, the plaintiff informs the defendant that the call of 2l. per share, due on the 12th, has been paid by the seller, and requires him to remit the amount: and on the 13th,—the day after the call was payable,—the plaintiff again writes to the defendant, and tells him that he has paid the 40l. to Miss Bennett's broker. The defendant is, therefore, without the excuse suggested. He is not called upon to pay the call until after the time at which the company were in a condition to enforce it. In the defendant's letter to the plaintiff, of the 17th of April, in which he makes the preposterous proposal to him to endeavour to get the money back, not a word is said as to his non-liability to pay the call. Then, on the 4th of November, he writes to the plaintiff's attorney, asking for time. There was ample evidence to shew that the money was paid by the plaintiff on account and to the use of the defendant, before the commencement of the action.

CRESSWELL, J. I entirely agree with the rest of the court in the view they take as to the authority given by the defendant to his broker, and that the latter acted within the scope of his authority. It is satisfactory to find, from the defendant's letters, that he himself took the same view of the matter. The cases of *Bowlby* v. *Bell*, and *Humble* v. *Langston*, in reality, do not apply at all. In *Humble* v. *Langston*, the defendant had bought shares of the plaintiff, but refused to accept a **[905]** transfer; the plaintiff, having been compelled to pay calls subsequently made, claimed to be entitled to an indemnity from the defendant, upon some supposed implied undertaking. I was unable to collect from the equity cases cited, whether they are at all at variance with that case. If the plaintiff had been compelled to pay calls for which the defendant was liable, no doubt he might have sued in respect of the special damage. As to *Bowlby* v. *Bell*, the case was shortly this:—The defendant authorised the plaintiff to sell for him registered shares. All parties at the time of the contract knew that the shares were then sent in for the purpose of being registered. The purchaser, without offering to pay for the shares, or tendering a transfer for execution, either to the seller or his broker (the plaintiff), bought other shares, and claimed and received the difference in the price from the plaintiff, who sought to recover it from his principal, as money paid to his use. But the court said: "If the contract was for unregistered shares, the plaintiff was not authorised to make it: and, if for registered shares, Richardson (the buyer), not having tendered a transfer, was not in a situation to proceed against the plaintiff; and, consequently, the payment by him was in his own wrong, and did not give him a right of action against the defendant for money paid to his use." The question there was quite independent of any rules of the Stock Exchange.

Rule discharged.

[906] Wood *v.* The Governor and Company of Copper Miners in England.

[S. C. 18 L. J. C. P. 293. For subsequent proceedings see 14 C. B. 428.]

No precise form of words is necessary to constitute a covenant: it is enough, if the intention of the parties mutually to contract, is apparent from the general scope of an instrument under seal,—more especially, where it commences with the words "it is hereby agreed by and between the said parties in manner following."—By an instrument under seal, expressed to be made and entered into between the defendants and the plaintiff, it was "agreed by and between the parties," amongst other things—that the defendants should grant a lease of certain premises to the plaintiff, for twelve years, at a peppercorn rent, for the purpose of the plaintiff's carrying on therein the manufacture of patent-fuel,—that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term, should be bought and purchased of the defendants, provided the defendants could and should supply him with the quantity that should from time to time be required by him, or to such extent as the defendants could supply, and that the defendants should charge for the same a given price, and no more,—and, further, that the defendants should not be compelled to supply more than 500 tons per week, and that, in case the defendants should, from some substantial cause, be unable to supply small coal to the extent agreed upon, they should give the plaintiff six months' notice of such their inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the defendants could supply, from any other source:—Held, that this instrument was properly declared upon as a covenant on the part of the defendants to supply the plaintiff with coal to the extent of 500 tons weekly, unless unable from some substantial cause.

This was an action of covenant. The declaration stated, that, theretofore, to wit, on the 21st of July, 1847, a deed was made and entered into by and between the defendants of the one part and the plaintiff of the other part,—profert,—and the said deed was and is to the tenor and in the words and figures following, that is to say, "An agreement made and entered into the 21st day of July, 1847, between the Governor and Company of Copper Miners in England (meaning the defendants) of the one part, and H. W. Wood (meaning the plaintiff), of, &c., manufacturer of fuel, of the other part: Whereas, the said H. W. Wood has lately erected a factory, works, and buildings on [907] part of a certain piece of land, containing, &c., belonging to the said governor and company, situate at Port Talbot, in the county of Glamorgan, South Wales, for the purpose of carrying on the manufacture of patent-fuel: And whereas the said governor and company have advanced and paid to the said H. W. Wood, for and towards the erection and completion of the said factory, works, and buildings, and the machinery therein, divers sums of money, amounting in the whole to the sum of 2500l.: And whereas the said governor and company have agreed to grant a lease of the said piece of land, and the manufactory and buildings, and other the premises, to the said H. W. Wood, and to enter into certain other arrangements for the supply of coal for the said manufactory, and otherwise, on the terms and conditions hereinafter mentioned: Now, these presents witness, and it is hereby agreed by and between the said parties in manner following that is to say,—First, That the said governor and company shall grant a lease of the said plot or parcel of land, with the manufactory, buildings, and machinery thereon, to the said H. W. Wood, for the term of twelve years from the 25th of March last, at a peppercorn rent; such lease, and a counterpart thereof, to be prepared at the expense of the said H. W. Wood: Second, That, immediately upon such lease being so granted by the said governor and company, he, the said H. W. Wood, shall execute an assignment thereof by way of mortgage to the said governor and company, or their trustee, as a security for the repayment of the said sum of 2500l., with interest after the rate of 5l. per cent. per annum, within seven years from the date thereof; such mortgage to contain a power of sale, and all other usual powers: Third, That the patent-fuel manufactured by the said H. W. Wood, on which he may require an advance, shall from time to time be placed and laid upon a cer-**[908]**-tain piece of land which shall be adjoining to the said piece of land hereby agreed to be demised, but divided off for that purpose and for the purpose next hereinafter mentioned, and shall there be and remain in the possession of the said governor and company, as a security for any moneys at any time due and owing to the said governor and company by the said H. W. Wood on any account whatsoever, excepting the said sum of 2500l. under or by virtue of this agreement: provided, nevertheless, that such deposit of fuel, and such advance or advances, shall in no way prevent or prejudice the sale of fuel from time to time by the said H. W. Wood, who for that purpose shall have full liberty to ship or give delivery orders for the same; the said H. W. Wood in that event depositing or agreeing to deposit with the said company the cash, or approved bills, to be received by him as the price of or advance upon such fuel, when and as the same shall be sold: Fourth, That all the coals consumed and used by the said H. W. Wood for the purpose of his manufacture, during the said term of twelve years, shall be bought and purchased of the said company, provided the said company can and shall supply him with the quantity that shall from time to time be required by him, or to such extent as the said company can supply; and that the said company shall charge for the same at and after the rate of 3s. 10d. per ton, delivered over the weighbridge on the premises of the said H. W. Wood, at Port Talbot aforesaid, and no more; the said coal to be that which is clean and good for the purpose of manufacturing steam-fuel, and to be that which is known as small coal unscreened, unless passed through a screen of longitudinal bars not less than four inches apart; and that the said H. W. Wood shall use and consume no other coal at the said factory, during the said term, than that which is bought and purchased of the said company, excepting **[909]** nevertheless, in the event of the said H. W. Wood requiring more small coal than the said company can and shall supply him with, and excepting nevertheless, for the purpose of making experiments, in the manufacture of fuel, in which case the said H. W. Wood is to be at liberty to purchase and consume coal not being the company's coal, such purchases and consumption of coal for the purposes of experiment not to exceed fifty tons in quantity from any six collieries in any one year: Fifth, That the said company shall not be compelled to supply more than five hundred tons per week; and that, in case the said company shall, from some substantial cause, be unable to supply small coal to the extent agreed upon, the said company shall give to the said H. W. Wood six months' notice of such their inability, and, in such case, the said H. W. Wood shall be at liberty to obtain his supply of coal, or the excess beyond the quantity the said company can supply, from any other source: Sixth, That all coal supplied to the said H. W. Wood by the said company, shall be delivered over the weighbridge erected at Port Talbot aforesaid, at the said patent-fuel works, at the rate of 3s. 10d. per ton, including the use of trams, waggons, haulage, and other necessary incidental expense, to the weighing machine, and the use of trams from the weighing machine to the manufactory, such further haulage to be at the expense of the said H. W. Wood; and the said H. W. Wood shall, if he shall so think fit, be at liberty to pass the said coal over a screen of longitudinal bars not less than half an inch apart; and all coal which will not pass through such screen shall be deemed rubble coal, and shall be taken back by the said governor and company within fourteen days after notice in writing shall have been given as next hereinafter is mentioned, and paid for by them, in cash, at the rate of 1s. 6d. per ton, at the periods hereinafter specified for the rendering accounts of all coal **[910]** delivered: Seventh, That the said company shall supply to the said H. W. Wood, in lieu and in place of the rubble coal so returned, free of cost and expense to him, an equal quantity of the coal hereby agreed to be delivered, within fourteen days after notice in writing shall have been given, specifying as nearly as is practicable the quantity so to be removed; and, in case the said company shall neglect to remove the said rubble coal, and to replace the same with such coal as aforesaid, within the time aforesaid, they shall pay to the said H. W. Wood, the sum of 2l. per diem, to be recovered as liquidated damages: Eighth, That, if the said coal shall not be of such quality of small coal as is required by the said H. W. Wood, and fit for the purposes of the manufacture, the same shall be notified to the said company within fourteen days after the same shall have been delivered, otherwise the same shall be deemed and taken to be good and sufficient for the purposes, and shall be charged for accordingly; but, in case the said H. W. Wood shall give notice to the said company, within the said period of fourteen days, that the said coal is not good and fit for the purposes of the manufactory, then the said company shall either take back the same, or shall, within seven days after such notice shall have been delivered, refer the question to the decision of an individual to be agreed upon between them and the said H. W. Wood, or, in case they cannot agree, shall give the name of a referee, who, together with a referee to be named by the said H. W. Wood, or such third party as such two referees shall appoint, shall award and determine whether such small coal be good and sufficient for the purpose of such manufacture, and as agreed for; and, in either of the said cases, the said company and the said H. W. Wood, shall be mutually bound by such decision: Ninth, That the said H. W. Wood shall be at liberty to erect a shipping-stage, adjoining the said fuel **[911]** manufactory, on the river Avon, and the said company shall contribute towards the cost and expense of erecting the same, when and after the same shall have been erected, a sum not exceeding 50l., and shall also allow the said H. W. Wood to make use of some one of their shipping-stages and weighing-machines for the purpose of shipping patent-fuel, or receiving pitch, in regular turn according to the stemming-list, due diligence being at all times used on the float at Port Talbot aforesaid, free of charge: Tenth, That the account for all coals delivered by the said company to the said H. W. Wood, after the rate of 3s. 10d. per ton, shall be rendered to the said H. W. Wood every three months, and shall include all coals delivered during that period; and, if no objection be stated to such account within ten days after the same shall have been delivered, the same shall be taken (errors excepted) as a correct account, and the said H. W. Wood shall be debited, on the tenth day of the succeeding month, with the amount found to be due to the said company upon such account, and the said H. W. Wood shall thereupon accept the drafts or bills of the said company for the amount so appearing due, such bills or drafts, including interest at 5l. per cent., to be drawn at not less than twelve months' date: Eleventh, That the said H. W. Wood shall not take down or remove the said manufactory and premises so erected and built as aforesaid, or the machinery in and about the same; but that such buildings, erections, and machinery, shall be and remain as a security to the said company for all moneys that shall at any time be due or owing to them, either on account of advances incident to the erection of such buildings and machinery, or for advances made upon manufactured fuel, if any, or for moneys that shall be due in respect of coals supplied, or any other account whatever under and by virtue of this agreement: provided always, nevertheless, that, upon **[912]** the said H. W. Wood paying or securing any balance that may at any time during the continuance, or at the determination, of this agreement, be due from the said H. W. Wood to the said company, the said company shall, if required so to do by the said H. W. Wood, take at a valuation, to be made by a referee or referees so to be chosen as aforesaid, the machinery and fixtures of and upon the said manufactory and premises: Twelfth, That, in the lease to be granted to the said H. W. Wood, a covenant for title shall be inserted on the part of the said company, and covenants shall be inserted on the part of the said H. W. Wood, that the premises so to be leased shall not be used for any other purpose or purposes than that of the manufacture of patent-fuel, and that the said H. W. Wood shall not underlet or assign the said premises, or any part thereof, without the consent of the said company, such consent not being unreasonably withheld: Thirteenth, That, in case the said H. W. Wood shall cease to use and consume the small coal of the said company, by reason of their inability to supply him therewith as hereinbefore mentioned and agreed, or otherwise howsoever, and the said H. W. Wood shall continue in the occupation of the said premises, the said H. W. Wood shall pay to the said company a rent or sum of 100l. per annum, during the then continuance of this agreement, such rent to commence within six months after the said H. W. Wood shall so cease to use and consume the small coal of the said company as aforesaid: Fourteenth, That the said agreement, to be determinable as aforesaid, shall continue for the term of twelve years from the date hereof, and that, at the expiration of the said term of twelve years from the date hereof, if the said H. W. Wood shall so elect and determine, and of such election or determination shall give one month's notice in writing to the said company, but not otherwise, the said company shall pay **[913]** or allow to the said H. W. Wood the then value of the machinery and fixtures, such value to be ascertained by arbitration in the manner hereinafter mentioned: provided also, and it is hereby agreed and declared between and by the said parties hereto, that, if at any time during the continuance of this agreement, any disputes or differences shall arise between the said parties, respecting any clause, matter, or thing herein contained, or relating to the premises, or otherwise arising out of this agreement, the same shall be referred to the arbitration of two indifferent persons, one to be chosen by each party; and the decision or award in writing of such arbitrators, in case they shall agree upon the matters in dispute, or of their umpire,—whom they are hereby authorised to appoint, in case they shall differ,—shall be binding and conclusive on the said parties hereto; provided such award, whether by the arbitrators or their umpire, shall be in writing, and be delivered to the parties within one calendar month after the matters therein contained shall have become the subject of reference to arbitration: Provided that the said piece or parcel of land, manufactory, and premises, shall not be a security for a larger amount than 5000l. In witness," &c.: prout patet, &c.: Averment, that, after the making of the said deed, and during the said term of twelve years, which had not yet expired, and in the week next after the making of the said deed, which expired, to wit, on the 28th of July, 1847, and in divers, to wit, twenty-five successive weeks then next following, and which elapsed before the commencement of this suit, the plaintiff required for consumption and use, for him, for the purposes of his said manufactory, in each of those weeks, a large quantity, not exceeding 500 tons, and amounting, to wit, to 500 tons, of the said small coal so to be supplied to him weekly by the defendants as aforesaid, and the **[914]** plaintiffs, at reasonable times before the expiration of each of those weeks, to wit, on the 22nd of July, 1847, and on divers days and times afterwards, gave the defendants notice of the premises, and required of them to supply him, in each of those weeks respectively with, and deliver to him, at the place in the said deed in that behalf provided for and agreed on as aforesaid, to wit, over the weighbridge on the said premises of the plaintiff at Port Talbot aforesaid, and in the manner named in the said deed, and according to the defendants' said covenant in the said deed, the said quantities of the said coal so required by him as aforesaid, not exceeding 500 tons per week, and so to be by the defendants supplied as aforesaid: that the plaintiff, during each of those weeks, and during all the time aforesaid, was ready and willing to buy and purchase of the defendants those quantities, and accept and receive and pay for the same respectively, at the place, in the manner, and upon the terms in and by the said deed in that behalf covenanted and agreed upon as aforesaid,—and whereof the defendants during all the times aforesaid had notice: That, although the defendants, during each of the said several weeks, could, and might, and ought, according to the said deed and their said agreement in that behalf, to have supplied the plaintiff with the said quantities of the said coal which the plaintiff so required as aforesaid; and although the defendants were not unable, from any substantial cause, so to supply the same, or any part thereof, and did not at any time during the time aforesaid, give to the plaintiff any notice of their inability to supply the same; and although the plaintiff had performed the said deed in all things therein contained on his part to be performed; yet that the defendants did not nor would, in or during the said twenty-six weeks, or at any other time, supply the plaintiff with the said quantities of the said small **[915]** coal so to be supplied to him by the defendants as aforesaid, and so required by the plaintiff as aforesaid, not exceeding 500 tons per week, or any part thereof, contrary to the said deed and the defendants' said covenant in that behalf: and, that, after the making of the said deed, and before the commencement of this suit, to wit, on the 22nd of July, 1847, and on divers days and times afterwards, the defendants did, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff, at his request, with, and deliver to him, divers large quantities, to wit, 2019 tons of coal, as and for the said small coal so to be by them supplied for consumption and use by him for the purposes of his said manufacture, and at the times of the delivery thereof, divers portions thereof, amounting in the whole, to wit, to 400 tons, would not, on being passed over a screen of longitudinal bars not less than half an inch apart, pass through such screen, and the same were rubble coal within the true intent and meaning of the said deed, and the plaintiff did afterwards, and within fourteen days after the days and times respectively when the said quantities of coal respectively were so supplied and delivered as aforesaid, to wit, on the 1st of August, 1847, and on divers, to wit, twenty-nine days and times afterwards, and before the commencement of this suit, give, in the whole, divers, to wit, thirty notices in writing to the defendants, and did require of them thereby, to remove and take back divers large quantities in the said notices respectively mentioned, amounting, to wit, to the whole of the said quantities of rubble coal, and to replace and supply to the plaintiff, in lieu and place of the said quantities of rubble coal, free of cost and expense to him, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as **[916]** aforesaid, according to the said deed, within fourteen days next after each of the said notices respectively were so given as aforesaid; and in each of the said notices the plaintiff specified, as nearly as practicable, the quantity of the said rubble coal so required to be removed and taken back: That, although fourteen days after each of the said notices so given as aforesaid, had elapsed before the commencement of this suit; and although the defendants did afterwards, to wit, on the day and year last aforesaid, and on the said several days and times last aforesaid, remove and take back the said quantities of the said rubble coal so required to be removed and taken back as aforesaid; and although the defendants, during those fourteen days after each of the said notices so given as aforesaid, could and might and ought, according to the said deed, and their said agreement in that behalf, have replaced and supplied the plaintiff, in lieu and place of the said quantities of rubble coal, an equal quantity of the small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff aforesaid, according to the said deed; and although the defendants were not unable from any substantial cause so to supply and deliver the same, or any part thereof, and did not at any time during the time aforesaid give the plaintiff any notice of their inability to supply or deliver the same: Yet the defendants did not nor would within the said space of fourteen days after each of the said notices was so given by the plaintiff as aforesaid, or at any other time, replace or supply to the plaintiff in lieu and place of the said quantities of rubble coal, an equal, or any, quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid, according to the said deed, but wholly neglected and refused so to do, and wholly neglected and refused so to do for and during divers, to wit, 150 days after the **[917]** expiration of fourteen days after each of the said notices was so given as aforesaid, and amounting in the whole, to wit, to 4500 days, which elapsed before the commencement of this suit; and that thereupon and thereby the defendants afterwards, and before the commencement of this suit, to wit, on the 24th day of January, 1848, became and were liable to pay, and indebted to the plaintiff in, a large sum of money, amounting, to wit, to 9000l., being at and after the rate of 2l. for each and every of the said days which the defendants so neglected and refused to replace the said rubble coal with the said small coal as aforesaid: yet that the defendants, although often requested by the plaintiff so to do, had not yet paid to him the said sum of 9000l., or any part thereof, and the same remained wholly due and unpaid to the plaintiff; and, that, by means of the said several premises, the plaintiff had been, for and during all the time aforesaid, greatly impeded in, and hindered and prevented from, carrying on the said manufacture of patent-fuel, and hindered and prevented from manufacturing divers, to wit, 30,000 tons of the said patent-fuel, and thereby had lost and been deprived of divers great gains and profits amounting, to wit, to 10,000l., which he might, and otherwise would, have derived and acquired therefrom, and from the sale and disposal of such patent-fuel when manufactured; and thereby the said factory, works, and buildings and premises, and divers large quantities of machinery and chattels which the plaintiff caused and procured to be erected and set up and maintained therein for the purpose of carrying on the said manufacture, became and were during all the time aforesaid, and still remained, unproductive, and of little or no use or value to the plaintiff; and the plaintiff had been hindered and prevented, during the time aforesaid, from having the use thereof and using the same; and the [918] plaintiff had lost and been deprived of the use of divers large sums of money, amounting, to wit, to 10,000l., which he invested and kept for the purpose of carrying on the said manufacture, and in erecting, procuring, maintaining, and keeping the said factory, works, buildings, premises, machinery, and chattels; and the plaintiff had been and was, by means of the premises, otherwise much damnified, &c.

The defendants demurred specially to this breach, assigning for cause,—that it does not appear in and by the said breach, or in any other part of the declaration, that the defendants ever bound themselves by any covenant, either express or implied, to furnish to the plaintiff 500 tons, or any quantity of coal, weekly, during the said period of twelve years mentioned in the said deed in the declaration mentioned, or during any portion of the said term: nor does it appear in and by the declaration, that, even presuming the allegations in the said breach to be correct, that the plaintiff hath any cause of action whatever against them, the defendants, for their refusing or neglecting to supply him with the quantities of coal in the said breach mentioned.

There was also a second breach, as follows:—That, after the making of the said deed, and before the commencement of this suit, to wit, on the 22nd of July, 1847, and on divers days and times afterwards, the defendants did, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff, at his request, with, and deliver to him, divers large quantities, to wit, 2019 tons of coal, as and for the said small coal so to be by them supplied for consumption and use by him for the purposes of his said manufacture; that, at the times of the delivery thereof, divers portions thereof, amounting in the whole, to wit, to 400 tons, would not, on being [919] passed over a screen of longitudinal bars not less than half an inch apart, pass through such screen, and the same were rubble coal within the true intent and meaning of the said deed; that the plaintiff did afterwards, and within fourteen days after the days and times respectively when the said quantities of coal respectively were so supplied and delivered as aforesaid, to wit, on the 1st of August, 1847, and on divers, to wit, twenty-nine days and times afterwards, and before the commencement of this suit, give, in the whole, divers, to wit, thirty notices in writing to the defendants, and did require of them thereby to remove and take back divers large quantities in the said notices respectively mentioned, amounting, to wit, to the whole of the said quantities of rubble, and to replace and supply to the plaintiff, in lieu and place of the said quantities of rubble coal, free of cost and expense to him, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid according to the said deed, within fourteen days next after each of the said notices respectively were so given as aforesaid; and in each of the said notices the plaintiff specified as nearly as practicable the quantity of the said rubble coal so required to be removed and taken back: that, although fourteen days after each of the said notices so given as aforesaid had elapsed before the commencement of this suit; and although the defendants did afterwards, to wit, on the day and year last aforesaid, and on the said several days and times last aforesaid, remove and take back the said quantities of the said rubble coal so required to be removed and taken back as aforesaid: and although the defendants, during those fourteen days after each of the said notices so given as aforesaid, could and might and ought, according to the said deed and their said agreement in that behalf, to have replaced and supplied to the [920] plaintiff, in lieu and place of the said quantities of rubble coal, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid according to the said deed; and although the defendants were not unable, from any substantial cause, so to supply and deliver the same, or any part thereof, and did not at any time during the time aforesaid give the plaintiff any notice of their inability to supply or redeliver the same; yet the defendants did not nor would, within the said space of fourteen days after each of the said notices was so given by the plaintiff as aforesaid, or at any other time, replace or supply to the plaintiff, in lieu and place of the said quantities of rubble coal, an equal or any quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid, according to the said deed, but wholly neglected and refused so to do, and wholly neglected and refused so to do for divers, to wit, one hundred and fifty days after the expiration of fourteen days after each of the said notices was so given as aforesaid, and amounting in the whole, to wit, to 4500 days, which elapsed before the commencement of this suit; and that thereupon and thereby the defendants, afterwards, and before the commencement of this suit, to wit, on the 24th of January, 1848, became and were liable to pay and indebted to the plaintiff in a large sum of money, amounting, to wit, to 9000l. being at and after the rate of 2l. for each and every of the said days which the defendant so neglected and refused to replace the said rubble coal with the said small coal as aforesaid; yet that the defendants, although often requested by the plaintiff so to do, had not yet paid to him the said sum of 9000l., or any part thereof, and the same remained wholly due and unpaid to the plaintiff.

To this breach the defendants pleaded,—first, that [921] they did not, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff with, or deliver to him, the said coal in the said breach in that behalf mentioned, as and for the said small coal so to be by them supplied for consumption and use by the plaintiff for the purposes of his said manufacture, in manner and form, &c.;—secondly, that the said portions of coal in the said second breach in that behalf mentioned, would, on being passed over a screen of longitudinal bars not less than half an inch apart, pass through such screen, and that the same were not, nor was any part thereof, rubble coal within the true intent and meaning of the said deed;—thirdly, that the plaintiff did not give the said respective notices in the said second breach, or any or either of them, in that behalf mentioned, to remove and take back the said quantities of rubble coal in the second breach in that behalf mentioned, and to replace and supply to the plaintiff, in lieu and place thereof, the said small coal in that behalf mentioned, in manner and form, &c.;—fourthly, that they, the defendants, were unable, from a substantial cause, to supply or deliver the said small coal, or any part thereof, in the said second breach in that behalf mentioned;—fifthly, that they did, within the space of fourteen days after each of the said notices was so respectively given by the plaintiff, replace and supply to the plaintiff, in lieu and place of the said respective quantities of rubble coal in the said second breach in that behalf mentioned, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid, according to the said deed and the said covenant of the defendants in that behalf.

Upon each of these pleas issue was joined.

By an order of nisi prius made at the Gloucester spring assises, 1848, it was ordered, amongst other [922] things, that the jury should find a verdict for the plaintiff, for the damages in the declaration, costs 40s., subject to the award of a barrister, to whom the cause and all matters in difference between the said parties were referred, to raise on his award such questions of law for the opinion of the court as either of the parties might call on him to do, and to assess the damages contingently upon the demurrer, and upon the views which the court might eventually take of the questions of law; with power to order the determination of the contract, and the terms upon which such determination should take place,—the demurrer to be argued at the same time, or to be taken as part of the award, so as to be heard along with the other questions of law.

By rule of court, it was afterwards,— on the 11th of May, 1848,—ordered "that the arbitrator should be at liberty to make and publish two several awards, at different times, of and concerning the different matters referred to him, and in and by the first of his said awards to raise such points of law for the opinion of the court as either of the parties should require him to do, and to assess the damages contingently upon the demurrer depending in the cause, and upon the views which the court might take of the questions of law so to be submitted to them as aforesaid: and that, after the judgment of the court should have been given upon the demurrer, and also upon the questions of law to be submitted to the court as aforesaid, the arbitrator should be at liberty to make and publish his second award of and concerning the other matters so as aforesaid referred to him."

At the request of the parties, the arbitrator accordingly stated the following case for the opinion of the court:—

This was an action of covenant brought by H. W. Wood against the Governor and Company of the Copper [923] Miners in England, to recover damages for the breach of certain covenants contained in a deed bearing date the 21st of July, 1847, made between the defendants of the one part, and the plaintiff of the other. Before and at the time of the execution of the deed, the plaintiff had been and was the occupier of certain buildings which had been erected on the land of the defendants for the purpose of manufacturing a certain composition made of small coal and pitch, called "Bell's Patent Fuel," and was carrying on the manufacture of such patent-fuel therein at the time of the execution of such deed. The defendants were the owners of certain coal-mines in the neighbourhood.

On the 21st of July, 1847,—the day of the date of the agreement,—the defendants delivered to the plaintiff, over the weighbridge on the plaintiff's premises at Port Talbot, certain quantities of coal of the description mentioned in the deed as small coal unscreened; and thenceforth contained, from time to time, till the commencement of the action, to deliver divers quantities of such coal to the plaintiff in the manner aforesaid, amounting in the whole to 3082 tons in weight. But the defendants failed to deliver to the plaintiff the quantity of 500 tons per week, notwithstanding they had received notice from the plaintiff that he required the full quantity of 500 tons to be sent down weekly, and notwithstanding the defendants were able to supply that quantity weekly.

Of the coals so supplied by the defendants to the plaintiff, 346 tons were coals which could not, on being passed over a screen of longitudinal bars of not less than half an inch apart, pass through such screen. These last-mentioned coals the plaintiff rejected as rubble coal, and from time to time gave the defendants certain notices in writing specifying, as nearly as practicable, the quantity of rubble coal on the plaintiff's premises, **[924]** and requiring the defendants to remove the same according to the agreement. The first of such notices was given by the plaintiff on the 16th of August, 1847, and by it the defendants were required to remove about 20 tons of rubble coal then lying in the plaintiff's yard, from the plaintiff's premises, according to agreement. On the 26th and the 30th of August, the 6th, 13th, and 28th of September, the 4th, 11th, 18th, and 25th of October, and the 13th and 28th of December in the same year, and on the 4th and 13th of January, 1848, the plaintiff also served the defendants with similar notices in writing, specifying as nearly as practicable the quantity of coals deemed by him to be rubble coal, and requiring the defendants to remove the same.

The defendants did, in fact, subsequently to every such notice, and within fourteen days after the receipt thereof, remove the rubble coal to which such notice applied. The defendants also could have supplied the plaintiff with an equal quantity of small coal, in the place of the rubble coal removed, and were not unable, from any substantial cause, to supply or deliver the said small coal. In fact, the defendants did subsequently to, and within fourteen days after the receipt of, every such notice, deliver to the plaintiff, at the place and in the manner mentioned in the deed, small coal unscreened exceeding in quantity the quantity of rubble coal removed by them in pursuance of such notice: but the total quantity of coals supplied weekly by the defendants to the plaintiff, fell short of the quantity of 500 tons per week, although the defendants might and could have supplied the plaintiff with that quantity weekly. There was no act done by the defendants on the first delivery of coals next after every such notice, or at any other time previous to the commencement of the action, to indicate that such delivery was for the purpose of replacing the rubble coal removed by them; nor was **[925]** there any direct substitution of an equal quantity of small coal in lieu and in place of the rubble coal removed.

The plaintiff claimed liquidated damages, under the second breach, in respect of every default on the part of the defendants to replace the rubble by small coal, after notice from the plaintiff to remove the rubble; such damages to be calculated at the rate of 2l. per diem for every day that had elapsed from the expiration of every such notice of default, up to the time of the commencement of the action. If this were the proper mode of calculating the damages in respect of the second breach, the arbitrator found that they would amount in the whole to 2416l.

The defendants contended that the plaintiff was not entitled to more than nominal damages in respect of the second breach. But that, if the plaintiff was entitled to more than nominal damages, in that case, the amount of such damages ought to be assessed in one of the modes following, that is to say, either at the sum of 28l., being 2l. per diem for one period of fourteen days,—or else at the sum of 28l. in respect of every neglect of the defendants to replace the rubble coal after notice, by which mode of calculation the damages amounted in the whole to 392l.,—or else at the sum of 2l. per diem for every day from the expiration of the first notice to the commencement of the action, according to which last mode of calculation the damages amounted in the whole to 296l.

The questions for the opinion of the court, were,—first, whether the first breach was sufficient in law. If the court should be of opinion that it was, then the arbitrator assessed the damages sustained by the plaintiff by reason of such breach, at 2272l. If not, then judgment was to be entered for the defendants on that breach.

[926] Secondly, whether the defendants, by the delivery to the plaintiff of the small coal in the manner stated in the case, did supply to the plaintiff, in lieu and in place of the rubble coal returned, an equal quantity of coal agreed to be delivered by the deed. If the court should be of opinion that the defendants did, under the circumstances stated in the case, supply to the plaintiff, in lieu and in place of the rubble coal returned, an equal quantity of the coal agreed to be delivered by the deed, then a verdict was to be entered for the defendants on the issue joined on the fifth plea; otherwise, the verdict for the plaintiff on that plea was to stand.

Thirdly, if the court should be of opinion that the plaintiff was entitled to a verdict on the issue joined on the fifth plea, then the opinion of the court was requested, whether the second breach was sufficient in law. And, if the court should be of opinion that the second breach was not sufficient in law, then judgment for the plaintiff on such breach was to be arrested.

Fourthly, if the court should be of opinion that the second breach was sufficient in law, then the opinion of the court was requested whether the plaintiff was entitled to more than nominal damages in respect of the second breach. And, if the court should be of opinion that the plaintiff was entitled to more than nominal damages in respect of the second breach, whether such damages were properly calculated in the mode contended for by the plaintiff; if not, whether they were to be calculated in any, and, if so, in which, of the modes contended for by the defendants,—if not, the court were asked to direct in what way the damages were to be calculated: and a verdict to be entered for the plaintiff for the amount, when ascertained.

And the arbitrator directed that the verdict entered for the plaintiff on the first, second, third, and fourth issues joined between the parties, should stand; and **[927]** that the verdict on the fifth issue joined between the parties be entered for the plaintiff or the defendant, as the court might, upon consideration, direct; and, if for the plaintiff, then with such damages as the court might direct; and that judgment should be finally entered for such party, and in such form, as the court, upon consideration of the premises, should deem meet; or, if the court should think right that judgment for the plaintiff be arrested, then that judgment for the plaintiff be arrested, accordingly.

The pleadings in the cause, and the deed of the 21st of July, 1847, were to form part of the case.

The case and demurrer now came on for argument.

Alexander, in support of the demurrer (*a*). The deed upon which the question in

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(*a*) The points marked for argument, on the part of the defendants, were—

"First, that, although the plaintiff was bound by the deed set forth in the declaration (subject to the exceptions therein contained) not to use or consume at the said factory any other coal than that which should be bought and purchased of the defendants, it was nevertheless entirely optional with the defendants whether they would supply such coal or not; and that the declaration does not disclose any covenant on their part, either express or implied, to furnish the plaintiff with any quantity of coal during the said period of twelve years, or during any portion of that time:

"Secondly, that, although the stipulation as to notice, contained in the fifth article of the said deed, may possibly shew that the plaintiff was not at liberty, in the absence of any such notice, to consume on his said premises small coal purchased from any person or persons other than the defendants, no covenant can be implied from it that the defendants should, until such notice should be given, supply the plaintiff with the said quantity of 500 tons weekly; and that no covenant in the alternative, either to supply the said quantity, or to give the said notice of inability, can be implied from any part of the said deed:

"Thirdly, that it appears in and by the declaration, and under the circumstances this case arises, is not framed **[928]** in very intelligible terms. The first stipulation contained therein relates to the grant of a lease of certain land by the defendants to the plaintiff, at a peppercorn rent. Then come certain provisions for advances of money by the defendants to enable the plaintiff to carry on the manufacture of patent-fuel. The most material stipulation is the fourth, which provides that all the coals used by the plaintiff in his manufacture during the term shall be bought of the company, provided that they can and shall supply him with the quantity required by him, or to such extent as they can supply, and restrains the plaintiff from using any other coal, except in the event of his requiring more than the company can and shall supply him with. This clearly gives an option to the defendants to supply the coal or not: the plaintiff binds himself to consume their coal to the extent to which the defendants are able and willing to supply it. On the part of the plaintiff, reliance will, in all probability, be placed on the fifth stipulation—that the company shall not be compelled to supply more than 500 tons per week, and that, in case they shall from some substantial cause be unable to supply coal to the extent agreed upon, they shall give the plaintiff notice of their inability, and in that case he shall be at liberty **[929]** to obtain a supply elsewhere. It will be contended that this amounts to a contract on the part of the company, to supply 500 tons per week at the least. But it is equally clear that the express terms of this fifth stipulation, will not sustain the first breach. In *Williamson* v. *Taylor* (5 Q. B. 175, 1 D. & M. 389), by agreement between the defendant and plaintiff, the defendant, being the owner of a colliery, retained and hired the plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and the plaintiff agreed to continue the defendant's servant during all times the pit should be laid off work, and, when required (except when prevented by unavoidable cause), to do a full day's work on every working day: and it was held that the defendant was not obliged by this contract to employ the plaintiff at reasonable times for a reasonable number of working days during the term. So, in *Aspdin* v. *Austin* (5 Q. B. 671, 1 D. & M. 515), by agreement between the plaintiff and defendant, the plaintiff agreed to manufacture for the defendant, cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him 4l. weekly during the two years following the date of the agreement, and 5l. weekly during the year next following, and also to receive him into partnership, as a manufacturer of cement, at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement: each party bound himself, in a penal sum, to fulfil the agreement: the defendant afterwards covenanted by deed for the performance of the agreement on his part: and it was held, that the stipulations in the agreement did not raise **[930]** an implied covenant that the defendant should employ the plaintiff in the business during three or two years, though the defendant was bound, by the express words, to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part. These cases tend to shew that the court will construe agreements according to the words the parties have used, and will not be beguiled by any arguments of suggested hardship. *Dunn* v. *Sayles* (5 Q. B. 685, 1 D. & M. 519) is an authority to the same effect. There, a declaration in covenant stated, that, by deed between the defendant, J. D., and the plaintiff, the plaintiff covenanted that J. D. should for five years from the date serve the defendant in the act of a surgeon-dentist,

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therein set forth, that the defendants were not bound to give to the plaintiff the notice required by the fifth article:

"Fourthly,—the defendants will also contend, if necessary, that, upon the true construction of the portion of the said deed to which the first breach applies, the plaintiff was always at liberty, even without such notice as is mentioned in the fifth article, to obtain from other sources any quantity or excess of small coal required for the purposes of his factory, immediately on the failure of the defendants (whether able to supply the said coal or not) to supply him with any, or a sufficient quantity of the said small coal: and that the object of the said stipulation for notice was merely, that, in the event of the actual inability of the defendants to supply any portion of the said quantity of 500 tons per week, the covenant of the plaintiff to use no other coal than that purchased of the defendants, should, as to such portion, at the expiration of six months from the time of giving such notice, thenceforth entirely cease."

and attend for nine hours each day; and the defendant, in consideration of the services to be done by J. D., covenanted with the plaintiff, that he, the defendant, would during the five years (in case J. D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise,) pay J. D. 35s. per week for the first year, 2l. per week for the second and third, and 2l. 2s. per week for the fourth and fifth: that J. D. was in the service for some time after the making of the deed, till dismissed, and during all that time faithfully performed service, &c., and was willing, and tendered to perform, &c., to the end of the five years; but that the defendant, during the term, refused to permit J. D. to remain in his service, and dismissed him: and it was held, on motion in arrest of judgment, that the declaration did not shew any covenant corresponding to the breach. Lord Denman, in delivering the judgment of the court in *Aspdin* v. *Austin*, says (5 Q. B. 684): "Where parties have entered into **[931]** written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted." [Maule, J., referred to *Hartley* v. *Cummings* (ante, vol. v. p. 247). Cresswell, J. Here, the contest is, not as to the necessity for mutuality, but whether mutuality exists.] There is no covenant, express or implied, on the part of the defendants, to supply the coals.

The arbitrator finds, in effect, that the defendants did remove the rubble coal, and did, within the stipulated time, deliver an equal quantity of small coal: it was not necessary that there should be any express appropriation of the coal so supplied. The penalty, therefore, never attached.

The arbitrator should have stated in his award what the damages actually sustained, were. The plaintiff has suffered only one part of the mischief for which the penalty was imposed: *Astley* v. *Weldon* (2 B. & P. 346); *Kemble* v. *Farren* (6 Bingh. 141, 3 M. & P. 425).

[932] Talfourd, Serjt. (with whom was Keating), contrà (*a*). Wherever it can be collected from the whole instrument that the parties mutually contract to do certain things, a covenant, though not expressed, will be implied. In Comyns's Digest, Covenant (C. 4) (*b*), it is said that "Some words import and make a covenant in law, though there be not any express covenant; as, if a man by deed demise land for years, and the lessee is ousted, covenant lies upon the word *demisi*." It is not necessary that the word "covenant" should expressly appear in a deed, in order to create a covenant: *Saltoun* v. *Lady Houston* (1 Bingh. 433, 8 J. B. Moore, 546).

(*a*) The points marked for argument on the part of the plaintiff, on the demurrer, were,—"That the deed shews a covenant by the defendants to furnish to the plaintiff 500 tons of coal weekly, during the term of twelve years; and that the declaration sufficiently shews a cause of action against the defendants for their not supplying him with the quantities of coal mentioned in the breach."

Those stated for argument on the plaintiff's part, on the award, were,—"That the first breach in the declaration is sufficient in law, for the reasons assigned above, and that he is entitled to judgment thereon for the damages found by the arbitrator; and that the second breach in the declaration is well assigned, and at all events sufficient after verdict; and that the verdict should be entered for the plaintiff on the fifth issue, upon the grounds stated in the award, and for damages to the amount as stated in the award to have been claimed by him before the arbitrator."

(*b*) Citing 1 Roll. Abr. 519, l. 46 (translated 6 Vin. Abr. 385, title Covenant (F.), pl. 1), which refers to H. 48 E. 3, fo. 2, pl. 4, where an opinion of Persay, J., to the contrary, is overruled,—not without an intimation of surprise that such an opinion should have been entertained by so wise a man; 4 Co. Rep. 80 b.; Dyer, 257 a.; 2 Lev. 104; Cro. Eliz. 674; Cro. Jac. 73.

There, by indenture between S. F. senior, of the first part, S. F. junior, of the second part, and J. H. H. of the third part, it was agreed that S. F. senior should retire from the business, and S. F. junior and J. H. H. become partners; that the capital employed should be 36,000l.,—24,000l. of **[933]** which S. F. senior should advance for S. F. junior, and 12,000l. was to be advanced by J. H. H. The deed then proceeded,—"And whereas, an account of all the debts of S. F. senior in his business of a merchant has been this day taken, and the balance in his favour amounts to 38,033l.; and whereas, it has been agreed by and between S. F. senior, S. F. junior, and J. H. H., that the whole of the debts and credits of S. F. senior shall be received and paid by S. F. junior and J. H. H., and that the balance of 38,033l. shall be accounted for, and paid, by them in manner hereinafter mentioned, and S. F. senior hath assigned the debts and credits to them,—this indenture witnesseth that it is agreed, that, in consideration of 12,000l. paid to S. F. senior by J. H. H., and for raising 24,000l., as S. F. junior's share of the capital, the sum of 36,000l., part of the 38,033l. is to be retained by S. F. junior and J. H. H., and the remaining 2033l. paid to S. F. senior by instalments, at six, twelve, and eighteen months; and, if any of the debts shall prove bad, the loss shall be borne by S. F. junior and J. H. H. And it was held that this deed amounted to a covenant by S. F. junior and J. H. H. to pay the debts due from S. F. senior in his business at the date of the indenture. Lord Gifford, C. J., there says (8 J. B. Moore, 571): "It is sufficient if it appears from the whole of the instrument, or can in terms be collected, that there is an intention of the parties that such a covenant shall exist; and, if it were necessary to refer to authorities in support of so clear a position, I need only mention *Stevenson's case* (1 Leon. 324), where, in an action of debt on bond, the condition was, that, 'whereas the plaintiff had covenanted with the defendant that it should be lawful for the defendant to cut down wood for fire-bote and hedge-**[934]**-bote, without making any waste, or cutting more than was necessary;' and the breach assigned, was, that the defendant had committed waste in felling wood, &c., and the condition of the bond was, to perform all covenants and agreements; and exception was taken, because the condition ought only to extend to covenants to be performed on the part of the lessee;—yet the exception was not allowed, as it appeared from the whole of the instrument that it was the agreement of the lessee, although it was the covenant of the lessor." So, in *Sampson* v. *Easterby* (*a*), where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds, for pulling down an old smelting-mill, and building another of larger dimensions; and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain an express covenant to build it: it was held that such covenant was to be implied. And in *Connoch* v. *Jones* (18 Law Journ., N. S., Exch. 204), where, in a lease, S. C. covenanted with E. J. that he would, during the term, at his own costs and charges, repair the windows of the messuage, and also the hedges, ditches, mounds, and fences; the said farm-house and buildings being previously put and kept in repair by the said E. J.,—it was held that these latter words raised an absolute covenant on the part of E. J. to put the farm-house and buildings in repair; and that (*c*), in order to constitute a covenant, no technical words are necessary; it is sufficient if you can collect, from **[935]** the terms of the instrument, that the thing is to be done. So, here, it was evidently the intention of the parties that the covenants should be mutual,—the plaintiff to take the coal, and the defendants to supply it, to the extent of 500 tons per week, provided they were of ability so to do. There is no necessity to resort to an implied covenant. The words amount to a covenant to buy, as well as to sell.

Upon the second breach, two questions arise,—first, how the verdict is to be entered on the fifth issue, whether for the plaintiff or for the defendants,—secondly, if for the plaintiff, upon what principle the damages are to be estimated. The finding of the arbitrator shews that the defendants failed to perform their covenant. [Maule, J. Do the facts found enable the arbitrator to ascertain the damages?] It is submitted that they do, and that there is nothing to prevent the plaintiff from recovering the amount as stipulated. [Wilde, C. J. In cases of payment, the party paying

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(*a*) 9 B. & C. 505, 4 M. & R. 422; affirmed, on error, by the Exchequer Chamber, *Easterby* v. *Sampson*, 6 Bingh. 644, 4 M. & P. 601.

(*c*) Per Parke, B., citing *The Duke of St. Albans* v. *Ellis*, 16 East, 352.

may appropriate the payment: if he do not, the receiver may (a). Apply that to this case.]

Alexander, in reply, insisted that the quantity of supply was altogether optional on the part of the defendants, and that, upon the finding of the arbitrator, the question of damages upon the second breach never could arise.

[It was ultimately agreed that the jury should be discharged as to the fifth issue.]

WILDE, C. J. I am of opinion that the plaintiff is entitled to judgment on the demurrer, and that the deed declared on amounts to a covenant on the part of the **[936]** defendants to supply small coal to the plaintiff, for the purpose of his trade, to the extent of 500 tons per week. The form of the deed does not shew clearly in one part a covenant by the plaintiff, and in another part a covenant by the defendants: but it is an instrument under seal, and the intention of the parties is sufficiently apparent from the whole language of it: it shews, with reasonable certainty, what it is that was intended to be contracted for by each party. It begins with reciting that the defendants had agreed to grant to the plaintiff a lease of certain land and premises, and to enter into other arrangements for the supply of coal for the plaintiff's manufactory, on the terms and conditions after mentioned. It then goes on to state that it is thereby agreed, by and between the said parties, in manner following. What is agreed? Why, amongst other things, that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term, shall be bought of the defendants, provided the defendants can and shall supply him with the quantity that shall from time to time be required by him, or to such extent as the defendants can supply; and that the plaintiff shall use and consume no other coal at his factory during the term than that which is bought of the defendants, except in the event of his requiring more small coal than the defendants can and shall supply him with. There must be two parties to a transaction, to make it enure as a purchase. When two persons mutually agree that one of them shall purchase goods of the other, that amounts to a contract that the one shall sell and that the other shall buy. The words "provided the defendants can and shall supply him with the quantity that shall from time to time be required by him," have not the effect of controlling the previous words. When the plaintiff contracted to purchase from the defendants all the coals which were **[937]** to be used by him, it was necessary that he should guard himself against the possibility of their being unable or unwilling to furnish him with the required supply. It was to meet that contingency that these words were introduced. The object the defendants had in view was, to restrain the plaintiff from using any other coal than that which came from their colliery. Considering this as a contract of purchase on the one hand, and of sale on the other, and looking to its nature and object, viz. the promotion of the manufacture to be carried on by the plaintiff near to the colliery of the defendants,—the contiguity of the place of supply being essential to the plaintiff's success, seeing that carriage would form so large a proportion of the value of the raw material; it appears to me to be plain and free from doubt, upon the words of the fourth stipulation alone, that the defendants did contract to supply the plaintiff with coal to the extent of 500 tons weekly, provided they were of ability so to do. Many of the subsequent stipulations confirm this view of the fourth. The fifth provides that the defendants shall not be compelled to supply more than 500 tons per week, and that, in case they shall, from some substantial cause, be unable to supply small coal to the extent agreed upon, they shall give the plaintiff a certain notice. The thirteenth provides for the case of the plaintiff's ceasing to consume the coal of the defendants, by reason of their inability to supply him therewith "as hereinbefore mentioned and agreed." There is no clause in the deed by which they have so agreed, unless it be the fourth. I therefore think the demurrer cannot be supported: it is founded upon a construction of the deed which its language does not warrant.

COLTMAN, J. I am of the same opinion. This is an agreement between the parties; the words are the **[938]** mutual words of each. If the case rested upon the fourth stipulation alone, I must confess I should have doubted whether it could be said that the defendants covenanted to supply the plaintiff, to the extent of their ability, with all the coal required by him for the purpose of his manufacture: although, considering the relative position of the parties, it might reasonably be supposed that such was their intention. That clause is certainly open to the construction, that it was only intended that the plaintiff should buy, if the defendants could and did supply the requisite quantity. All doubt, however, is removed by the fifth stipulation, which clearly shews that the defendants considered themselves bound to supply some coal, and therefore limit their obligation to the supply of 500 tons weekly. I think the case is a perfectly plain one.

(a) Vide *Devaynes* v. *Noble*, 1 Meriv. 604; *Simson* v. *Ingham*, 2 B. & C. 65; 3 D. & R. 249, 252; Vin. Abr. Payment (M.).

Maule, J. I also am of opinion that the plaintiff is entitled to judgment on this demurrer. This agreement is not in the regular form of a covenant: it was probably, however, more intelligible to the immediate parties in its present shape, than if it had been more formal. I have no difficulty in seeing that their intention was, that the plaintiff should buy his coal of the defendants, and that they should sell their coal to him. Upon the construction contended for on the part of the defendants, many of the words that are introduced into the instrument are insensible. The words "provided the company can and shall supply him with the quantity that shall from time to time be required by him," are relied on as limiting and controlling the previous words. But the word "shall" is evidently used with reference, by anticipation, to what comes afterwards, by way of limitation, in the fifth stipulation. The intention of the parties is sufficient to constitute a covenant, in an instrument under seal, commencing with **[939]** the words, "it is agreed between the said parties, as follows." If it is competent to give the words of the fourth stipulation that sense, the subsequent words of this instrument abundantly shew that it is the true sense.

Cresswell, J. I am entirely of the same opinion. The words in this deed are the words of both parties. Taking the fourth stipulation alone, the observations of my brother Maule seem to me to be strong to shew that this is a covenant by the defendants to supply the plaintiff with coals, as far as they were of ability, to the extent required, subject to the limitation provided by the fifth stipulation.

Judgment for the plaintiff, on demurrer.

Doe, on the several Demises of Daniel Brammall and Thomas Blackburne *v.* James Collinge. June, 6, 1849.

[S. C. 18 L. J. C. P. 305; 13 Jur. 791.]

The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the ordinary and immediate patron, granted a lease for years of unopened mines, which had not before been leased; but the patron of the advowson was no party:—Held, that the lease was void at common law, for want of confirmation by such patron paramount; and that it was not set up by the acceptance of rent by the lessor's successor in the curacy,—the only effect of such acceptance of rent being, to create a tenancy from year to year.

This was an action of ejectment, brought for the recovery of certain lands situate in the parish of Prestwich-cum-Oldham, in the county of Lancaster.

The declaration contained counts on demises laid on the 1st of May, 1841, and 31st of December, 1846.

[940] The cause came on for trial at the last summer assises for the southern division of the county of Lancaster, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case:—

The lands sought to be recovered in this action, are called the Nether Hey Estate, and are situate in the township of Oldham, in the parish of Prestwich-cum-Oldham, in the southern division of the county of Lancaster, and were, prior to the year 1847, in the diocese of Chester. The chapelry of Shaw is in the patronage of the rector for the time being of the parish of Prestwich-cum-Oldham; and, prior to the year 1847, was within the jurisdiction of the Bishop of Chester, as ordinary.

In the year 1718, the chapelry of Shaw was duly augmented by the Governors of Queen Anne's Bounty; by virtue of which, and by force of the statute made in that behalf, it became a perpetual curacy.

By indenture bearing date the 2nd of November, 1724, made between the Rev. William Assheton, B. D., then being rector of Prestwich-cum-Oldham, of the first part, the Governors of the Bounty of Queen Anne, of the second part, and John Kippax, clerk, then being the curate of Shaw chapel, of the third part,—after reciting the grant of the governors made in 1718—it was witnessed, that, for the consideration therein mentioned, he the said William Assheton, at the nomination of the said governors, granted, bargained, and sold unto the said John Kippax, and his successors, curates of Shaw chapel aforesaid, All that messuage or tenement, with the appurtenances, commonly called or known by the name of Nether Hey, together with the dwelling-houses and parcels of land therein more particularly described (the same being the premises hereinbefore called the Nether Hey Estate), To hold the said messuages or tenements, lands, and premises, with their appurtenances, unto the **[941]** said John Kippax, and his successors, curates of Shaw chapel aforesaid, for ever, for a perpetual augmentation of the said chapel.

[A copy of that indenture accompanied the case, and either party was to be at liberty to refer to it, as if set out therein.]

The above indenture was in due manner executed by the Governors of Queen Anne's Bounty, by the said William Assheton, and by the said John Kippax, and was inrolled, within six months, in the court of Chancery.

From the time when the estate of Nether Hey was so conveyed as aforesaid, up to the time of the granting the leases hereinafter mentioned, the same has been enjoyed by the curates of the chapelry of Shaw; and, during that time, there have been several incumbents of the rectory of Prestwich-cum-Oldham, and several curates of the chapelry of Shaw. But, at the date of the leases hereinafter mentioned, the Rev. Thomas Blackburne, one of the lessors of the plaintiff, was the incumbent rector of Prestwich-cum-Oldham, and the Rev. James Hordern was the perpetual curate of the chapelry of Shaw.

For more than twenty years prior to the granting of the lease hereinafter next mentioned, and during the curacies of Mr. Hordern and his last two predecessors, one Abraham Clegg occupied the Nether Hey Estate, as yearly tenant, paying an annual rent of 50l. to the curate of Shaw for the time being. He paid that rent merely for the occupation of the surface.

During the time that Abraham Clegg occupied as such tenant, he and Abraham Lees bored in the said estate, to search for coal, but were not successful in finding any; and, prior to the granting of the lease hereinafter next mentioned, no coals had been wrought or gotten under the said estate. But, in or about the **[942]** year 1833, the defendant commenced working the coals.

On the 29th of September, 1830, by an indenture then made between the Rev. James Hordern, therein described, of the one part, and the defendant, therein described, of the other part, it was witnessed, that, for the considerations therein mentioned, he the said James Hordern did demise unto the said James Collinge, his executors, administrators, and assigns, All that messuage or tenement and farm known by the name of Nether Hay, situate as therein described, with the appurtenances; and also all the parcels of land therein described (the same being the premises hereinbefore called the Nether Hey Estate); and also all the mines, veins, beds, and seams of coal and cannel, of all kinds, nature, and quality, lying and being within or under the aforesaid several parcels of land; and also full liberty to and for the said James Collinge, his executors, administrators, and assigns, agents, and servants, to enter into and upon the said lands, from time to time, and at all times during the continuance of the said demise, and to dig, bore, delve, sink, search for, get, and raise the coal, cannel, culm, and slack lying and being in such mines, veins, beds, and seams, and to dig, sink, drive, run, and make any pits, shafts, levels, soughs, trenches, and watercourses in and about the said mines and works; and also to erect, in and upon the said lands, engines, gins, and other machines, smithies, forges, and other buildings, and use all such devices, ways, and means as should be found necessary for draining, raising, and getting, and working the said mines, veins, beds, and seams of coal and cannel; and to place, stack up, and lay such coal, and the earth, rubbish, and soil to be raised out of the pits, upon the said lands; and also to make roads, railroads, pools, reservoirs, canals, and watercourses, in, through, and over the said lands, **[943]** and to do and perform all things necessary or expedient for taking, conveying, carrying away, and disposing of the said coal and cannel,—To have and to hold the said messuage or tenement and farm, and parcels of land, and to have, hold, use, and enjoy the said mines, veins, beds, and seams of coal and cannel, culm, or slack, liberties, privileges, and powers aforesaid, unto the said James Collinge, his executors, administrators, and assigns, from the day of the date thereof, for the term of fifty years thence next ensuing, and fully to be complete and ended, if he the said James Hordern should so long happen to live and continue incumbent of the curacy of Shaw aforesaid; Yielding and paying therefore, yearly, during the first two years of the said term, unto the said James Hordern, his executors, administrators, or assigns, the yearly rent or sum of 150l., and yielding and paying, from and immediately after the expiration of the first two years of the said term, yearly and every year during the continuance of the said term, unto the said James Hordern, his executors, administrators, and assigns, the clear annual rent or sum of 200l.

[A copy of this indenture also accompanied the case, and either party was in like manner to be at liberty to refer to it.]

After the granting of the last-mentioned lease, the said Abraham Clegg continued to occupy the surface of the said Nether Hey Estate, as tenant to the defendant; and, in or about the year 1832, the defendant opened, and has thence hitherto worked, the mines which lie under that estate; and the same are still in the occupation of the defendant.

By indenture bearing date the 24th of December, 1839, made between the said James Hordern, therein described, of the first part, the Right Rev. Father in God, John Bird, Lord Bishop of Chester, ordinary of **[944]** the said curacy, of the second part, the Rev. Thomas Blackburne, of Prestwich, in the county of Lancaster, rector and patron of the said curacy, of the third part, and the defendant, as therein described, of the fourth part,—it was witnessed, that, for the consideration therein mentioned, the said James Hordern, according to his estate and interest in the said premises, and so far only as he lawfully could or might, demised and leased, and the said bishop and Thomas Blackburne consented unto and confirmed unto the defendant, all that messuage or tenement and farm known by the name of Nether Hey, with the several parcels of land therein mentioned, being the said premises called the Nether Hey Estate, and then in the occupation of Abraham Clegg, and his undertenants; and all and every the mines, veins, beds, and seams of coal and cannel, of all kinds, nature, and quality, lying and being within or under the aforesaid messuage or tenement, farm, and parcels of land; and also full and free liberty, licence, power, and authority, to and for the defendant, his executors, administrators, and assigns, servants, miners, and workmen, from time to time, and at all times thereafter during the continuance of the said demise, to enter in and upon the said lands and premises, or any part of them, and to bore, dig, delve, sink, search for, get, and raise the coal, cannel, culm, and slack lying and being in such mines, beds, and seams, and to dig, sink, drive, run, and make any pits, shafts, levels, soughs, trenches, and water-courses, in and about the said mines and works; and also to set up cottages for workmen, engines, machines, smithies, and forges and other buildings, and use all devices for laying dry, raising, and getting the said coal and cannel, and also the coal and cannel lying and being within or under the lands or grounds belonging to any other person or persons whomsoever, of which the defendant, either solely, or jointly with any other person or **[945]** persons, then was, or of which he the defendant, his executors, administrators, or assigns, either solely or jointly, should or might at any time during the term thereby granted become lessee or proprietor, and to place, stack up, and lay such coal and cannel, and the earth, rubbish, and soil to be raised out of such pits or shafts and mines, upon the said lands, and to make railways, pools, reservoirs, canals, and water-courses, and to get stone and gravel, and to dig clay, marl, and sand, and to temper, mould, make, and burn such clay, marl, and sand into bricks, at any convenient place or places upon the said lands and grounds,—nevertheless, such stone, gravel, and bricks, only to be used in and about, and for the purposes of, the said works, and for repairing the buildings then in being on the said lands; and also to have like liberty to do and perform all reasonable acts for carrying away the coal, and liberty of full ingress, egress, and regress into, from, and out of the said lands and premises, with or without horses and carriages; to hold to the said James Collinge, his executors, administrators, and assigns, from the date thereof, for the term of twenty-one years from thence next ensuing: Yielding and paying yearly and every year unto the said James Hordern, and his successors, the yearly rent of 250l. The indenture also contained, amongst other provisoes and covenants, a proviso for re-entry on non-payment of rent, and a covenant that the defendant would at all times permit the said James Hordern, and his successors, and his or their agents or servants, during the continuance of the demise, to inspect the mines. There was also a proviso that it should be lawful for the defendant to determine the lease at the expiration of the first seven or fourteen years, by giving twelve months' notice. And the said James Hordern did thereby, with the consent and approbation of the said bishop and the said Rev. Thomas Blackburne, for **[946]** himself, his heirs and successors, direct and declare that the yearly sum of 50l., part of the said yearly rent of 250l. thereby reserved, should yearly be paid into the hands of the said Governors of Queen Anne's Bounty, for the purpose of augmenting the curacy of Shaw.

[A copy of this indenture also accompanied the case, and either party was in like manner to be at liberty to refer to it.]

The rent expressed to be reserved by the last-mentioned lease, in respect of the premises mentioned therein,—which are the premises sought to be recovered in this action,—was paid by the defendant to the said James Hordern, from the date thereof, up to and including the 25th of December, 1840.

The Rev. Daniel Brammall, one of the lessors of the plaintiff in this action, was duly nominated by the Rev. Thomas Blackburne, the then patron, to the said curacy, the same being then vacant by the resignation of the said James Hordern, on the 10th of March, 1841. The form of nomination annexed to the case (*a*) is the form **[947]** then used, and is the form commonly used in nominating to the said curacy. And, by deed of licence, dated the 12th of March, 1841, under the hand and episcopal seal of John Bird, then Bishop of Chester, the ordinary, the said Daniel Brammall was duly licensed to the said curacy: and, after such nomination and licence as aforesaid, the said Daniel Brammall read the prayers, articles, and certificate, and read and made the declarations and other matters and things required by the statute 13 & 14 Car. 2, c. 4, as prescribed by the said statute. And, after the 25th of December, 1840, the rent reserved by the said last-mentioned lease was paid by the defendant to the said Daniel Brammall for and in respect of the said premises in the said lease mentioned, up to and inclusive of the 25th of December, 1845, and with a knowledge of its contents. And his agent, in 1844, inspected the mines, under the authority given by the lease for that purpose.

Since the 25th of December, 1845, no rent has been received by the said Daniel Brammall from the defendant.

On the 22nd of June, 1846, the said Daniel Brammall served the defendant with a notice in writing, requiring him to quit the said premises on the 24th of December then next, or at the expiration of the current year of his tenancy.

On the 30th of December, 1846, the said Daniel Brammall demanded possession of the said premises from the defendant; but he refused to give up possession; whereupon this action has been brought.

The said James Hordern was alive at the time of the trial.

The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action. If the court shall be of that opinion, then the said verdict shall stand: but, if the court shall be of a contrary **[948]** opinion, then a verdict shall be entered for the defendant, or a nonsuit, as the court shall see fit to order.

The court is to be at liberty to draw any inferences of fact which a jury might draw.

(*a*) "To the Right Rev. John Bird, Lord Bishop of Chester.

"I, the Rev. Thomas Blackburne, rector of Prestwich, in the county of Lancaster, clerk, and, in right of the said rectory, true and undoubted patron of the perpetual curacy of Shaw, in the parish of Prestwich aforesaid, and in your lordship's diocese of Chester, vacant by the resignation of James Hordern, the last incumbent there, do nominate to your lordship and the said perpetual curacy, Daniel Brammall, clerk, M.A., humbly requesting that you will be pleased to license the said Daniel Brammall to the said perpetual curacy, with its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your lordship's episcopal office. In witness whereof, I have hereunto set my hand and seal, this 10th day of March, 1841. "THOMAS BLACKBURNE (L.S.).

"Signed, sealed, and delivered by the
above-named Thomas Blackburne,
in the presence of
"G. Cornwall Legh,
"High-Legh, Cheshire."

Hugh Hill (with whom were Tatham and Sumner), for the plaintiff. It appears from the case, that the Nether Hill Estate has, for more than one hundred years, belonged to the perpetual curates of Shaw chapel, as part of the augmentation; and that, for more than twenty years prior to the leases being granted, the surface has been occupied by tenants from year to year. A demise of the land will not authorise the lessee to open mines therein: Vin. Abr. Mines (A. 2), (citing 5 Co. Rep. 12); *Astry* v. *Ballard* (2 Lev. 185). In September, 1830, the estate was demised to the defendant, together with the mines, for the term of fifty years, if the grantor should so long live, reserving an annual rent. Clegg, who had before held the land, as tenant from year to year, continued in the occupation of the surface, paying rent to the lessee, instead of to the curate. The mines were opened in 1832, and continued to be worked down to the year 1839, when the lease in question was granted,—the parties to it being the curate, James Hordern, of the first part, the ordinary of the second part, the Rev. Thomas Blackburne, the immediate patron, of the third part, and the defendant of the fourth part. The demise is of the land, and of all mines of coal, &c., with power to sink shafts, &c., to erect cottages for workmen, engines, &c., to get stone and gravel, dig clay, make bricks, &c., &c., for twenty-one years, at the yearly rent of 250l., with a proviso for re-entry on non-payment of the rent, a covenant to permit Hordern and his agents to inspect the mines, and a proviso for the de-**[949]**-termination of the lease at the expiration of the first seven or fourteen years, on twelve months' notice,—50l. of the rent to be paid yearly into the hands of the governors of Queen Anne's Bounty, for the purpose of augmenting the curacy of Shaw.

This lease was void: and it is not made good by the receipt of rent by Brammall, the present curate, or by the circumstance of his agent's having inspected the mines: the receipt of rent, at the most, created only a tenancy from year to year.

The nature of the estate of a perpetual curate is very much considered in *Doe d. Richardson* v. *Thomas* (9 Ad. & E. 556), where most of the authorities are collected. It was there held that land which has been annexed to a perpetual curacy of a parish, by the Governors of Queen Anne's Bounty, under the 1 G. 1, stat. 2, c. 10, ss. 4, 21, cannot be leased by the curate so as to bind the successor, if the patron only consents, and not the ordinary. The 4th section of that statute recites that Queen Anne's bounty "was intended to extend, not only to parsons and vicars who come in by presentation, or collation, institution and induction, but likewise to such ministers who come in by donation, or are only stipendiary preachers, or curates, officiating in any church or chapel where the liturgy and rites of the church of England as now by law established, are and shall be used and observed, most of which are not corporations, nor have a legal succession, and therefore are incapable of taking a grant or conveyance of such perpetual augmentation, as is agreeable to the intention of the late Queen:" and it enacts "that all such churches, curacies, or chapels which shall, at any time hereafter, be augmented by the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, **[950]** shall be, and are hereby declared and established to be, from the time of such augmentations, perpetual cures and benefices, and the ministers duly nominated and licensed thereunto, and their successors respectively, shall be and be esteemed in law, bodies politic and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and are hereby enabled to take in perpetuity to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy." And the 21st section enacts, that, if the governors "shall, by any deed or instrument in writing under their common seal, allot or apply to any church or chapel, any lands, tithes, or hereditaments, arising from the said bounty, &c., and shall declare that the same shall be for ever annexed to such church or chapel, then such lands, tithes, and hereditaments shall from thenceforth be held and enjoyed, and go, in succession, with such church and chapel for ever." By force of that statute, a curacy augmented by the governors of Queen Anne's bounty, becomes a benefice, within the definition of that word in Co. Litt. 300 b. (§§ 644, 5, 6, 8), and 2 Inst. 29. The result is, that a perpetual curate has no higher estate than a vicar has, at common law. Now, this is not a valid lease, by the common law; it wants the confirmation of the patron of the advowson. In Bac. Abr.

Leases (G.), 2 (*b*)[1], it is said: "If there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as, if a parson be patron of a vicarage of the same church, **[951]** and the vicar makes a lease, confirmed by the parson and ordinary, this is not good, without the confirmation of the patron of the rectory also, because both have an interest in the possessions of the vicarage." So, in Watson's Clergyman's Law (edit. 1747, p. 479), it is said: "That the patron's confirmation may be sufficient, no other person ought to have any interest in the patronage, but the patron or patrons that do confirm; for, those grants that are confirmed, being to find successors, are in the nature of a charge upon the advowson, and therefore ought to be directed by the estate which the confirmer hath, and, being derived out of the estate of the advowson, can endure no longer than the estate of the patron confirming doth abide (*b*)[2]. Accordingly, if there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: for instance, if a parson be patron of the vicarage of the same church, and the vicar doth make a lease confirmed by the patron and ordinary only, this is not good, without the confirmation of the patron of the rectory also." The nature and character of a perpetual curate's interest is very fully gone into in Lord Denman's judgment, in *Mason* v. *Lambert* (17 Law Journ., N. S., Q. B. 366).

Further, it is submitted that the lease in question is avoided by the restraining statute of 13 Eliz. c. 10, s. 3, which,—reciting "that long and unreasonable leases, made by colleges, deans and chapters, parsons, vicars, and other having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of **[952]** all successors, incumbents in the same,"—enacts, "that, from henceforth, all leases, gifts, grants, feoffments, conveyances, or estates, to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one-and-twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary any ways notwithstanding." These words are sufficient to include a perpetual curacy. In Bacon's Abridgment (*a*), it is said that this statute "hath been always construed largely and beneficially, to prevent all inventions and evasions against the true intent thereof."

This is not a good lease within the enabling statute of 32 H. 8, c. 28 (*b*)[3]. The

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(*b*)[1] Citing Co. Litt. 300 b.; Complete Incumbent, 372.

(*b*)[2] Citing Co. Litt. 306 b.; *Maund and French's case*, 1 Roll. Rep. 361; 1 Roll. Abr. 480, translated and commented on, 5 Vin. Abr. 375, title Confirmation (N.), pl. 1.

(*a*) Title Leases and Terms for Years (E.), 1, pl. 6, citing *Magdalen College's case*, 11 Co. Rep. 76.

(*b*)[3] The 2nd section of which enacts "that this act, or any thing contained, shall not extend to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease; nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the fermors thereof, by the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of twenty-one years, or three lives, at the most, from the day of making thereof; and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof things necessarily to be [953] observed in making such a lease, are enumerated in Co. Litt. 44 a., 44 b. Amongst others, "it must be of lands or tenements which have most commonly been letten to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made." Here, prior to the year 1839, the surface only had been demised, and not the mines. In *Doe d. Tennyson* v. *Lord Yarborough* (1 Bingh. 24, 7 J. B. Moore, 258), waste land belonging to a vicarage, which land had remained waste and uninclosed from the inability of the vicars to incur the expense of inclosure, was let (having never been letten before) by the incumbent (with the confirmation of patron and ordinary), for three lives, the lessee undertaking to reclaim the land, and to pay a rack-rent which was the most that could be obtained: and it was held that this lease was not binding on the incumbent's successor. Dallas, C. J., there says (7 J. B. Moore, 265): "The words of the statute 13 Eliz. c. 10, are, that 'all leases by any parson or vicar other than for the term of twenty-one years or three lives, whereupon the accustomed yearly rent, or more, shall be reserved yearly during the term, shall be utterly void.' This can only apply to lands which [954] have been formerly or commonly let or demised. Some rent must have been previously reserved, viz. the accustomed rent, or more: and, in *The Bishop of Hereford* v. *Scory* (Cro. Eliz. 874), it was resolved that the statute of Elizabeth (referring to the 1 Eliz. c. 19), ordains that no lease shall be good unless warranted by the statute 32 H. 8; and that, as the former statute appoints that the ancient rent shall be reserved, it is thereby limited and intended that the land should have been usually demised; for, otherwise, the antient rent could not be paid for it. That case is precisely in point: and, as both the statutes must be taken together, I am clearly of opinion that the lease and confirmations in this case, are not binding on the lessor of the plaintiff." In *Doe d. Bartlett* v. *Rendle* (3 M. & Selw. 99), under a devise of lands to trustees and their heirs, in trust to the use of W. B. B. and his first and other sons in strict settlement, remainder to J. B. and his first and other sons in strict settlement, with power to the trustees, from time to time during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of all or any part of the lands so limited, so as there be reserved the antient and accustomed yearly rent, &c.,—it was held that a lease by W. B. B. of part of the lands devised, in several parcels, in one of which parcels were included, together with lands antiently demised, two closes never before demised, at one entire rent, viz. the antient rent for that part which had been antiently demised, was void for the whole of the lands included in that parcel, as well the lands never before let, as those antiently let. In *Campbell* v. *Leach* (Ambler, 740, 2 Sugden on Powers, 7th edit. p. 600), tenant for life of an estate on which mines were opened, with power to grant leases in [955] possession for twenty-one years, reserving the best rent, leased the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs and assigns: and it was decreed that the lease should bind the remainder-man for twenty-one years; and, the rent reserved not being a gross sum for all the mines, but separate on each, that the power was well executed as to the open mines, but not as to the mines unopened.

Again, the lease is void, by the 32 H. 8, c. 28, s. 2, inasmuch as it enables the lessee to commit waste: *The Dean and Chapter of Worcester's case* (6 Co. Rep. 37 a.); *Knight* v. *Moseley* (Ambler, 176); *Wither* v. *The Dean and Chapter of Winchester* (3 Meriv. 421). In *Knight* v. *Moseley*, Lord Hardwicke says: "The parson has a fee-simple qualified and under restrictions, in right of the church; but he cannot do every thing that a private owner of an inheritance can. He cannot commit waste, nor open mines, but may work those already opened. Even a bishop cannot. Talbot, Bishop of Durham, applied to parliament to enable him to open mines, but rejected." This is, in fact, not a lease, but a parting with the actual property of the church. The 6th section of the 5 & 6 Vict. c. 108, enables ecclesiastical corporations, aggregate or sole, to grant leases of mines; but, by s. 14, it is provided that a portion of the

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shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomably yielden or paid for the manor, lands, tenements, and hereditaments so to be letten within twenty years next before such lease thereof made," &c.

improved value under such leases shall be paid to the ecclesiastical commissioners for England.

It will be urged, on the other side, that the lease in question has been set up by the receipt of rent under it by Mr. Bramwell since the year 1840, and by exercising the right of inspecting the mines under the **[956]** power for that purpose contained in the lease. The lease, however, being absolutely void, no act done by the lessor's successor could have the effect suggested. In Bacon's Abridgment (title Leases and Terms for Years (H.)), it is said: As to leases by parsons, vicars, &c., if by the common law any of these had made a lease for years of any of the possessions of their church, without confirmation of patron and ordinary, &c., such leases by their death or other avoidance had become absolutely void, without entry or other ceremony, so as no acceptance of the rent, or other act done by the successor, could affirm or make them good or binding over against themselves. But leases for years by bishops, abbots, &c., though without confirmation of the dean and chapter, or assent of the convent, were not absolutely determined by their death, &c., but continued good till some act done by the successor to avoid them: for, they have, and always were allowed to have, the whole fee-simple and inheritance of their possessions in themselves; and therefore, before the third council of Nice, anno 710, might, by their sole alienation, without the confirmation of the dean and chapter, have bound their successor for ever: and though by that council such alienations are restrained, as hurtful and injurious to the church, and the confirmation of the dean and chapter made necessary, yet this is only quoad binding the successor; for, the fee-simple continues still in them; and therefore leases for years made by them subsist after their death or removal, as they would do if they had been made by a tenant in fee of any lay possessions, till the successor comes to avoid them by aid of the canons made at that council, which have received a sanction from our law." The like is laid down in Comyns's Digest (title Estates by Grant (G. 5)); and it is **[957]** added—"and the acceptance of rent by the successor does not make it (the lease) good for his time." In *Rickman* v. *Garth* (Cro. Jac. 173), it was held that a bishop's lease for a portion of tithes, for three lives, reserving the antient rent, is void, for the antient rent cannot be reserved; and it is not made good against the successor by the acceptance of rent. *Doe d. Simpson* v. *Butcher* (1 Dougl. 50), and *Doe d. Potter* v. *Archer* (1 Bos. & Pull. 531), are authorities to the same effect. The acceptance of rent in such a case is at the most only evidence of a tenancy from year to year. *Roe d. Jordan* v. *Ward* (*d*); *Doe d. Tucker* v. *Morse* (1 B. & Ad. 365); *Doe d. Pennington* v. *Toniere* (18 Law Journ., N. S., Q. B. 49).

Cowling, for the defendant. It must be conceded that there had been no demise of the mines prior to the year 1830. But it is submitted that the lease in question is good at common law; that, by the statute 13 Eliz. c. 10, it is voidable only, and that the acceptance of rent under it by Brammall had the effect of making it, as against him, a valid lease.

The validity of the lease at common law, depends upon the nature and quality of the estate of a perpetual curate. Before the statute 1 G. 1, stat. 2, c. 10, a perpetual curate could not be said to be seised of the lands belonging to the church. But the 4th section of that act gives him the same sort of interest that a bishop has in the lands belonging to the see: he (the bishop) has a fee at common law, though he cannot convey without confirmation by the dean and chapter (Co. Litt. 341 b.). **[958]** Speaking of the estate of the perpetual curate, in *Doe d. Richardson* v. *Thomas*, Littledale, J., says (9 Ad. & E. 372): "To all intents and purposes, his estate resembles that of an archbishop, who can no more sell than a parson. The curate has not the land, to him and his heirs; but he has it, to him and his successors. I think, therefore, that he has, within the meaning of the statute, an estate in the nature of a fee-simple." It is, however, of little importance whether he is seised in fee or for life. It is true, he cannot convey away, without the consent of the ordinary and the immediate patron. They are the only persons interested. In the case of a vicarage, it is otherwise; because the vicarage is carved out of the rectory. Here, however, the estate is given by third parties—the governors of Queen Anne's bounty. The court of King's Bench, in *Doe d. Richardson* v. *Thomas*, seem to have assumed that a perpetual curate is within

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(*d*) 1 H. Blac. 97. And see *Doe d. Martin* v. *Watts*, 7 T. R. 83; *Right* v. *Dean of Wells* v. *Bawden*, 3 East, 260; *Roe d. Brune* v. *Prideaux*, 10 East, 158.

the restraining statute of 13 Eliz. c. 10. But it has been held that the provisions of the enabling statute of 32 H. 8, c. 28, are to be imported into it. Therefore, a lease of unopened mines, not demised within twenty years before, may be voidable.

The acceptance of rent by Brammall, and the exercise of the right of inspection of the mines pursuant to the covenants contained in this lease, clearly had the effect of setting it up, as against him: Bacon's Abridgment (title Leases and Terms for Years (H.) 2); *Wheeler* v. *Danby* (1 Roll. Abr. 476, S. C. cited in *Owen* v. *Thomas ap Rees*, Cro. Car. 95); Viner's Abridgment (title Confirmation (D.), pl. 1, 3). Bacon distinguishes between things lying in grant and things lying in manurance. *Rickman* v. *Garth* was a lease of tithes, and so within the distinction. In **[959]** *Wheeler* v. *Danby* the lease was not a lease in possession, and was therefore void under the 1 Eliz. c. 19.

Hugh Hill was not heard in reply.

Wilde, C. J. It seems to be conceded, on the part of the defendant, that, if the lease of the 29th of September, 1839, has not received the confirmation of all necessary parties, it is void; and that no subsequent acceptance of rent by a successor of the lessor under it, could set it up. The common law recognises an interest in the patron, and requires him to be a consenting party to that which goes to diminish the value of the advowson. Here, the rector has joined, as a consenting party, in granting the lease: but the patron has not. The interest of the paramount patron is quite as great as that of the immediate patron: in each case it is a pecuniary interest: and the same reasons which require the confirmation of a lease by the one, apply equally to the other. That the owner of an advowson has a general interest in every thing which relates to its value, cannot be questioned. Neither can it be denied that the law takes notice of the pecuniary value of an advowson. It seems to me that the case as stated is free from ambiguity. Its object was, to raise the question, whether or not the lease is a valid lease. To do this, the character as well as the names of the parties who concurred in the making of the lease, are fully disclosed. The curate, as curate, grants, and the Bishop of Chester, as ordinary, and the Rev. Thomas Blackburne, the rector, as patron of the chapelry, concur. But, where is the patron of the rectory? He is also a necessary party: and, for want of his concurrence, the lease is void.

Then, what was the effect of the acceptance by the successor of the curate of the rent reserved by the **[960]** lease? The lease being void, the only effect of the acceptance of rent, could be, to create a tenancy from year to year between the parties. And that has been put an end to by a regular notice to quit. The plaintiff is therefore entitled to judgment.

Coltman, J. This appears to me to be a very plain case, and to be decided by the authorities collected in Bacon's Abridgment (title Leases and Terms for Years (E.)). where it is distinctly laid down that a lease of this description is void for want of confirmation by the patron paramount. The title Leases in that book has always been considered of high authority,—being generally attributed to Lord Chief Baron Gilbert (Co. Litt. 45 a., n. (5)). It is quite clear from the way in which the case is framed, that the parties intended it to be understood that there was a patron paramount who had not joined in the lease in question. The want of that concurrence avoids the lease. And the defect is not aided by the subsequent acceptance of rent by the successor.

Maule, J. This case has been very properly argued upon the true point that was intended to be raised. The authority of Bacon's Abridgment, title Leases, is indisputable: and, even without the aid of so high an authority, I should have felt no difficulty in coming to the conclusion that this is a void lease. The interest of the patron paramount is certainly as great as that of the immediate patron. Both should have joined.

Cresswell, J, concurred.

Judgment for the plaintiff.

[961] Ramsden *v.* Gray and Others. May 29, 1849.

The first count of the declaration stated that the defendants agreed to sell to the plaintiff twenty tons of sal-enixon, to be delivered at a time and place mentioned, and alleged for breach the non-delivery pursuant to the contract.—The second count, "for a further breach of the said agreement and promise of the defendants as aforesaid," stated, that, although the defendants, in part performance of the contract, delivered ten tons of an article resembling sal-enixon, as and for a part of the twenty tons so agreed to be delivered, yet that the defendants deceived the plaintiff in this, that the article delivered was not sal-enixon, but an article of a different and inferior description and value,—and alleged for special damage, that the goods had been returned to the plaintiff by the persons to whom he had sold them.—A judge at chambers having put the plaintiff to his election to retain one or other of these two counts, on the ground that they were founded on the same subject-matter of complaint, and were a violation of the 5th rule of Hilary term, 4 W. 4, the court refused to rescind the order.

The first count of the declaration stated, that, before and at the time of the making of the promise by the defendants thereinafter next mentioned, the defendants were, and still continued, the makers and manufacturers of certain merchandise called sal-enixon, and it was mutually agreed by and between the plaintiff and the defendants, that they should sell to the plaintiff twenty tons of sal-enixon of good merchantable quality, at the price of 11l. 11s. per ton, to be delivered to the plaintiff free on ship board at Newcastle, &c., to be paid for by the plaintiff in cash; and that, although the period for the delivery of the whole of the said sal-enixon had elapsed long before the commencement of this suit, and the plaintiff, from the time of the making of the said agreement, was, and always had been, and still continued, ready and willing to receive and pay for the said twenty tons of sal-enixon, and in all respects to perform and fulfil the said agreement on his part,—yet that the defendants, with intent to deceive and defraud the plaintiff, neglected their said promise, and did not nor would, although often requested so to do, deliver to the plaintiff the said sal-enixon, or any part **[962]** thereof, or any sal-enixon whatever, but had thenceforward wholly made default therein, and neglected and refused so to do,—to the plaintiff's damage, &c.

The second count stated, that, for a further breach of the said agreement and promise of the defendants as aforesaid, the plaintiff further said that he had always been, from the time of making the said agreement hitherto, ready and willing to receive and pay for the said sal-enixon, according to the terms of the said agreement, and in all respects to perform the said agreement on his part to be performed as aforesaid,—of all which the defendants had notice; yet that the defendants further disregarded their said promise, and, although they did, after the making of the said agreement, deliver to the plaintiff, in alleged and pretended part performance of their said promise, a certain quantity, to wit, ten tons, of certain merchandise exactly resembling in appearance the said article called sal-enixon, as and for a part of the said twenty tons of sal-enixon so agreed to be delivered by the defendants under their said agreement, and the plaintiff then, relying on their said promise, received the same as and for sal-enixon, and did also pay for the same in cash, yet the defendants craftily and knowingly deceived the plaintiff, in this, to wit, that the said merchandise so delivered by the defendants to the plaintiff as last aforesaid, was not, nor was any part thereof, sal-enixon, but, on the contrary thereof, was a certain other article, to wit, nitrate of soda cake, exactly resembling in appearance the said article called sal-enixon, but of greatly inferior value, to wit, to the amount of 10l. per ton, and of different properties, qualities, and uses, as the defendants, before and at the time of the said delivery thereof, well knew. The special damage alleged was, that the plaintiff, confiding in the promise of the defendants, sold the article so delivered to him by the defendants, to Messrs. Francis & Co., as sal-enixon, to be used in Messrs. **[963]** Francis & Co.'s manufactory of prussiate of potash, and that the article, not being sal-enixon, was useless to Messrs. Francis & Co., who returned the same to the plaintiff,—to the plaintiff's damage, &c.

An order having been made by V. Williams, J., at chambers, for striking out one or other of these two counts, as being in apparent violation of the rule of Hilary term, 4 W. 4, r. 5.

Prideaux, for the plaintiff, now moved for a rule nisi to rescind that order. The two counts are founded upon totally different promises; the first is upon an executory contract for the sale and delivery of a quantity of sal-enixon, alleging for breach the non-delivery: the second is for a breach of warranty, resulting in special damage. [Cresswell, J. The expression in the sixth rule is, "founded on the same subject-matter of complaint."] The leading case upon this subject is *James* v. *Bourne* (4 N. C.

420): there, the declaration contained a count on a promise to carry goods from Dublin to London, and a count on a promise to carry the same goods from the wharf at which they should be landed in London, to the plaintiff's place of business; and it was held that the joining these two counts was not an apparent violation of the rule. In *Bleaden* v. *Rapallo* (3 M. & G. 116, 3 Scott, N. R. 564), a count in case for employing a vessel let to hire to the defendant, in an illegal manner, whereby the vessel was rendered liable to forfeiture, was allowed to be joined with a count charging a breach of an express contract, in detaining the vessel longer than the stipulated time. So, in *Cahoon* v. *Burford* (13 M. & W. 136, 2 D. & L. 234), a count in assumpsit to recover damages for the breach of a warranty of a horse, and a count in indebitatus assumpsit for money had **[964]** and received (in the particulars stated to be the price of the horse),—not being for the same cause of action,—were allowed. In *Vaughan* v. *Glenn* (5 M. & W. 577), the plaintiff declared, in the first count, on a charter-party whereby the defendant agreed to sail to Honduras, and there take on board a full cargo of mahogany, &c., and therewith proceed to London or Liverpool, and deliver the same, on being paid freight, &c., and alleged as a breach that part of the cargo delivered by the plaintiff at Honduras, and received by the master and crew, was not carried or delivered according to the agreement: the second count stated, that, in consideration that the plaintiff had caused certain goods, to wit, &c., to be taken to and loaded on board of the defendant's vessel in the bay of Honduras to be conveyed to England, for reasonable freight, &c., the defendant promised the plaintiff that due and proper care should be taken of the goods until they were loaded, &c., and assigned as a breach, that due and proper care was not taken of the goods until after they were loaded, but, on the contrary, that, by the negligence of the defendants, the goods, after they were delivered to the defendants, and whilst in their custody to be loaded, were lost:—and it was held, that those counts disclosed distinct subject-matters of complaint, and that the plaintiff was entitled to retain them both. [Maule, J. A plaintiff must not describe the same contract in two different counts. That, I think, is very hard: but, nevertheless, it is the law. Are not the two counts in this case founded upon the same contract, and the same subject-matter of complaint?] Clearly not the same subject-matter of complaint,—the one being founded upon a contract to supply certain goods at a given price,—and the other being for the breach of a warranty, arising out of a **[965]** subsequent delivery of goods with a false statement that they were the goods contracted for. [Wilde, C. J. Would not the same evidence support both counts?] Probably the same facts would be evidence in support of each count: but that is not conclusive. In *Deere* v. *Ivey* (4 Q. B. 379), the plaintiff in assumpsit, declared, in one count, that, in consideration that he, at the defendant's request, would buy of the defendant a horse, the defendant promised that the horse was sound; that the plaintiff bought the horse; but that it was not sound. In a subsequent count, the plaintiff declared, that, in consideration that he, at the defendant's request, would buy of the defendant a certain other horse, the defendant promised that the horse was quiet, and had no vice, except that he was given to biting when he was saddled, or approached for the purpose of being saddled, or cleaned. In each count, a breach of the promise in that count was alleged. Non assumpsit was pleaded to the whole declaration. On the trial, one contract of sale and warranty only was proved; and damages were given on the two counts collectively. The court directed a new trial, on the ground that the plaintiff could not recover upon the two counts for the same subject-matter of complaint. Here, the promises, in law, are distinct, though the contract may be the same. *Bleaden* v. *Rapallo* is precisely in point. [Wilde, C. J. There were there two distinct subject-matters of complaint: the first count charged an illegal use of a chartered ship, whereby a risk of seizure was incurred; the second was for detaining her longer than the stipulated period. In *Bridge* v. *Wain* (1 Stark. N. P. C. 504), in assumpsit, it was alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings; per quod they be-**[966]**-came and were of no use or value to the plaintiff: and the plaintiff was held entitled, without further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by the defendant. The first count here is only another mode of alleging a warranty.] In *Hartley* v. *Harman* (3 P. & D. 567), where the declaration stated a contract of service for certain yearly wages, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c., which he might have acquired from being continued in the service,—it was held that the plaintiff was only entitled to recover as damages wages for one month, and that the arrears of salary due to him at the time of dismissal could alone be recovered in indebitatus assumpsit for work and labour. But, in a subsequent case, Parke, B., says that the declaration might have been so framed as to include the whole.

The order is also open to a technical objection. It is drawn up "on hearing the attorneys or agents on both sides" only; whereas, according to the case of *Roy* v. *Bristow* (5 Dowl. P. C. 452), it should have been drawn up "on reading the declaration," or upon affidavits shewing that the two counts are identical. [Maule, J. *Roy* v. *Bristow* is altogether a different case from this. The objection there was, that the rule nisi did not refer to any affidavit or other thing upon which it was founded. A judge's order is commonly drawn up "upon hearing the attorneys or agents" only.]

Wilde, C. J. Looking at this declaration, it appears to me that the two counts are founded on one and the same principal matter of complaint, and are in **[967]** apparent violation of the 5th rule of Hilary term, 4 W. 4. Both counts evidently refer to the same contract. They are but different modes of setting out the same contract and the same breach,—the non-delivery of the article sold. It is true that the second count brings forward a new head of special damage, which might as well have been inserted in the first count. But there is nothing to repel the presumption that both counts are in reality founded upon the same contract, and the same subject-matter of complaint. I therefore think the order of my brother Williams was right. Though the introduction of the two counts is an apparent violation of the rule, the plaintiff might, if the fact were otherwise, have shewn it by affidavit; or he might have availed himself of the alternative offered by the 6th rule.

Coltman, J. I think there is reasonable ground for a surmise that these two counts are a mere splitting up of the same contract, and consequently an express violation of the rule. The first example given seems to me to be closely applicable,—"Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." This is just a case in which two counts might be allowed, upon the plaintiff's satisfying the judge that some distinct subject-matter of complaint was bonâ fide intended to be established in respect of each count. But that he did not choose to do.

Maule, J. I also think the order of my brother Williams was well made. The language of the 6th rule,—"Where more than one count, &c., shall have **[968]** been used in apparent violation of the preceding rule, &c.,"—is equivocal. "Apparent violation" may mean that the two things may be, and clearly appear to be, the same,—as in the expression "heir apparent;" (*a*) or,—as more popularly used,—that they appear to be the same, whether they are so or not. In the new rules, the expression is evidently used in the latter sense; and means this,—that if the two counts be such that any person conversant with pleading, looking at them, would say that they are founded on the same subject-matter of complaint, the 5th rule is violated. The language of the 6th rule confirms this view. I think it is quite clear that two counts have been resorted to here for the purpose of avoiding the difficulty of amendment. The power of amendment given by the statute 3 & 4 W. 4, c. 42, s. 23, does not, in practice, supply the place of a plurality of counts, as it was intended, and recited in the new rules, to do. Still, for the reasons already given, I am of opinion that the rule should be refused.

Cresswell, J., I am of the same opinion. It appears to me that these two counts are founded on the same contract, and on the same breach of it, merely with a different statement of damage.

Rule refused.

(*a*) The term "heir apparent" was formerly understood in a less absolute sense, and was used so as to include an "heir presumptive."

[969] Butler *v.* Frost and Another. June 2, 1849.

Upon a motion for judgment as in case of a nonsuit, for not proceeding to trial after notice, the affidavit need not allege that due notice of trial has been given.—It is no objection to a rule for judgment as in case of a nonsuit, founded on an omission to proceed to trial pursuant to a notice, that such notice was given at an earlier period than, for any thing shewn by the defendant, it need have been given.

Wilkins, Serjt., obtained a rule for judgment as in case of a nonsuit, upon the ordinary affidavit, stating that issue was joined on the 2nd of May, and notice of trial given on the part of the plaintiff for the sittings after last Easter term, at Westminster, and that the plaintiff did not proceed to trial pursuant to the notice.

H. Coles now shewed cause. The affidavit upon which the motion is founded, is insufficient: it does not state that due notice of trial was given; nor does it negative that the cause was not tried, by reason of its having been made a remanet. Issue was not joined until the 2nd of May, and the sittings commenced on the 9th: there was, therefore, not time for the proper notice of trial. In *Ranger* v. *Bligh* (5 Dowl. P. C. 235, 2 Harr. & W. 299), it was held, that, if a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the court, and afterwards gives another notice of trial for a later sitting, but which is still within due time, the defendant is not entitled to judgment as in case of a nonsuit, although the plaintiff has not proceeded to trial under his first notice, nor countermanded it.

Wilde, C. J. We cannot intend that the notice of trial was irregular. The defendant was probably under terms to take short notice. If there was anything to justify the plaintiff in treating the notice he gave as a nullity, he should have shewn it.

Coles producing an affidavit of excuse,

Rule discharged, on a peremptory undertaking.

[970] Butler *v.* Fox. June 8, 1849.

A declaration on a policy of assurance from Baltimore to Liverpool, alleged a loss by perils of the sea.—The court refused to allow the venue to be changed from the southern division of Lancashire to London, upon the usual affidavit that the cause of action arose in London and not elsewhere, the declaration shewing that such statement could not be correct;—although the policy was effected in London, and the loss was payable there.

This was an action upon a policy of insurance on goods "at and from Baltimore to Liverpool." The declaration alleged a total loss by perils of the sea, and assigned for breach the non-payment of the amount insured. The venue was laid in South Lancashire.

James Wilde, upon an affidavit that "the plaintiff's cause of action (if any) arose in the city of London, and not in the southern division of the county of Lancaster, or elsewhere out of the city of London," moved to change the venue to London. [Wilde, C. J. How can the cause of action upon a policy of insurance be said to arise in London and not elsewhere?] The cause of action would be the non-payment of the money; and it is the course of business to pay in London all losses on policies effected in London. Formerly, it was the practice not to change the venue in actions upon written contracts: but, in *Mondel* v. *Steele* (8 M. & W. 640. Vide ante, vol. v. p. 484), Parke, B., in delivering the judgment of the court of Exchequer, after reviewing the authorities, says: "We think it cannot be laid down as a general proposition, that the venue is not to be changed in actions upon contracts appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to the general rule, which, in conformity with the statute law, is, that actions should be tried where the causes of action arise: and the exceptions to that rule should not be [971] too readily extended. We think, that, in all actions on contracts, though in writing, except on specialties, bills, and notes, the venue may be changed upon the usual affidavit being made. At all events, it may be changed in an action on such a contract as this (*a*), which is to be performed, not any where, but in a particular place, and for the breach of which the cause of action arises wholly in one county." And in *Martin* v. *Daws* (*b*), the same learned judge expressed an opinion, that, "since the case of *Mondel* v. *Steele*, it was to be considered that the rule which prohibited the change of venue, applied only to actions of debt or covenant on a specialty, and to bills or notes, and therefore not to an action upon an award, which, although under seal, was not a specialty." [Wilde, C. J. There certainly has been a very general impression that the venue cannot be changed in an action on a policy of insurance. The question is whether the recent cases have had the effect of altering the practice in this respect.] The court will take it, upon the affidavit, as sworn, that the cause of action arose in London, and not elsewhere. [Maule, J. *Cailland* v. *Champion* (7 T. R. 205) was an action on a policy of insurance on the life of a person who had lately died in Scotland; and it was brought in Middlesex. The defendant changed the venue to London, on the usual affidavit that the cause of action arose wholly in London: after which, a rule was obtained, calling on the defendant to shew cause why the former rule for changing the venue to London should not be discharged, on the ground that the venue had been improperly removed to London, because the fact sworn to by the defendant could not possibly be true, namely, that the whole cause of action arose in London, the party whose life **[972]** was insured having died in Scotland. And the court were of opinion that the venue should not have been originally removed from Middlesex to London, for the reason above mentioned. That is a judicial decision that such an affidavit as this could not possibly be true. Substituting the death of the assured in the one case for the loss of the ship in the other, *Cailland* v. *Champion* is on all-fours with this case. Wilde, C. J. That case also shews that the loss is the cause of action.] The question is whether that case is good law, or is applicable on the present occasion.

Wilde, C. J. There may possibly be cases in which the facts which would shew the statement in the affidavit to be incorrect, may not appear. But when,—as is required in cases of this sort,—the declaration is produced, we must look at it to see if the affidavit is warranted. Without saying whether or not the venue may in any case on a policy of insurance be changed upon the ordinary affidavit, let us see what are the facts of this case. Here is a policy upon goods at and from a foreign port to a port in this country, and a loss happening on that voyage. We are not to assume a possible case, but must suppose that the loss occurred according to the ordinary course. The declaration charges a breach in the non-payment of the money. It is said that the non-payment of the money is the whole cause of action. But, is that so? The matter is not res integra; for, it appears to have been decided by the court of King's Bench, so long ago as in the time of the 7th Term Reports, that, where an assured upon a life-policy made in London, died in Scotland, an affidavit that the whole cause of action arose in London was not true. There have been many cases since in which it would have been very convenient to change the venue, if it could have been done. I have myself been con-**[973]**-cerned in several. But I have always considered that it could not be allowed. We start, therefore, with a distinct authority against this application: and no one of us can recollect or discover a case that looks the other way. *Martin* v. *Daws* is a very strong case. That was an action of assumpsit for not surrendering to the plaintiff certain copyhold premises, pursuant to an award,—which was much the same as if it had been a direction to pay money. The venue was laid in London. A motion was made to change it to Sussex, on the usual affidavit that the cause of action arose in that county; and it was contended that, as the action was not on an award, the case was not within any rule which prevented the venue from being changed in such actions, and which applied only to cases where the mere production of the instrument entitled the plaintiff to recover: and that, even if the action had been on an award, *Mondel* v. *Steele* was an authority to shew that the venue might be changed in such an action. Upon granting the rule, Parke, B., expressed the opinion which has already been adverted to. The rule having been granted to change the venue, an application was afterwards made to discharge it, on the ground that the case was not one in which the venue could be changed on

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(*a*) To build a ship for the plaintiff at Liverpool.

(*b*) 11 M. & W. 734, S. C. (but where this dictum does not appear), 1 D. & L. 279.

the ordinary affidavit. After argument, the court held that the action was an action on the award, within the meaning of the rule: and Lord Abinger, C. B., said: "We cannot take the law from the casual expressions of judges, but must look to decided cases. The case of *Stanway* v. *Heslop* (3 B. & C. 9, 4 D. & R. 635) is a direct authority that the courts will not change the venue in an action on an award. Abbott, C. J., there says, 'There is not any case deciding that the venue may be changed in an action on an award, and, as the contrary has been held **[974]** in the court of Common Pleas,'—alluding to *Whitburn* v. *Staines* (2 Bos. & Pull. 355),—'We think it best that the practice of this court should be conformable to that decision.' I think the practice has been settled by those decisions." It appears to me that that case distinctly recognises the principle which is applicable to the present. No authority, therefore, having been cited in support of the motion, and there being authorities that strike me as satisfactory the other way, I am of opinion that no rule should be granted.

MAULE, J. I do not think that this rule should be refused upon the ground that the venue cannot be changed in an action upon a policy of assurance; although that seems formerly to have been the inclination of the courts, probably because policies were usually under seal. It was thought, that, in the case of specialties, it could not properly be predicated that the whole cause of action arose in a particular place. Still, that only remits it to the general class of cases in which the venue may be changed. The courts very wisely and properly require in these cases, not merely an affidavit that the cause of action arose in the county or place to which it is sought to change the venue, and not elsewhere, but that the order be made upon reading the declaration. The authorities, it seems, shew that deponents may be found who are bold enough to swear that the whole cause of action upon a policy of assurance arises in the place where the policy was made and the money is payable. In *Cailland* v. *Champion* the court of King's Bench held, that, in an action upon a life-policy, where the party had died in Scotland, it could not properly be sworn that the whole cause of action arose in London, where the policy was effected. What **[975]** conscientious man could think of swearing that the whole cause of action upon a sea policy arose in London, where the voyage was from a foreign port to Liverpool, and the vessel never came within a thousand miles of London? Looking at the declaration, the affidavit in this case cannot possibly be true.

CRESSWELL, J. I am of the same opinion. Looking at the declaration, it appears that the deponent has made a mistake in supposing that the cause of action arose in the city of London and not elsewhere.

V. WILLIAMS, J., concurred.

Rule refused.

HILL *v.* KEMPSHALL. May 30, 1849.

[Referred to, *Phillips* v. *Bridge*, 1873, L. R. 9 C. P. 53.]

Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded.

Trespass. The declaration stated that the defendant, on the 5th of June, 1847, with force and arms, broke and entered a certain dwelling-house of the plaintiff, situate No. 2 Queen's Terrace, Queen's Road, Bayswater, in the parish of Paddington, in the county of Middlesex, and then and there ejected and expelled the plaintiff and her servants from the possession and enjoyment of the said dwelling-house, and kept and continued them so ejected and expelled for a long time, to wit, for the space of four days; whereby the plaintiff, during all that time, lost and was deprived of the use and benefit of the said dwelling-house; and was put to great inconvenience and much expense, to wit, 50l., in **[976]** procuring and removing to another residence for herself and family; and other wrongs, &c.

Plea,—that, before the plaintiff became and was possessed of the said dwelling-house in which, &c., and before the said time when, &c., to wit, on the 2nd of March, 1847, the defendant demised the said dwelling-house in which, &c., to one Mary Elizabeth Raybot, to hold the same to her the said Mary Elizabeth Raybot from the

25th of March, 1847, for the term of three years then next following, at a certain rent, to wit, 65l., payable quarterly, to wit, on the 24th of June, the 29th of September, the 25th of December, and the 25th of March, in each year of such tenancy, and upon condition, that, if default should be made in payment of such rent as aforesaid, it should be lawful for the defendant, within twenty-one days to enter into and take possession of the said dwelling-house and premises in which, &c.: that the said Mary Elizabeth Raybot held and enjoyed the said message under and by virtue of the said tenancy; and that the said tenancy therein continued until, and was subsisting at, the said time when, &c.: that, before the said time when, &c., to wit, on the 24th of June, 1847, a certain sum of money, to wit, 16l. 5s. of the rent aforesaid, for a certain time, to wit, one quarter of a year of the said tenancy, ending on a certain day, to wit, on the day and year last aforesaid, became and was due and in arrear from the said Mary Elizabeth Raybot, and at the said time when, &c. remained in arrear and unpaid,—of all which the plaintiff, before and at the said time when, &c. had notice: that the plaintiff became, and at the said time when, &c. was, possessed of the said dwelling-house in which, &c., as assignee of the said Mary Elizabeth Raybot, and of the said tenancy in this plea aforesaid, and of the said interest of the said Mary Elizabeth Raybot in the said tenancy and the said dwelling-house **[977]** in which, &c.: and that thereupon the defendant afterwards, and within twenty-one days from the time when the said last-mentioned arrear of rent became and was due and payable, to wit, at the said time when, &c., the same being then unpaid, entered into the said dwelling-house in which, &c., the outer door thereof being then open (*a*)[1], to take possession, and did then take possession thereof, for the non-payment of the said last-mentioned rent, as he lawfully might for the cause aforesaid; which were the supposed trespasses in the declaration mentioned,—verification.

Special demurrer, assigning for causes—that it is not alleged in the said plea that any demand of the rent was ever made of the plaintiff, or on the said premises, before the said entry of the defendant, and that, without such demand duly made, the defendant has no right of re-entry under the said agreement,—that the plea should have shewn a forfeiture at common law of the said term previous to the said entry of the defendant,—that the plea should have disclosed the commencement of the defendant's estate, in order that the plaintiff, in reply, might have shewn the defendant's estate, at the time of the making of the devise, to have passed away from him, or to have ceased or determined,—that the said plea is ambiguous and uncertain, in this, that it is ambiguous whether the defendant intends to rely on a forfeiture of the said term, in which case a demand of the rent ought to have been averred, or a right to enter and take possession of the said premises for any temporary or other purpose,—and that, as the said plea is framed, the plaintiff cannot safely reply thereto, &c. Joinder in demurrer.

[978] Petersdorff, in support of the demurrer. At common law, a demand of the rent prior to a re-entry for condition broken, was indispensable: and the reason is obvious, viz. that the tenant should have an opportunity of tendering the rent. In Comyns's Digest (*a*)[2], it is laid down, that, "in all cases of a subject, where an estate is upon condition to be void for non-payment of rent, the condition will not be broken if the rent be not demanded (*b*). Though it appears that the party was not ready to pay, if a demand had been made (*c*). Though the condition be upon a lease for years (*d*). So, if there be a lease and a nomine pœnæ for non-payment of rent, the rent must be demanded before he is entitled to the nomine pœnæ" (*e*). This common law rule has never been in any degree qualified. It is true, that the lessor might have expressly stipulated for a right of re-entry without demand,—as in *Kavanagh* v. *Gudge* (5 M. & G. 726, 6 Scott, N. R. 508; 7 M. & G. 316, 7 Scott, N. R. 1025); but he has not done so. [Maule, J. If he lets the twenty-one days elapse, he cannot enter.] All

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(*a*)[1] Quære, the necessity for this allegation.

(*a*)[2] Title Rent (D. 3). And see Viner's Abridgment, title Rent (I.).

(*b*) Citing Co. Litt. 201 b.; *Molineux* v. *Molineux*, Cro. Jac. 145.

(*c*) Citing Rol. Abr. 458, l. 17, 22 (1 Roll. Abr. 458, pl. 3, 5).

(*d*) Citing *Hanson* v. *Norcliffe*, Hob. 331, Sir W. Jones, 9; *Amphurst* v. *Palmer*, Hob. 331.

(*e*) Citing Rol. Abr. 459, l. 25 (1 Rol. Abr. 459, pl. 3, translated 5 Vin. Abr. 262, pl. 3); *Maund* v. *Gregory*, 7 Co. Rep. 28 b.; *Grobham* v. *Thornborough*, Hob. 82; *Howell* v. *Samback*, Hob. 133; *Tracy* v. *Dutton*, Palmer, 208.

that was to be ascertained, was, on what day the rent became due. This might have been a good plea, under the statute 4 G. 2, c. 28, s. 2,—one of the objects of which was, to dispense with a demand: but it is not so pleaded. [Maule, J. From what time does the entry put an end to the tenancy?] The tenancy would cease from the moment of entry under the condition. [Maule, J. The plea would be good, whether the defendant had a **[979]** right to enter and determine the tenancy, or a right to enter and hold till payment.]

The plea is ambiguous. It does not disclose upon what ground the defendant relies for the right to re-enter, or whether his entry was for the purpose of putting an end to the demise, or for a temporary purpose. A demand may not be necessary, where the object of the entry is, not to determine the lease, but merely to enforce the payment of the rent. [Maule, J. No points have been delivered on the part of the defendant.]

C. Jones, Serjt., contrà. The condition in this lease is an unusual one. No demand was necessary. The rent was payable on the quarter days; and, if not paid on the day on which it accrued due, the lessor had a right to re-enter and take possession at any time within twenty-one days. [Maule, J. Does the entry of the landlord put an end to the lease?] Yes. [Maule, J. Then a demand was requisite.] The forfeiture was incurred on the rent being unpaid on the 25th of June: it was a complete forfeiture, on the landlord's choosing to avail himself of it. [Maule, J. The tenant should have an opportunity of paying the rent, by having it demanded.] He might create the opportunity, by going and paying it. [Maule, J. Where?] At the dwelling-house or last known place of abode of the landlord. [Wilde, C. J., referred to 1 Williams's Saunders, p. 287, n. (16), as to the requisites at common law, to entitle the reversioner to re-enter; the first being, a demand of the rent (*a*).] Whether a demand is necessary or not, must depend upon the language of the deed.

WILDE, C. J. This is a perfectly plain case. The plea shews a demise upon condition, with a power to **[980]** the lessor to re-enter upon condition broken, and determine the lease. The plea, however, shewing no demand, shews no justification for the trespass complained of.

The rest of the court concurring,

Judgment for the plaintiff.

KINNERSLEY *v.* KNOTT. June 6, 1849.

Where, in describing a party in pleading, a single letter is prefixed to his surname, the court will intend it to be his full christian name, if a vowel; otherwise, if a consonant.—In a count upon a bill of exchange, by indorsee against acceptor, the defendant was described as, "John M. Knott:"—Held, an insufficient description, and properly taken advantage of by demurrer.

Assumpsit. The first count of the declaration stated that the plaintiff, by E. S. his attorney, complained of John M. Knott, who had been summoned to answer the plaintiff by virtue of a writ issued on, &c.: For that whereas, on the 26th of February, 1848, William Henry Hyde made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of him the said William Henry Hyde the sum of 65l. 10s., three months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill; and the said William Henry Hyde then indorsed the said bill to the plaintiff,—of all which the defendant then had notice, and then promised the plaintiff to pay him the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement, &c.

The defendant demurred specially, assigning for causes—that the christian name of the defendant is not fully stated and set forth therein, and that the de-**[981]**-fendant is therein described as John M. Knott, and with that initial letter M. for his christian name, or one of his first names;—that the christian name or first names of the defendant should have been stated and set forth in full, or else the plaintiff should have stated a sufficient cause or excuse for not so stating or setting the same forth,—that the description of the defendant by the said name of John M. Knott, and with that

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(*a*) Citing Bro. Abr. title Demaunde, 19.

initial, is improper,—and that the declaration does not allege the full christian names or first names of the defendant, &c.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The description of a defendant by the initials of his christian name only in a declaration, is clearly ground of demurrer, except in those cases where the defect is aided by the 12th section of the 3 & 4 W. 4, c. 42 (*a*). The point has been repeatedly discussed and distinctly decided. In *Appelmans* v. *Blanch* (14 M. & W. 154), the omission of the christian name of a person mentioned in pleading, was, in the absence of an averment of excuse for such omission, held fatal. In *Esdaile* v. *Maclean* (15 M. & W. 277), in a declaration against the drawer of a bill of exchange, the bill was alleged to have been drawn upon "one W. Watson;" and it was held bad on demurrer, for not shewing that the party was so described in the bill itself. In *Levy* **[982]** v. *Webb* (9 Q. B. 427), the declaration,—against the acceptor,—stated that "one J. C. Pawle" made his bill of exchange, directed to the defendant, and thereby required the defendant to pay "to the order of the said J. C. Pawle," &c., that the defendant "accepted the said bill," that "the said J. C. Pawle" indorsed it to the plaintiff, and that the defendant did not pay: and it was, in like manner, held bad. So, in *Gatty* v. *Field* (9 Q. B. 431), to a count upon an account stated, the defendant pleaded, that, a horse-race being about to be run, an illegal lottery was set up, upon the terms that the adventurers therein should consist of seventy members, who should pay 15s. each; that "Mr. Richards" should be treasurer, and "Mr. Selway" the secretary; that the names of the horses should be put, on separate cards, in one box, and the names of the adventurers, on separate cards, in another box; that two disinterested persons should draw these cards by chance, one from each box, alternately; and that the person whose name was drawn next after the name of the winning horse, should be paid, out of the subscriptions, 24l.: the declaration then proceeded to aver, that the plaintiff, the defendant, and others became adventurers, and paid the same sum each to "Mr. Selway" and the defendants; and that the plaintiff became the winner, &c.: and it was held, on special demurrer, that the plea was bad, for not stating the christian names of the persons therein mentioned,—no reason being assigned for the omission. In delivering the judgment of the court in these two cases, Lord Denman says: "The question reserved for our consideration in the first of these cases, turned upon the insertion of initials only, instead of the full christian names; in the second, on the omission of christian names and substitution of 'Mr.' And we are of **[983]** opinion, that, when such omission or substitution is made, not in the description of some written instrument, but in the statement of a transaction between the parties, on which the action turns, it is good ground of special demurrer. We must presume that every person has a christian name; and it ought to be stated, or reason assigned for the omission." In *Turner* v. *Fitt* (ante, vol. iii. p. 701), this court refused to set aside as frivolous a demurrer assigning for cause that the drawer of a bill, in a count by indorsee against acceptor, was described by the initials of his christian name only,—"I. B. Doe,"—without shewing that he was so designated or described in the bill: and they came to a similar decision in *Nash* v. *Calder* (ante, vol. v. p. 177), where the declaration, in an action by indorsee against acceptor, described the defendant as "William Henry W. Calder." In *Lomax* v. *Landells* (ante, vol. vi. p. 577), the description of a party as "I. Shakspeare Williams" was held sufficient: but the ground of that decision was,—as put by Maule, J.,—that "a vowel which is in itself a word, and may be pronounced separately, may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel, cannot." And in *Miller* v. *Hay* (3 Exch. 14), in an action by indorsee against acceptor of a bill of exchange, the count was held bad on demurrer, for describing the defendant as "W. D. Hay." Parke, B., there says: "The defect is not a wrong, but an insufficient, designation of the defendant, and bad

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(*a*) Which enacts "that, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters or contraction of the christian or first name or names, instead of stating the christian or first name or names in full."

on the face of the declaration. Before the act for the amendment of the law, the defendant could not have pleaded a misnomer in abatement, if so described, in most, if not all the cases, as he could not have truly stated that he was not known by that name; and yet it was a defect of which advantage could be [984] taken in some form, and, being on the face of the declaration, a demurrer is the proper form." [Maule, J. Sully, in his Memoirs (*a*), makes mention of a French nobleman at the court of Henry III., named François d'O., lord of Fresnes. It would seem, therefore, that a name may consist of a single letter.]

F. Robinson, contrà. The argument on the other side unwarrantably assumes that "John M. Knott," means "John," with the initial of a second christian name, followed by a surname. It may be a part of the surname, like the M. in M'Adam, M'Donald, M'Knight, &c.; or, the defendant may have been christened "John M." [Maule, J. I think it must be assumed that "M." is an initial: it can have no sound by itself.] In *Lindsay* v. *Wells* (3 N. C. 777, 4 Scott, 471), this court refused to set aside a declaration, on the ground that the plaintiff had therein described himself as "Henry H. Lindsay." In *Rust* v. *Kennedy* (4 M. & W. 586), it was held, that, where in the writ and declaration in an action not upon a written instrument, the defendant is described by the initials of his name, the only remedy is, by summons to amend, under the 3 & 4 W. 4, c. 42, s. 11 (*d*); and the court will not set aside the proceedings for irregularity. In *Braithwaite* v. *Harrison* (1 D. & L. 210), where, in an action on a bill of exchange, [985] by the indorsee against the acceptor, the declaration alleged that "one J. Bankes" made his bill, &c., a demurrer, on the ground that the christian name of Bankes ought to have been set out in full, or that it should have been alleged that he was designated by the initial letter only in the bill, was set aside as frivolous. The argument on the other side assumes that "E. M." would have been unobjectionable: if so, this is a mere case of misspelling, which would not amount to a variance: *Williams* v. *Ogle* (2 Stra. 889). [Maule, J. There, the name was "Segrave," instead of "Seagrave," and it was held no variance, qui idem sonans.]

The defendant admits by the form of the demurrer that he is properly described as "John M. Knott," in the declaration. This clearly would be a fatal objection to a plea in abatement: *Talland* v. *Germyn* (Comb. 188); *Roberts* v. *Moon* (5 T. R. 487); *Docker* v. *King* (5 Taunt. 652); Comyns's Digest (title Abatement (F. 17), pl. 4). [Cresswell, J. The authorities you cite do not bear out your position. Maule, J. In truth, you are demurring to the demurrer.]

The court intimated to Robinson that he might amend his declaration. This, however, he declined to do.

Talfourd, Serjt., in reply. *Braithwaite* v. *Harrison* is overruled by the subsequent decisions. *Nash* v. *Calder*, and *Miller* v. *Hay*, are precisely in point.

Wilde, C. J. This point has been discussed and decided upon several occasions; and the result of the cases is, that this demurrer is well founded, and must prevail. In *Nash* v. *Calder*, this court intimated a pretty plain opinion, not only that a demurrer to a de-[986]-claration, on the ground that the defendant had been described therein by the initial of one of his christian names, was not frivolous, but that it was one which was likely to succeed. The plaintiff seems to have very wisely acted upon the hint so given; for, nothing more was heard of the case. The attention of the court was in that case drawn to the very point that has been under discussion here; for, there, as here, there was one portion of the christian name of the party properly set out. The court of Exchequer, in *Miller* v. *Hay*, acted upon the authority of *Nash* v. *Calder*, and held that the objection was properly taken advantage of on demurrer. That, I think, the authorities shew to be the proper course.

Coltman, J. I am of the same opinion. *Nash* v. *Calder*,—upon which the court

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(*a*) Liv. vii. See also Moreri, as to this François, sieur d'O. de Fresnes et de Maillebois.

(*d*) Which enacts "that no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

of Exchequer rely in *Miller* v. *Hay*,—is not to be distinguished from the present case. I think the conclusion come to in those two cases was correct.

MAULE, J. The statute 3 & 4 W. 4, c. 42, s. 12, which enables a plaintiff, in declaring on a bill or note, or other written instrument, any of the parties to which are designated by initials of their christian names, so to designate them in the process or declaration, assumes that letters are used as initials of names. Seeing, therefore, a letter before the defendant's name, which cannot be sounded by itself, the court must treat it as an initial letter. The rule of pleading is, that the name of every person mentioned in a declaration or plea, must be fully and correctly set forth, or an excuse for the omission alleged. Here, the plaintiff had done neither the one nor the other. Where the letter used is a vowel, which is vocalis or sonans, and can be uttered, the courts have—and, I think, correctly,—been astute **[987]** to discover a reason for not allowing a demurrer on this ground to succeed, and have assumed it to be possible that it may be a christian name. Here, however, the letter used is a consonant, consonans, which can only be sounded with the aid of a vowel, and consequently cannot fairly be assumed to be a name by itself. The defendant's name, therefore, is left in uncertainty; and that, in my opinion,—adopting the view of the court of Exchequer, in *Miller* v. *Hay*, founded upon the previous decision of this court, in *Nash* v. *Calder*,—is an insufficient designation of the defendant, and bad on the face of the declaration. And the proper way to take advantage of it is by demurrer. I therefore am of opinion that the defendant is entitled to judgment.

CRESSWELL, J., concurred.

Judgment for the defendant.

PENNELL AND OTHERS, Assignees of Burton, a Bankrupt, *v.* STEPHENS.
June, 4, 1849.

[S. C. 18 L. J. C. P. 291; 13 Jur. 766.]

An intimation given by a clerk of a defendant's attorney, to a clerk of the plaintiff's attorney, that the defendant has committed an act of bankruptcy,—the clerk to whom it is given not being shewn to be a managing clerk, or to have communicated the matter to his principal,—is not such a notice as will defeat an execution, under the proviso in the 2 & 3 Vict. c. 29, s. 1.—Quære, whether a notice to one who is shewn to be a managing clerk, would suffice?

This was a feigned issue to try whether, at the time of the seizure of the goods of one Burton, under an execution at the suit of the defendant, the defendant had had notice of an act of bankruptcy having been committed by Burton.

The issue was tried before Lord Denman, at the **[988]** spring assises for Surrey in 1848. The facts that appeared in evidence were as follows:—An action had been brought by Stephens against the bankrupt, in which issue had been joined prior to the 6th of November, 1847. In that action, one Cox acted as the attorney of the plaintiff, and one Lloyd as the attorney of the defendant. On the 6th of November, Lloyd addressed a letter to Cox, as follows:—

"*Burton* ats. *Stephens*.

"Dear Sir,—If your client means to press this action, Mr. Burton must go into the *Gazette*. Upwards of two-thirds of his creditors have consented to an arrangement, by which they will be paid their full demands, and interest, and costs: but there are now twenty creditors suing Mr. Burton; and I am pledged to the others not to allow any judgment to be obtained. I am therefore prevented from endeavouring to carry out the resolutions come to by the creditors, and am now applying to those who have commenced proceedings against Mr. Burton, to induce them to come in with the rest. In the event of their not doing so, I shall feel it to be my duty to lay the state of such proceedings before the creditors: and, as there will, in the event of the suing creditors not abandoning their proceedings, be an act of bankruptcy committed before any verdict can be obtained, the parties will have to pay their own costs. Pray write me that your client will do as the rest."

On the 12th of November, Lloyd again addressed the following letter to Cox:—

"*Stephens* v. *Carr*. *Same* v. *Burton*.

"Dear Sir,—Mr. Carr has just waited upon and informed me that the plaintiff in these actions is willing **[989]** to receive the amount claimed by him by instalments, as follows, i.e. 100l. on the 21st of December, 50l. on the 21st of January, 1848, 50l. on the 21st of February, 50l. on the 21st of March, and the balance on the 21st of April. Will you be kind enough to say per bearer, whether I may take out a summons to stay upon these terms. Of course, your costs will be provided for."

A summons was afterwards taken out to stay the proceedings, and an order thereupon drawn up, on the terms proposed. Subsequently, a clerk of Mr. Lloyd, named Rule, called at the office of Mr. Cox, and there saw the clerk who had attended the summons on behalf of Stephens, and asked for further time to pay the first instalment: Cox's clerk said he would speak to his principal about it; whereupon, Rule, Lloyd's clerk, said: "If you do not give us time, you will have notice of an act of bankruptcy. Burton has committed an act of bankruptcy." To which Cox's clerk replied—"Has he? Perhaps he has committed several." "Yes," rejoined Rule, "he has committed several."

Rule, who was called as a witness, admitted, that, at the time this conversation took place, he did not know that Burton had committed an act of bankruptcy; but only that Cox had said so: and he further stated, on cross examination, that he was, at the time, aware that notices that an act of bankruptcy had been committed by Burton, had been served upon several of the creditors on the 13th of November.

Judgment was signed in the action against Burton on the 26th of November, and execution executed on the 27th. On the 3rd of December, the execution-creditor and others had notice of an act of bankruptcy: on the 8th a fiat was obtained against Burton; of **[990]** which Stephens had notice on the 9th,—on which day the sale took place.

On the part of the defendant, it was submitted that the execution was protected by the 2 & 3 Vict. c. 29, the creditor not having had notice of any prior act of bankruptcy having been committed, at the time of the levy.

His lordship, however, told the jury that the conversation between the two attorneys' clerks was evidence of notice to Stephens of an act of bankruptcy having been committed by Burton: and the jury thereupon returned a verdict for the plaintiffs.

Shee, Serjt., in Easter term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He cited *Taylor* v. *Willans* (2 B. & Ad. 845).

Bovill and Wise shewed cause. The intimation given by Rule, Lloyd's clerk, to Cox's managing clerk, was clearly notice of an act of bankruptcy having been committed by Burton, so as to bind Stephens, the client. It was not necessary that the notice should state the nature or particulars of the act of bankruptcy: a general notice that the party "had committed several acts of bankruptcy," was sufficient: *Udal* v. *Walton* (14 M. & W. 254). Pollock, C. B., in that case, says, "In the case of *Conway* v. *Nall* (ante, vol. i. p. 643), which has been referred to, there was merely a statement of circumstances which in themselves did not amount to an act of bankruptcy; it was not a mere general notice that the party had actually committed an act of bankruptcy. The case of *Hocking* v. *Acraman* (12 M. & W. 170) is not at all opposed to this **[991]** view of the case. Notice of a docket having been struck merely informs the party that another person has taken a certain step which is adverse to the debtor; the commercial world gather nothing from that fact, except that some person has made a certain affidavit. But here there is a direct notice that acts of bankruptcy have been committed; and such a notice is, on general principles, sufficient to satisfy the act of parliament. There would be great inconvenience in putting any other construction upon it; for, there are twenty different kinds of acts of bankruptcy, and it would be almost impossible to state with accuracy what ought to be the form of notice adapted to each act of bankruptcy. Some light is thrown upon this point by the former statute, of the 43 G. 3, c. 135, s. 3, which makes the issuing of a commission and the striking of a docket notice of an act of bankruptcy. Now, when a docket is struck, the act of bankruptcy is not stated; it is merely stated that the party is a bankrupt: and the commission itself gives no more information on that subject: nor is the specific act of bankruptcy made known until the examination takes place. I think, therefore, on principle, that there has been in this case sufficient notice of an act of bankruptcy." In *Rothwell* v. *Timbrell* (1 Dowl. N. S. 778), it was held, that, if an act of bankruptcy has been committed by a trader, by making an assignment of all his property for the benefit of his creditors, and information of that fact is communicated to the attorney of an execution-creditor, previously to the issuing of a fi. fa. sued out by such attorney, it is sufficient to invalidate the execution, as against the assignees, notwithstanding the 2 & 3 Vict. c. 29, s. 1, and although the fiat issued after the writ was lodged with the sheriff. Coleridge, J., there says: "The words of the statute are, 'provided the person or persons at **[992]** whose suit or on whose account such execution shall have issued, had not at the time of executing or levying such execution, notice of any prior act of bankruptcy.' Now, I by no means say, that, in every case, notice to or knowledge of the attorney of a party will satisfy those words: but, in the present case, the notice was given to the attorney in the cause, when he was acting in it as such. He was the same agent as issued the execution, and it should seem issued it at that time in consequence of the information, in order to anticipate the fiat. Under these circumstances, it is impossible, I think, to distinguish between him and his client." A notice to the attorney, then, being sufficient, does not a notice to the clerk who had the management of the cause, stand upon the same footing? [Cresswell, J. Have you any authority that notice to an attorney's clerk, is notice to his principal?] In *Taylor* v. *Willans* (2 B. & Ad. 845), in an action for maliciously indicting the plaintiff for perjury, an affidavit made by the plaintiff's attorney's clerk, was put in for the purpose of shewing that those who conducted the prosecution had taken means to prevent a person becoming bail for the plaintiff: and it was held to be admissible, without calling the clerk to prove an authority from his master to make an affidavit. "If," said Lord Tenterden, "an attorney leaves the conduct of a cause to his clerk, what the latter does therein, binds the party, as much as the act of the attorney himself. The affidavit, therefore, was receivable." [Wilde, C. J. It was part of the proceedings in the cause.] In *Wilmott* v. *Smith* (M. & M. 238), a tender to a person in the office of the plaintiff's attorney, who was referred to on the subject by a clerk in the office, and refused the tender, as being of an insufficient sum, was held to be a good tender, with-**[993]**-out shewing who the person was. [Wilde, C. J. Lord Tenterden there inferred from the circumstances, that the person referred to had authority to receive the money, and therefore held that a tender to him was good.] The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself: *Taylor* v. *Forster* (2 C. & P. 195); *Bowman* v. *Norton* (5 C. & P. 177). And, in *Standage* v. *Creighton* (ibid. 406), it was held, that, where the clerk of an attorney has the management of a cause, what he says is receivable in evidence, just as if it had been said by the attorney himself. The recent case of *Pike* v. *Stephens* (17 Law Journ., N. S., Q. B. 282),—which will probably be relied on for the defendant,—by no means warrants the conclusion which will be sought to be drawn from it. On the contrary, that case shews that a notice to an attorney's clerk who has had the conduct of the cause would be as effectual as a notice to the attorney himself. Besides, in that case, the duty and authority of the attorney, as dominus litis, was at an end.

Shee, Serjt., and Pearson, in support of the rule. The question is, how far the statute 2 & 3 Vict. c. 29, is to be extended by construction. In *Rothwell* v. *Timbrell*, it was decided that notice of a prior act of bankruptcy to the attorney of the execution-creditor, is notice to the client. But the principle upon which that case proceeded is, that the attorney is put in the client's place, and is necessarily intrusted with an almost unlimited control over the proceedings. No case has yet carried it any further. The cases that were cited to shew that an attorney's clerk is for some purposes identified with the attorney himself, are altogether in-**[994]**-applicable. An act done by a clerk who has the management of the cause, in the progress of the cause, may well bind the client. That is all that *Taylor* v. *Willans* decides. *Wilmott* v. *Smith* raised a totally different question. And with respect to *Taylor* v. *Forster* and *Bowman* v. *Norton*, it is to be observed that the privilege is the privilege of the client, and not of the attorney. *Pike* v. *Stephens* is a strong authority in favour of the defendant. It was there held, that notice of a prior act of bankruptcy given to a clerk of an attorney, who has issued a writ of execution, at the office, and in the absence of the master,—such clerk not being shewn to have had personally the conduct of the suit in which the execution issued,—will not operate to defeat the execution, under the proviso in the 2 & 3 Vict. c. 29, s. 1, until communicated by the clerk to his master. Lord Denman there says: "The question is, whether a notice in other respects treated as sufficient, but served on a clerk of the plaintiff's attorney issuing the execution, such clerk not being shewn to have had personally the conduct of the suit, will take the execution out of the protection of the clause. . . . The statute, in terms, requires that the person dealing or suing should have notice, not that he should be personally served; and, wherever, in the transaction or the suit, he has put, or allowed to be put, some one else in his place to manage or control, in good sense and equity a notice to that person must be considered a notice to himself. This being the principle, the question is, whether such a clerk as we have described from the evidence in the cause, falls within it. The counsel for the defendant contended that he did; that any clerk at the office of the attorney—the place where all notices in the cause were to be served—was such clerk; nay, that any other person, at any other place, to whom or at which, by notice over his door, the attorney might direct **[995]** papers, letters, or notices in a cause to be delivered, was such an agent as might receive a notice under the proviso, to bind the client. But there is an obvious distinction between such a notice and those notices and matters which, in the ordinary progress of a cause, must be passing from one attorney to the other. That the cause may proceed with regularity and without delay, the courts require that the attorney shall always be at his office, or have some competent person there during office hours, for the purpose of receiving them; and, as to these, the attorney is regarded not merely as the mere agent of the client, but rather as a substituted principal. What is required upon a notice of this kind to be done or communicated, there ought to be a clerk at the office sufficiently skilled and intrusted to be able to do or communicate, or take the necessary step upon, if the attorney himself be absent: and the client must suffer if his attorney be guilty of any default in not employing such a clerk. But the notice now in question was not a notice in the cause; it was the intervention of a third party, on the result of which would depend the perception or not of the whole fruits of the cause. It cannot be said that the clerk receiving it had authority to stay the issuing or the levying of the execution, and that his master was bound, at all office hours, to have a clerk there with such authority, in his own absence. This was a matter which would require the whole discretion of the principal to determine whether he would yield to it, or enforce his writ; and attorneys are not bound in all cases to have in their employment clerks to whom such extensive authority may be safely intrusted. What has been called a managing clerk, is by no means a necessary officer in an attorney's establishment: it would be very unjust to require it; and it must not be taken that even such a person would, under all circumstances, be one on **[996]** whom such a notice could be effectually served." In *Ramsey* v. *Eaton* (10 M. & W. 22), notice to a sheriff's officer was held insufficient. In *Bird* v. *Bass* (6 M. & G. 143, 6 Scott, N. R. 928), where notice of an act of bankruptcy was sent by letter to the attorney of the execution-creditors,—it was held that they were not affected with such notice, by the mere delivery of the letter at their attorney's office, nor until the same had been read; there being nothing to shew a wilful abstaining from reading the letter. Here, there was no evidence to shew that the clerk to whom the alleged notice was given was the managing clerk of Mr. Cox, or was a person intrusted with any discretion in the matter. On the contrary, when asked by Rule for an extension of time for payment of the first instalment, he said he would speak to his principal on the subject. [Wilde, C. J. Rule himself did not, at the time he had the conversation with Cox's clerk, know that an act of bankruptcy had been committed.] It was admitted by Rule, at the trial, that the fact of an act of bankruptcy having been committed, was unknown to him, otherwise than by the circumstance of his knowing that notice that there had been an act of bankruptcy had been served on certain creditors of Burton. And the fiat was founded upon an act of bankruptcy occurring after the date of the alleged conversation.

Wilde, C. J. It appears from the authorities, that notice of an act of bankruptcy given to the attorney in the cause, in the course of the proceedings, is notice to the party: and it may not be material how the notice comes to the hands of the attorney, provided he does receive it. It may very well be that Cox's clerk might be the means used to convey a notice to Cox: **[997]** and, if it had appeared that the clerk did communicate to Cox what Rule had told him, I am not prepared to say that that would not have been a sufficient notice. But the question whether Cox did or did not receive notice, ought not to depend upon whether the clerk was intrusted with more or less authority. It appears that Rule, Lloyd's clerk, called at Cox's office with an account; that he asked if they would allow Burton a little more time to pay the first instalment, saying, that, if time was not given, they (meaning the plaintiff in the action, and Cox, the attorney) would receive notice of an act of bankruptcy, and telling the clerk that Burton had committed several acts of bankruptcy. It was not, in my opinion, sufficient that Cox's clerk should be told in that loose way, that an act of bankruptcy had been committed by Burton, and that the matter should be left there. I think the intimation was not given in such a manner and under such circumstances, as to shew that it was intended to serve as a notice, or so as to charge Cox's clerk with the duty of repeating it to his master (*a*). It appears from Lord Denman's notes, that he ruled, at the trial, that the notice was sufficient, as a matter of law. That clearly was going further than is warranted by the authorities. There must, therefore, be a new trial, on the ground of mis-direction.

Coltman, J. It seems to me to be going quite far enough, to hold that notice of an act of bankruptcy having been committed, given to the attorney of an execution-creditor, is tantamount to notice to the party himself. It has, however, been so decided, and no doubt on good grounds. But it would be going one step further, to hold, that, for the purpose of receiving notice, the managing clerk may be treated as the representative of his employer. Undoubtedly, there are many cases [998] shewing that the convenience of practice requires that the managing clerk should be, in a great degree, looked upon as representing the attorney himself. Therefore, if, in this case, the clerk to whom Rule addressed himself had been shewn to be Cox's managing clerk, that would have given rise to the question whether notice to a managing clerk would in all cases suffice. But there was no proof that he was such managing clerk. For these reasons, I think the rule for a new trial should be made absolute.

Maule, J. I agree with the rest of the court, that no such notice of an act of bankruptcy was given in this case as would defeat Stephens's execution. It seems to have been considered at nisi prius, and ruled as a matter of law, that Cox's clerk was a fit recipient of notice. I agree with my brother Coltman that it was some extension of the principle of construction, to hold that notice to the attorney was notice to the party. In the present case, all that occurs is this,—a clerk of Burton's attorney goes to Cox's office with an account, and asks for an extension of time for payment of the first instalment under the judge's order; saying to the clerk there, "You had better give us time; for, if you do not, we will give you notice of an act of bankruptcy," and adding that Burton had committed several acts of bankruptcy. I think it is quite clear that Cox's clerk was not a competent person to receive such a notice, and therefore that there ought to be a new trial.

Cresswell, J. I also think the learned judge was not right in taking upon himself to determine, as a matter of law, that the notice in this case was sufficient: and upon that ground I concur with the rest of the court in making this rule absolute.

Rule absolute.

[999] Wild *v.* Harris. June 12, 1849.

[S. C. 7 D. & L. 114; 18 L. J. C. P. 297; 13 Jur. 961.]

In assumpsit for breach of promise of marriage, the declaration stated, that in consideration that the plaintiff, being sole and unmarried, at the request of the defendant had promised the defendant to marry the defendant within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the promise of the defendant, had from thenceforward remained sole and unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that, although a reasonable time had elapsed since the making of the defendant's promise, yet the defendant had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise, and from thenceforward, had been and still was, married, &c.; and that the plaintiff did not know, at the time of the defendant's making his said

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(*a*) Especially as the intimation was, that notice would be given.

promise to her, nor for a long time afterwards, that the defendant was married:—Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise.

Assumpsit for a breach of promise of marriage.

The declaration stated, that, on, &c., in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, had then promised the defendant to marry him the defendant within a reasonable time, he the defendant then promised the plaintiff to marry her within a reasonable time: Averment, that the plaintiff, confiding in the said promise of the defendant, had always from thenceforward remained and still was sole and unmarried, and had been during all the time last aforesaid, until she had notice that the defendant was married as thereinafter mentioned, ready and willing to marry him, the defendant, &c.; that, although a reasonable time had elapsed since the making of the defendant's promise, and before the commencement of the suit, yet the defendant had wholly neglected his promise, and had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise, and from thenceforward, had been and still was married to a certain woman whose name was to the plaintiff unknown, then and still being the wife of the defendant; and that she, the plaintiff, did not know at the time of the defendant's making his said **[1000]** promise to her, nor for a long time afterwards, that he the defendant was married, &c.

At the trial, before Maule, J., at the sittings in Middlesex, after the last Hilary term, a verdict was found for the plaintiff, damages 10l.

Huddlestone, in the following term, moved for a rule nisi to arrest the judgment. The declaration discloses no consideration. The plaintiff could not perform her promise,—which is the only consideration alleged for the defendant's promise. [Wilde, C. J. Will not the detriment sustained by the plaintiff form a good consideration?] It is not the consideration alleged. A consideration is insufficient, if its performance be utterly impossible: Chitty on Contracts (4th edit. p. 57). In *Harry* v. *Gibbons* (2 Lev. 161), the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that he would discharge him of 20l. due to J. S., promised to expend 40l. in repairing a barge of the plaintiff's: and the court, upon error brought, reversed the judgment for the plaintiff, the consideration being illegal, for, the plaintiff could not discharge a debt due to his master. So, in *Nerot* v. *Wallace* (3 T. R. 17), it was held that a promise made by a friend of the bankrupt, when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was void, as being against the policy of the bankrupt laws. Lord Kenyon there says: "I do not say that this is nudum pactum: but the ground on which I found my judgment is this, that every person who, in consideration of some advantage, either to him-**[1001]**-self or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law." And Ashhurst, J., said: "In order to found a consideration for a promise, it is necessary that the party by whom the promise is made, should have the power of carrying it into effect; and, secondly, that the thing to be done should, in itself, be legal." Possibly the defendant might have rendered himself liable to an action for deceit, in falsely representing himself to be a single man, when in truth he was married. [Wilde, C. J. How can we say that the performance of the defendant's promise was absolutely impossible? His wife might have died before the lapse of a reasonable time (vide post, 1004 (*a*)).] The court cannot speculate upon such a possible contingency. In *Caines* v. *Smith* (15 M. & W. 189), the declaration, in assumpsit for breach of promise of marriage, stated, that the defendant promised the plaintiff to marry her; that the plaintiff remained and still was sole and unmarried, and, during all the time aforesaid, was ready and willing to marry the defendant, of which he had notice; yet that the defendant disregarded his promise, and wrongfully married another woman. Upon a demurrer to the plea, it was objected to the declaration, that "the averment that the defendant had married another woman, without an allegation of the lapse of a reasonable time for the performance of his agreement with the plaintiff, does not shew a breach of the express promise stated in the declaration. The defendant's wife may die before the lapse of a reasonable time, and he may still be able to perform his contract with the plaintiff." But Alderson, B., said: "Why should we presume that the wife will die before the lapse of a reasonable time, or in the life-time of her husband? We ought rather to presume the **[1002]** continuance of the present state of things; and, while that continues, it is clear that the defendant is disabled from performing his contract." Here, the promise, being to do an illegal thing, is absolutely void. The defendant's disability to perform his promise did not arise by matter subsequent. In Comyns's Digest (*a*)[1], it is said, that, "if a condition be to do a thing which by no means can be done, it shall be said to be an impossible condition; as, to go from London to Rome in three hours." "But," continues Comyns, "if the condition be improbable, and out of his power to do, yet it shall not be said to be impossible: as, if the condition be, that a married man shall marry such a woman; for, it is possible that his present wife may die before him and the other woman" (*b*)[1]. For this latter position, Lord Chief Baron Comyns cites 1 Roll. Abr. 419, l. 45 (*c*)[1]. Rolle cites 40 Ass. 13 (*d*), which **[1003]** is no authority at all (*a*)[2]. [Cresswell, J. referred to Brooke's Abridgment (*b*)[2],—"Assise. Feme ssi, et infeſſe hõe q̃ auoit fem̃, s̃ cõdic̃ q̃ il luy marriera; le feſſee infeſſe A., que enfeſſ' B., q̃ infeſſe C., q̃ infeſſe D.; le prim̃ feſſee deuie; le fem̃ ent̃ s̃ D. xvi. ãs ap̃s et lent̃ bõe, car ceo est admit bõ condic̃, car com̃t q̃ le feſſee ne puit marry al tẽps; del feſſem̃t, unc̃ poet estr̃ q̃ sa fem̃ deuiera, et dõqs il puit marry le feſſeres; et ideo bon condic̃, et lent̃ congeable." Coltman, J. Is there any authority for the position, that, where the impossibility to perform the promise at the time, is known only to the defendant, he is discharged?] No authority to that precise effect has been found. [Cresswell, J. There is nothing impossible or illegal in the promise. Is the defendant absolved from his engagement, because it turns out by matter subsequent,—the continued life of the wife,—that he cannot perform it?] In Comyns's Digest (*c*)[2], it is said, that, "if a

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(*a*)[1] Title Condition (D. 2): citing 1 Roll. Abr. 240, l. 10 (a misprint for 1 Roll. Abr. 420, l. 10, which refers to Co. Litt. 206 b.), translated 5 Vin. Abr. 111, pl. 3.

(*b*)[1] If land be given to the husband of A. and to the wife of B., and the heirs of their bodies, they have presently an estate-tail, by reason of the possibility: Co. Litt. 20 b., 25 b. And see 34 Ass. pl. 1, T. 7 H. 4, fo. 16, pl. 9; *Chudleigh's case*, 1 Co. Rep. 120.

(*c*)[1] Title Condition (C.), translated, 5 Vin. Abr. 110, pl. 1.

(*d*) "Un assise fuit port̃ enṽs ũ feme: qui pl' nul tort, et le verdict vient et dit, coment la feme fuit (seisie) de m̃ la terr̃ en sa demeñ come de fee, et de m̃ la terre enfeoſſa ũ J. sur cõdition q'l luy duist prẽdr̃ a feme, le q̃l J. aṽ une feme a ceo temps; le q'l J. enfeoffa oust' ũ aut̃, et il oustr̃; et issint plusours feoſſem̃ts tanq, le pl' ore fuit enfeoſſe: et trove fuit q̃ celuy qui primes fuit enfeoffe p la conditiõ, fuit mort, et q̃ les feoſſ. fuer̃ continus issint per xvi ans, et q̃ la feme entra sur cẽy q̃ est ore pl'. Et sur ceo ils fuer̃ adjorñ a W., ou, p avise de touts les justic̃, fuit ag̃ q̃ le pl' ne prist riẽ p son bř̃e, eo q̃ la t̃re fuit touts temps charg ove la conditiõ, issint l'ent congeable pur la conditiõ enfreint, ẽ q̃ mainz la t̃re fuit." The reporter adds, "Quære de isto judicio: car, come semble, lacõdic̃ fuit void, eo q̃ le feoffee av' feme a ceo temps, ut suprà. Ideo quære."

(*a*)[2] The case as stated supra, 1002 (*d*), to have been decided by the advice, i.e. the opinions of all the justices, is a direct authority for the position that an estate made by a woman to a married man, on condition that he shall marry her, is determinable by re-entry on the breach of such condition. And, in abridging this case, Lord Brooke adds that the reason why this was treated as a good condition was, that, although the feoffee could not marry the feofforess at the time of the feoffment, yet it might be that the wife would die, and then he could marry her. It is true, that, in the Book of Assises, the reporter says, quære de isto judicio, because it seems that the condition was void, the feoffee having a wife at the time, and that Lord Rolle consequently adds "but quære," to his abridgment of the case. Lord Brooke, however, pays no regard to the doubt expressed by the old reporter.

(*b*)[2] Title Conditions, pl. 119. This professes to be an abridgment of the case in 40 Ass. 13.

(*c*)[2] Title Condition (D. 7); citing Sir F. Moore, 477 (*Prat* v. *Phanner*), for that position, and Co. Litt. 206 b., for the position, that an obligation with condition to kill another, is void. In the case in Moore, the condition was, "to accept of, use, and maintain the said Alice as his lawful wife." The defendant pleaded, that, before condition of an obligation be, to do a thing [1004] which is malum in se, the condition and also the obligation is void: as to maintain and use such a one as his wife, who is the wife of another." That comes very near to the present case.

Cur. adv. vult.

WILDE, C. J. This was a motion in arrest of judgment. The action was for a breach of promise of marriage; and the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, promised to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time: it then went on to aver, that the plaintiff remained sole and unmarried, and had always been ready and willing to marry the defendant, but that the defendant disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise. On behalf of the defendant, it has been contended, that, inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise,—so that the plaintiff was not bound by her promise to marry the defendant,—there was a total absence of consideration. But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time,—which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do: and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time, was not absolutely impossible of performance; for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff (*a*)[1]. The authority referred to by my brother Cress-[1005]-well in the course of the argument,—from Brooke's Abridgment,—seems to recognise the principle which must govern this case. There, a woman infeoffed a man, upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married (*a*)[2]; whereupon the original feoffor entered as for condition broken: and it was held that it was a lawful condition; for, that the feoffee's wife might have died within a reasonable time. It would be strange, indeed, to allow the defendant to rely upon his own wrong,—to set up his fraudulent conceal-

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Alice was married to him, she was married to one Hawle, who is still alive, per quod ipse de prædictâ Aliciâ ut de uxore suâ legitimâ, acceptare, uti, vel manutenere juxta formam conditionis, non potuit."

(*a*)[1] Quære, whether some ambiguity is not involved in the words "within a reasonable time." The plaintiff, when promising to marry the defendant within a reasonable time, must be taken to have so promised with reference to her own free position, and also with reference to the supposed free position of the defendant. A. B., the actual wife, being wholly unknown to the plaintiff, her promise was tantamount to a promise to marry the defendant within a reasonable time, whether A. B. was alive, or not. The promise of the defendant to marry the plaintiff within a reasonable time, must either be understood in the same sense as the promise of the plaintiff,—in which case the defendant's promise would be, to marry the plaintiff within the same reasonable time, whether A. B., his wife, should survive such reasonable time, or not; or his promise must be understood as a promise to marry within a reasonable time after the death of A. B. The court appear to adopt the latter construction, under which this difficulty arises,—the two promises are not co-extensive: as if the declaration had alleged a promise to marry the plaintiff on a certain day, if J. S. were then dead, in consideration that the plaintiff, at the defendant's request, promised the defendant to marry him on that day, whether J. S. were alive or not.

(*a*)[2] No question seems to have been raised in any of the cases, whether such a promise would be void, as being contrary to public policy. Vide *Gilbert* v. *Sykes*, 16 East, 150. Such an objection would hardly have lain in the mouth of the defendant in the principal case: *Rex* v. *Wroxton*, 4 B. & Ad. 641, 1 N. & M. 712. But, in the case reported in 40 Ass. pl. 13, the feofforess causâ matrimonii prælocuti must be taken to have known the existing disability. It was the case of a woman giving land to a married man upon condition that he will make her his next wife. Quære whether, according to the doctrine laid down in *Gilbert* v. *Sykes*, it would not be now held that the condition was void, and the estate absolute in the feoffee? And see Co. Litt. 204.

ment of his marriage,—in order to **[1006]** discharge himself from his promise; the plaintiff having performed her part of the consideration, by remaining unmarried, and ready to marry the defendant, until she discovered that he was already a married man. We therefore think there is no ground for the application.

Rule refused (*a*)[1].

SURRIDGE *v.* ELLIS. May 8, 1849.

Upon a motion for a suggestion under the 9 & 10 Vict. c. 95, s. 129, an affidavit by the defendant's attorney, stating the places of residence of the plaintiff and defendant upon information and belief only, is not sufficient.

Needham, in Easter term last, obtained a rule nisi for a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, on the ground that the verdict, —upon the trial before the secondary of London, in an action upon a bill of exchange, —was for an amount recoverable by plaint in the county court. The only affidavit produced, was one sworn by the defendant's attorney, in which it was alleged that the deponent "had been informed and believed" that the plaintiff in the action dwelt and carried on business at Peckham, in the county of Surrey, and that the defendant in the action dwelt and carried on business at No. 4 Allison's Terrace, Silver Street, in the parish of Kensington, in the county of Middlesex, and that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant," &c.

Byles, Serjt., on shewing cause, objected that the affidavit was insufficient, as it contained no distinct and positive allegation that the plaintiff and defendant dwelt at the places mentioned therein, but a mere statement founded on information and belief.

[1007] Needham, in support of his rule. The affidavit is sufficient: if false, an indictment for perjury could be sustained upon it. It was common in affidavits to hold to bail, made by a clerk or bookkeeper, to allege the existence of the debt in this way.

WILDE, C. J. The affidavit is not sufficient. The only allegation to bring the case within the jurisdiction of the county court, is given upon anonymous information and belief. It should be positive. In the cases referred to, the affidavit shewed the party's means of knowledge. We cannot receive statements upon information and belief in respect of a matter that is within the knowledge of the defendant himself.

The rest of the court concurring,

Rule discharged.

Needham now renewed his motion, upon an additional affidavit, sworn by the defendant himself (*a*)[2]. He submitted, that, as the merits had not been gone into on the former occasion, he was entitled to move again.

Per curiam. The former rule was discharged on the ground that the affidavit was insufficient to bring the case within the statute. The matter cannot be reargued. If the defendant had at the time asked leave to produce another affidavit, possibly it might have been granted (*b*). But, after argument, it is contrary to all practice to allow a second application.

Rule refused (*c*).

[1008] LEE *v.* LESTER. June 4, 1849.

[S. C. 7 D. & L. 137; 18 L. J. C. P. 312.]

To an action of debt on a bond conditioned for the payment of the interest half-yearly, and the principal sum six months after notice, the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the

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(*a*)[1] Acc. *Milward* v. *Littlewood*, Exch. M. T. 1850 (Nov. 6), decided upon the authority of this case.

(*a*)[2] The affidavit need not be made by the defendant or his attorney, but may be made by any third party. *Walker* v. *Furnell*, 1 New County Court Cases, 190.

(*b*) See *Lloyd* v. *Gregory*, 2 New County Court Cases, 343.

(*c*) See *Tilt* v. *Dickson*, ante, vol. iv. p. 736.

action, but after the interest became payable,—with an allegation that notice to pay the principal had not been given:—Held, that the plea was a good answer to the action, under the 8 G. 2, c. 24, s. 5.

Debt. The first count was on bond in the penal sum of 300l. Plea,—first, as to the first count, that the writing obligatory in that count mentioned, was and is of the tenor, and in the words and figures, following, that is to say, &c. (setting out the bond, dated the 4th of September, 1824); that the said writing obligatory was and is subject to a certain condition thereunder written, and that such condition was and is to the tenor and in the words and figures following, that is to say,—"The condition of the above-written bond or obligation is such, that, if the above-named John Lester, his heirs, executors, or administrators, or any other person or persons on his or their behalf, do and shall well and truly pay, or cause to be paid, unto the said D. Lee, his executors, administrators, or assigns, the sum of 150l. of lawful money current in England, with interest for the same, at and after the rate of 4l. per cent. per annum, of like lawful money, on the days and times hereinafter mentioned, that is to say, the sum of 3l., for one half-year's interest thereof, on the 4th day of March and 4th day of September in every year, so long as the said principal sum shall remain due on this security, and the sum of 150l. at the expiration of six calendar months next after the said D. Lee, his executors, administrators, or assigns, shall have given to, or left at the usual place of abode of, the said John Lester, his executors or administrators, notice in writing, and thereby required payment thereof, together with all, interest, after the rate aforesaid, as may at the ex-[1009]-piration of such six calendar months remain unpaid; and if the said John Lester, his heirs, &c., or any other person or persons as aforesaid, do and shall make all such payments, without any deduction whatsoever thereout, and without fraud or further delay, then the above-written bond or obligation is to be void, or else to remain in full force and virtue," &c.; that the plaintiff or his assigns did not, six calendar months before the commencement of this suit, or at any other time, give to or leave at the usual place of abode of the defendant notice in writing requiring payment of the said sum of 150l. in the said condition mentioned, and the said sum of 150l. did not become due or payable at any time before or since the commencement of this suit; that, at the time of the commencement of this suit, there was due and owing from the defendant to the plaintiff, upon the said writing obligatory, by the said condition thereof, for the interest in the condition mentioned, a certain sum of money, to wit, the sum of 6l. 14s. 10d.; that the plaintiff before and at the commencement of this suit was, and still remained, indebted to the defendant in a large sum of money, that is to say, the sum of 57l. 8s. 6d., for work and labour done and performed by the defendant for the plaintiff, at his request, and for money by the defendant paid, laid out, and expended for the plaintiff at his request, and for money found to be due from the plaintiff to the defendant on an account stated between them; which said sum of money so due and owing from the plaintiff to the defendant was wholly unpaid, and equalled the money so due and owing from the defendant by virtue of the said condition of the said writing obligatory, and which said sum of money so due and owing from the plaintiff, or so much thereof as should be necessary in this behalf, he, the defendant, was ready and willing and offered to set off and allow against the said sum of money so [1010] remaining due and payable by the condition of the said writing obligatory, accordng to the form of the statute in such case made and provided—verification.

Upon this plea issue was joined. There were other pleas, to which, however, it is not necessary to advert.

The cause was tried before Platt, B., at the spring assises at Taunton, in 1848, when a verdict was found for the defendant.

Cockburn, in the following term, obtained a rule nisi to enter judgment for the plaintiff non obstante veredicto.

Crowder and Barstow now shewed cause. No notice having been given to the defendant calling upon him to pay the principal sum, all that was due according to the condition of the bond at the time of the commencement of the action was, the 6l. 14s. 10d. which had accrued due for interest. The statute 4 Anne, c. 16, s. 12 (*a*),

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(*a*) "Where any action of debt shall be brought upon any single bill, or where action of debt, or scire facias, shall be brought upon any judgment, if the defendant allows payment after the day. [Maule, J. Does that statute apply to a bond for payment of interest?] It has been expressly so decided, in *Hodgkinson* v. *Wyatt* (1 D. & L. 668). The 8 & 9 W. 3, c. 11, s. 8, clearly **[1011]** applies to a case of this sort; and, under that statute, it has been held that payment of interest was like the payment of an instalment. The statute 8 G. 2, c. 24, s. 5, was passed for the very purpose of enabling a defendant to do, by plea of set-off, that which might have been done under the statute of Anne. It enacts, "that, by virtue of the said clause in the said first-recited act contained (2 G. 2, c. 22, s. 13), and thereby made perpetual, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty: and, in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." [Maule, J. If this motion fails, will there not be judgment for the defendant quod eat sine die, and an end of the remedy of the plaintiff for future instalments of interest, or for the penalty?] The plaintiff might have assigned breaches under the statute 8 & 9 W. 3, c. 11, s. 8. [Maule, J. He was not bound to assign breaches in his declaration.] The defendant clearly could not plead the judgment in this action as a bar to any future action upon the bond. [Cresswell, J. This very point seems to have **[1012]** been decided, after great argument, in *Collins* v. *Collins* (2 Burr. 820). Lord Mansfield, speaking of the statute 8 & 9 W. 3, c. 11, s. 8, there says: "Before this statute, the actual payment of money in discharge of the demand, was exactly upon the same footing as the set-off of a debt is now put upon: and a plea of payment of a sum of money sufficient to discharge the whole demand, was just the same then as a set-off of a debt large enough to balance the whole demand is now; that is to say, it was a full answer to the plaintiff's demand; and he could have no judgment at all against the defendant. But, if it had come out that there had been a failure of payment of any part of the plaintiff's just demand, the plaintiff would have been entitled to take his judgment for the whole penalty (though execution was to be stayed, on payment of damages already incurred, and costs): and this judgment for the whole penalty was to stand as a security, to answer future breaches. But the payment here intended was to be an actual payment: for, stoppage, or setting off of debt against debt, was not then equivalent to actual payment; but cross-actions must at that time have been brought for the respective mutual debts. Since these two very beneficial acts of 2 G. 2, c. 22, and 8 G. 2, c. 24, stoppage or setting off of mutual debts, is become equivalent to actual payment: and a balance shall be struck, as in equity and justice it ought to be. At common law, before these acts, if the plaintiff was as much, or even more, indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to strike a balance: he could only go into a court of equity, for doing what is most clearly just and right to be done. The 2 G. 2, c. 22, was made to answer this just and reasonable end; and enacts generally, **[1013]** 'that, where there are mutual debts between the parties, one debt may be set against the other.' Upon which act of 2 G. 2 doubts about the different natures of debts have arisen, the 8 G. 2, c. 24, was thereupon made; the 5th section

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hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and, where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."

whereof is a general provision, without exception."] That is precisely applicable. [Maule, J. The statute 8 G. 2, c. 24, seems to be the statute of Anne, and something more.] In *Bell* v. *Shaw* (Holt, N. P. C. 293), where, to debt on bond, the defendant pleaded that 110l. was due, and no more, and undertook to discharge himself therefrom by a set-off, and the plaintiff replied, generally, that a larger sum was due, to wit, the sum of 175l.,—it was held that the plaintiff was bound to prove that more than 110l. was due. There, upon proof of the set-off, the plaintiff was nonsuited. Whether the result be a nonsuit, or a verdict followed by a judgment, is quite immaterial. Upon the plain language of the statute of set-off, the defendant is entitled to judgment.

Cockburn and Phinn, in support of the rule. What is the true construction of the contract between these parties? It is, that, if the principal sum of 150l. be not paid at the expiration of six calendar months after notice, the bond is forfeited; and that, if the interest be not duly paid, the bond is in like manner forfeited. If that be so, the arguments urged and the cases cited on the other side, are altogether inapplicable. In *The Skinners' Company* v. *Jones* (3 N. C. 481, 4 Scott, 271), a bond executed by, the defendant as surety for J., on the 1st of March, 1832, was conditioned for payment of 5l. interest on a principal sum of 200l. on the 1st of March, 1833, 5l. on the 1st of March, 1834, and 205l. on the 1st of March, 1835. The first year's interest was not paid till March 30th, 1833. In June, 1833, the defendant **[1014]** became bankrupt: and it was held that the bond had been forfeited, and was therefore provable under the defendant's commission. So, in *Ashbee* v. *Pidduck* (1 M. & W. 564, Tyrwh. & Gr. 1016), to debt on a bond for 2800l., the defendant,—craving oyer of the condition (which was for securing the repayment of 1400l. and interest),—as to 800l., parcel of the sum of 1400l. in the condition mentioned, pleaded, that, after the day named in the condition, he paid the sum of 800l., parcel of the said sum of 1400l.: and the plea was held bad on special demurrer. Lord Abinger, C. B., there says: "The bond became forfeited by the non-payment of the money at the day named in the condition. Then, the statute of Anne gives the plea of solvit post diem, but it does not authorise such a plea as the present." And in *Tighe* v. *Crafter* (2 Taunt. 387), it was decided, that, if default be made in payment of the interest on a bond, the principal whereof is not yet due, the court will not stay proceedings on payment of the interest and costs; though, it seems, they would restrain the execution to the interest and costs. The like was held in *Masfen* v. *Touchet* (2 Sir W. Blac. 706), and *Van Sandau* v. ——— (1 B. & Ald. 214). [Maule, J. It cannot be denied that the bond is forfeited by non-payment.] The bond was forfeited, and the plaintiff became entitled to judgment for the penalty, upon the defendant's failure in payment of the interest,—subject to the equitable jurisdiction of the court. [Maule, J. What equitable jurisdiction has the court? If it rests on the statute of William, it is no longer an equitable jurisdiction.] It arises on the 4 & 5 Ann. c. 16. [Maule, J. It can hardly be said, that, where the statute 8 G. 2, c. 24, applies, the circumstance of the bond's having become forfeited, can affect the right of set-off.] What is the plaintiff's demand? **[1015]** All that is due upon the bond, principal and interest. [Maule, J. No. The principal sum was not payable until after six months' notice.] The bond is forfeited, and all the consequences are to follow, if the interest is unpaid at the times specified. [Coltman, J. In effect, you say that the case is not within the statute 8 & 9 W. 3, c. 11, s. 8. Maule, J. Nor within the 8 G. 2, c. 24, s. 5.] The plaintiff had a vested right to recover the penalty before the set-off arose. [Maule, J. The plea of set-off never applies itself to the time at which the debt became due: if the set-off applies at all, it is because there are mutual debts at the time of the commencement of the action. It is essential to your argument, to shew that *Collins* v. *Collins* is not good law.] The question now raised was not discussed there. Would it be any answer to a penalty due on the 1st of January, to say that the defendant has a set-off accruing on the 1st of February? [Maule, J. At common law, certainly not: but, under the 8 G. 2, c. 24, it is: the plaintiff is only to recover what is fairly and justly due. No doubt, here, if the interest had been paid, under the statute of Anne, after the day, and the obligee had accepted it, that would have been a good bar. According to the case of *Collins* v. *Collins*, the existence of the set-off is, since the 8 G. 2, c. 24, a good bar. It follows, therefore, that the plaintiff has brought his action too soon. When the six months' notice has expired, he may bring another action, to which, I think, the judgment in this action would be no answer. *Collins* v. *Collins* seems to be a very distinct authority.]

COLTMAN, J.(*a*). I am of opinion that this rule should be discharged. This is a motion to stay the judgment. To entitle himself to that, the plaintiff is [1016] bound to make out a very clear case. The argument we have heard has not, to my mind, successfully distinguished this case from that of *Collins* v. *Collins*. If that case was rightly decided, it follows that this rule cannot prevail: and I can see no reason to dissent from the conclusion to which the court there came. The words of the statute of set-off (8 G. 2, c. 24, s. 5) are, that, "in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty (*b*), the debt intended to be set off shall be pleaded in bar; in which plea shall be shewn how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other, as aforesaid." It appears to me that the amount which is to be considered as truly and justly due in this case, is that which should have been paid in the usual course, viz. the interest, and not the 150l., which is only to be paid on a contingency.

MAULE, J. I also think that this rule should be discharged. This is an action on a bond. The plea, setting out the condition, which was for the payment of interest, at 4 per cent. per annum, upon 150l., half yearly, and for the payment of the 150l. at the expiration of six calendar months after notice, stated that the principal sum had not become due; and, with regard to the interest, it shews that 6l. 14s. 10d. only was due at the time of the commencement of the action, and relies on a set-off to a larger amount due to the [1017] defendant from the obligee. The statute under which this plea is pleaded,—the 8 G. 2, c. 24,—enables a defendant to plead a set-off in bar to an action on a bond or specialty, where the amount of the set-off exceeds the sum justly due upon the bond. A distinction has been sought to be made in this case between a set-off existing at the time the liability on the bond accrued, and one arising at a subsequent period. But I think there is no foundation in law for that distinction: it is just as much a bar, whether it accrued at the one time or the other. Before the statute of set-off, one demand could not be set against another; but the defendant was obliged to resort to a cross-action. The statute gives force and effect to the set-off, provided it has all the requisites of a legal debt at the time of the commencement of the action. Supposing, then, the statute of set-off to apply to this case, is the debt in question the proper subject of a set-off? That a set-off may be pleaded against the sum accrued due according to the condition of the bond, was decided by the court of King's Bench, on argument, in the case of *Collins* v. *Collins:* and no substantial argument has been urged against the propriety of that decision. It follows from that case, that, if, at the expiration of a six months' notice, the principal sum remains unpaid, the plaintiff may, notwithstanding the verdict and judgment upon this occasion, maintain an action for it. I think the plea is clearly a good one, and that the plaintiff is barred of this action.

It is to be observed that this case comes before the court upon a motion for judgment non obstante veredicto. The plaintiff having had an opportunity of demurring to the plea, and having chosen not to do so, but having treated the plea as one the facts of which were fit and proper to be ascertained before a jury, could only be entitled to relief in this form, in case the court could see clearly that the plea was a bad plea. For the reasons [1018] already given, I think the plea is clearly not a bad plea. It is, of course, open to the plaintiff to bring a writ of error, if so advised.

CRESSWELL, J. Having only heard a portion of the argument in support of the rule, I abstain from saying more than this,—that I see no reason for dissenting from the opinions expressed by my brothers Coltman and Maule.

Rule discharged.

H. S. MATHEWS *v.* PETER MATHEWS. June 7, 1849.

In case, in the nature of waste, by a reversioner against a tenant for life, for cutting down timber, &c., a count alleged, that, by the custom of the country where the lands were situate, beech trees were reckoned timber trees. A judge at chambers

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(*a*) Wilde, C. J., was not present at the argument.

(*b*) A penalty contained in any bond or specialty.

having allowed, amongst others, in addition to not guilty, a plea traversing the above allegation,—the court declined to rescind his order.

Case, in the nature of waste, by a reversioner in fee, against the tenant for life, for felling timber and grubbing up hedges.

The first count of the declaration stated, that, before the committing of the grievances by the defendant thereinafter next mentioned, and before the commencement of this suit, to wit, on the 1st of April, 1847, Thomas Mathews, of, &c., clerk, was seised, in his demesne as of fee, of and in certain lands, tenements, and hereditaments, consisting of divers, to wit, 100 acres of woodland, 100 acres of pasture land, and 100 acres of other land, situate, &c., upon which said land there was then, and thence continually had been until the committing of the grievances by the defendant therein after mentioned, divers, to wit, 10,000 timber trees, and divers, to wit, 10,000 trees likely to become timber, and also divers, to wit, 1000 perches of hedges; that Thomas Mathews, being so seised, after the 1st of January, 1838, duly made and published his last will and testament in writing, bearing date the 1st of April, 1847, and thereby, amongst other things, gave and devised the said lands hereinbefore mentioned, unto the **[1019]** defendant, for life, and, after the death of the defendant, then unto the plaintiff, to hold the same unto the plaintiff, and his heirs, for ever; that Thomas Mathews died so seised on the 12th of April, 1847, without altering or revoking his said will as to his said devise of his said lands; that the defendant afterwards, to wit, on the day and year last aforesaid, entered into and upon the said lands, with the appurtenances, whereupon and whereby the defendant, then, to wit, on the day and year last aforesaid, became and was, and still continued, seised, in his demesne as of freehold, of and in the said lands, for the life of him the defendant; that thereupon and thereby the plaintiff, then, to wit, on the day and year last aforesaid, became and was, and continued, seised, in his demesne (sic) as of fee, of and in the said reversion of the said lands: yet that the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his said reversionary estate and interest of and in the said lands, whilst the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and before the commencement of this suit, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed as aforesaid of the said lands so devised by the said Thomas Mathews, as aforesaid, to wit, on the 1st of May, 1847, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly rooted up, pulled up, felled, cut down, prostrated, and destroyed, divers, to wit, 10,000 oak trees, 10,000 elm trees, 10,000 ash trees, and 10,000 other trees, the same being timber trees there upon the said lands standing, growing, and being, and also divers, to wit, 6000 saplings likely to become timber, and 10,000 standards likely to become timber, that is to say, 2000 saplings of oak trees, 2000 saplings of ash trees, 2000 **[1020]** saplings of elm trees, there then also standing, growing, and being at the said times respectively in and upon the said lands, of great value, to wit, of the value of 2000l., and then also wrongfully and unjustly lopped, topped, shrouded, and barked, and excised, and caused and procured to be lopped, &c., divers other maiden trees, the same then being timber trees, that is to say, 100 oak trees, 100 ash trees, 100 elm trees, and 100 other trees, there then standing, growing, and being in and upon the said lands, and of great value, to wit, of the value of 1000l., and took and carried away the wood and the bark thereof, and then wrongfully rooted up, stubbed up, grubbed up, and destroyed divers, to wit, 100 quicksets of white thorn there then growing and being in and upon the said lands, of great value, to wit, of the value of 500l., then forming certain hedges and fences, then being in and upon the said lands,—whereby the plaintiff, during all the time aforesaid, had been and still was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said lands.

The second count stated, that, before, &c., and whilst the defendant was and continued so seised, &c., as in the first count mentioned, and whilst the plaintiff was and continued so seised in his demesne as of fee of and in his said reversion of and in the said lands in the said first count mentioned, as in the said first count mentioned, and before the commencement of this suit, to wit, &c., divers, to wit, 10,000 beech trees were then growing and being in and upon the said lands; that, by the custom of the country in which the said lands were situate, beech trees were reckoned and accounted to be, and were, timber trees: yet that the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in his said reversionary estate and interest of and in the said lands, afterwards, and before the commencement of this suit, and whilst **[1021]** the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed of the said lands as aforesaid, and after he had entered into and upon the same as aforesaid, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of the suit, wrongfully and unjustly felled, cut down, and prostrated, and caused and procured to be felled, cut down, and prostrated, divers, to wit, 5000 of the said beech trees, at the said last-mentioned times respectively then standing, growing, and being in and upon the said lands, of great value, to wit, of the value of 1000l., and then also wrongfully and unjustly lopped, topped, shrouded, and barked, and caused and procured to be lopped, topped, shrouded, and barked, divers others of the said beech trees, to wit, 3000 of the said beech trees, the said last-mentioned beech trees then being maiden trees at the said last-mentioned times respectively then growing and being in and upon the said lands, of great value, to wit, of the value of 1000l., whereby the plaintiff, during all the time last aforesaid, had been and still was greatly injured, aggrieved, and dammified in his said reversionary estate and interest of and in the said lands.

The third count stated, that, before, &c., to wit, on, &c., there were divers trees which were not nor are timber trees, then standing, being, and growing in and upon the said lands so devised as aforesaid, that is to say, 5000 abeles, 5000 poplars, 5000 sycamores, 5000 larches, 5000 firs, 5000 limes, 5000 horse-chestnuts, 5000 walnuts, 5000 birches, 5000 planes, 5000 acacias, 5000 maples, 5000 yews, and 5000 other trees,—which said last-mentioned trees were and are of such a nature, kind, and description, that, when and so soon as the stems or trunks of the same should or might be cut **[1022]** through, felled, or divided, the same trees became and were and are wholly destroyed and eradicated, and of no further use, benefit, or advantage to the said land, and the stumps, stocks, and stools of the last-mentioned trees would never, when so cut as aforesaid, grow, spring up again, or produce again their ordinary or usual profit, or any profit or advantage whatever, or any underwood or shoots of any value or benefit from their growth: yet that the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in his said reversionary estate and interest of and in the said lands, afterwards, and before the commencement of this suit, and whilst the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed of the said lands as aforesaid, and after he had entered into and upon the same as aforesaid, to wit, on, &c., &c., wrongfully and unjustly felled, cut down, divided, destroyed, and prostrated, and caused, &c., divers, to wit, 70,000 of the said last-mentioned trees, that is to say, 5000 of the said abeles, &c. &c., at the said last-mentioned times respectively then standing, growing, and being in and upon the said lands, of great value, to wit of the value of 1000l., and being then of the nature, kind, quality, and description as in this count above mentioned, and thereby then rendered all such trees so cut down as last aforesaid wholly useless, &c.,—whereby, &c.

The fourth count was in trover, for trees, saplings, pollards, and bushes.

The defendant obtained leave to plead,—first, not guilty,—secondly (to the first count), that the said Thomas Mathews did not devise the reversion to the plaintiff and his heirs in manner and form as in the first count alleged,—thirdly (to the second count), that **[1023]** the plaintiff was not, at the said times when, &c., or either of them, seised of the said reversion of and in the said lands in the second count mentioned and referred to, in manner and form, &c.,—fourthly (to the second count), that, by the custom of the country in which the said lands in the second count mentioned and referred to were situate, beech trees were not reckoned or accounted to be, and were not, nor are, timber trees, in manner and form, &c.,—fifthly (to the third count), that the plaintiff was not at the said times when, &c., or either of them, seised of the said reversion of and in the said lands in the third count mentioned and referred to, in manner and form, &c.(a),—sixthly (to the third count), that the said trees in the third count mentioned were not, nor are not, nor was nor is any of them, of the nature, kind, quality, or description in the said third count mentioned, in manner and form, &c.,—seventhly (to the last count), not possessed.

(a) This plea appears to traverse a mere inference of law.

Pearson now moved for a rule nisi to rescind the order (which had been made a rule of court) allowing the defendant to plead the above pleas, on the ground that the fourth plea was a traverse of a matter that was included in not guilty. [Maule, J. Can the defendant do more, under not guilty, than shew that he did not commit the act complained of? Cresswell, J. Was it necessary to allege that beech trees are timber trees?] It would seem so from the authorities: *Phillips* v. *Smith* (14 M. & W. 589). In *Sutherland* v. *Pratt* (11 M. & W. 296), a declaration in assumpsit on a policy of assurance stated that the plaintiff caused a policy to be effected, &c.; and a plea, that the policy was not caused to be made by or on behalf of the plaintiff, was held bad on special demurrer, as amounting to non assumpsit. In a recent case in this court (*d*), the allegation of a bailment, in detinue, **[1024]** was held necessary, but not traversable. [Maule, J. I thought we held that it was not necessary to allege it. Coltman, J. If you fail to prove the custom of the country, would the defendant be entitled to a verdict upon not guilty, he having been proved to have cut down the trees?] This sort of plea may very seriously embarrass the plaintiff at the trial. [Maule, J. It may be demurrable.] The defendant's object evidently is, to invite a demurrer. But the court is in the habit of striking out pleas on the ground that they amount to the general issue. [Maule, J. Not so; but because there is already another plea upon the record raising the same defence, and thus the 5th rule of Hilary term, 4 W. 4, is violated.] That is a new principle altogether. [Cresswell, J. Should you not have gone to a judge at chambers for an order to strike out the objectionable plea?] The case of *The South Eastern Railway Company* v. *Sprott* (8 Dowl. P. C. 493), shews that this is the proper form of motion.

Wilde, C. J. Not guilty merely puts in issue the wrongful act, the cutting down of the trees.

Maule, J. In case for diverting a water-course, the wrongful act complained of is, the diversion; and that alone, and not the title, is put in issue by not guilty. I see no pretence for saying that the plea referred to is one which ought not to have been allowed under the statute of Anne.

The rest of the court concurring,

Rule refused.

End of Trinity Term.

(*d*) The case alluded to is, *Clossman* v. *White*, ante, p. 43.

COMMON BENCH REPORTS. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, in Trinity Vacation, and Michaelmas Term and Vacation, 1849. By JAMES MANNING, Serjeant at Law; T. C. GRANGER, of the Inner Temple, Esq., Barrister at Law; and JOHN SCOTT, of the Inner Temple, Esq., Barrister at Law. Vol. VIII. London, 1851.

[1] CASES UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS, ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERMS, IN THE THIRTEENTH AND FOURTEENTH YEARS OF THE REIGN OF VICTORIA.

MICHAELMAS TERM, 1849.

COUNTY OF WARWICK—NORTHERN DIVISION.

DAVID CAPELL, *Appellant*, THE OVERSEERS OF ASTON, *Respondents*. Nov. 12, 1849.

[S. C. 19 L. J. C. P. 28; 14 Jur. 508. Distinguished, *Saunders* v. *Searson*, 1880, 50 L. J. C. P. 117.]

A. owned and occupied freehold land in the parish of B., of more than the clear yearly value of 40s., and also occupied, as tenant, a house of more than the clear yearly value of 10l., in the parish of C., at a distance from the land,—both house and land being within the borough of D.:—Held, that A. was entitled to be registered for the county, in respect of the land, and also for the borough, in respect of the house; for, that, in order to give effect to all the words of the 24th section of the 2 W. 4, c. 45, as expounded by the 27th section, it was necessary to read it as applicable to the tenant or owner distributively, and to construe the words "occupied by him therewith as owner," as importing an ownership as well of the house as of the land to be united with it—in harmony with the provision by which tenanted land, to be united with a tenanted house, must be occupied under the same landlord. [See the next case.]

David Capell claimed to have his name inserted in the list of county voters, for the parish of Aston, in the town of Birmingham, as follows:—

[2] Christian name and surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Capell, David.	46 Pershore Street, Birmingham.	Freehold building land.	Weston Street, near Bloomsbury Street, Duddeston Manor, in the Liberty of the Nechells.

It was proved that David Capell owned and occupied freehold land in the parish of Aston, of more than the clear yearly value of 40s., and also occupied, as tenant, a house, of more than the clear yearly value of 10l., in the parish of Birmingham, at a distance from the land: both the house and the land were within the limits of the borough of Birmingham.

It was objected, that, under the statute 2 W. 4, c. 45, ss. 24, 27, David Capell was not entitled to vote for the county, in respect of his land, as the house and the land were to be taken together as forming a borough qualification.

The revising barrister held the objection good, and disallowed the claim.

The cases of twelve other persons whose claims to vote rested on grounds precisely similar to the above, were consolidated with the principal case.

Keane, for the appellant. The question in this case turns upon the 24th section of the reform act, 2 W. 4, c. 45, which enacts, "that, notwithstanding anything thereinbefore contained, no person shall be entitled to **[3]** vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-houses, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions thereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." The facts stated by the revising barrister do not bring the case within that provision: the land is at a distance from the house, and in a different parish, and cannot in any sense be said to be "occupied therewith." [Wilde, C. J. You would contend that a house on one side of a highway, and a garden on the other side, could not be occupied together?] A public road could be no obstacle to a joint holding: but, could the Duke of Devonshire be said, in the sense here meant, to occupy his mansion in Piccadilly "together with" Chatsworth? or the Duke of Northumberland to occupy Sion House "together with" Northumberland House?

The 27th enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being, either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear **[4]** yearly value of not less than 10l., shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough." To bring the case within that section, the party must be the occupier of both house and land, as owner, or he must be the occupier of both as tenant under the same landlord. If he be the owner of the one and tenant of the other, neither the words nor the spirit of the act are satisfied. [Maule, J. That argument rather founds itself upon inference than upon the very words of the statute.] This is the view which seems to have been taken by Erle, J., in *Dewhurst, App., Fielden, Resp.* (7 M. & G. 182, 8 Scott, N. R. 1013, 1 Lutw. Reg. Cas. 274), where that learned judge says (8 Scott, N. R. 1013): "The 27th section requires that one building of a certain value shall be occupied, in order to obtain the franchise, or land may be joined to the building: but, if the land is occupied by the party as tenant, it must be held under the same landlord." A singleness of possession and title, seems always to have been required. The principle is recognised in *Powell, App., Price, Resp.* (ante, vol. iv. p. 105, 1 Lutw. Reg. Cas. 586). There, A. occupied a shop, which, together with a house and other premises, also occupied by him, constituted a sufficient qualification in point of value, neither being sufficient alone. The shop was separated from the rest of the premises by a yard, in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him: it was held, that the shop could not be joined with the **[5]** rest of the premises, so as to constitute one entire qualification under s. 27.

Mellor, for the respondent. The object of the 24th section was, to prevent persons having borough qualifications, from voting for the county in respect of the same qualification; taking away, in such cases, the right to vote acquired under the 8 H. 6, c. 7. This is plain, from the 25th section, which enacts, "that, notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, in respect of his estate or interest as a copyholder or customary tenant, or tenant in ancient demesne, holding by copy of court-roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid, in any house, warehouse, counting-house, shop, or other building, or in any land occupied together with a house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him or on any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." This clause disfranchises copyholders in boroughs, not confining it to the case of owner and occupier being one and the same person. Reading the 24th section with the 27th, which is incorporated in it by reference, it is obvious that the word "therewith" means, with reference, not to space, but to time. [V. Williams, J. The word "therewith" is not used in the corresponding clause (s. 11) of the Scotch reform act, 2 & 3 W. 4, c. 65.] The only condition is, that the land and the house shall be locally **[6]** situate within the same borough. The dictum of Tindal, C. J., in *Dewhurst, App., Fielden, Resp.*,—that the amount of qualification may be made up by the conjunction of land occupied with a house, &c., only where the value of the house alone would not suffice to give a qualification,—is extra judicial and uncalled for. The value is wholly immaterial, if the land be occupied together with the house. A person who is tenant of a house and owner of land, is clearly within this section. The test is, that the voter shall be a person of such credit as to be able to occupy a 10l. house. The object of the legislature will be as well secured by the voter's being tenant of a house, and owner of land, being together occupied by him, and of the required value. The dictum of Erle, J., in *Dewhurst, App., Fielden, Resp.*, was wide of the question in judgment. But for the restriction imposed by this section, the qualification might have been made up of two plots of ground held under different landlords. A qualification cannot be gained by the addition of any land that is held under a different landlord: but there is no difficulty in the owner of a house joining two or more pieces of land, provided he holds them as tenant under the same landlord.

Keane, in reply. The real question here is, whether a man shall be allowed to vote for the county, and also for the borough, in respect of the same qualification. The reading of the 24th section, by the respondent, altogether overlooks the words "together with" and "therewith": and the same difficulty arises upon the 27th section.

WILDE, C. J. We will hear the argument on the next case, before we pronounce any opinion.

[7] BURTON, *Appellant;* THE OVERSEERS OF ASTON, *Respondents.*
Nov. 12, 1849.

[S. C. 14 Jur. 509.]

A. owned and occupied freehold land in the parish of B. of more than the clear yearly value of 40s., and also occupied, as tenant, a house of less than the clear yearly value of 10l., in the parish of C., at a distance from the land,—both house and land being within the borough of D., and, if added together, being of value sufficient to form a borough qualification:—Held, that A. was entitled to be registered for the county, in respect of the land, but not for the borough.

John Burton claimed to have his name inserted in the list of county voters for the parish of Aston, in the town of Birmingham, as follows:—

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Burton, John.	34 Court Lower Brearly Street, Birmingham.	Freeholding building land.	Bloomsbury Street, in the Liberty of Nechells, in the Parish of Aston, in the Borough of Birmingham.

It was proved that John Burton owned and occupied freehold land, in the parish of Aston, of more than the clear yearly value of 40s., and also occupied, as tenant, a house, of less than the clear yearly value of 10l., in the parish of Birmingham, at a distance from the land. Both the houses and the land were within the limits of the borough of Birmingham, and, taken together, were of sufficient value to form a borough qualification.

It was objected, that, under the statute 2 W. 4, c. 45, ss. 24, 27, John Burton was not entitled to vote for the county in respect of his land, as the house and land were to be taken together, as forming a borough qualification.

The revising barrister held the objection good, and disallowed the claim.

The case of Thomas Whitmore, whose claim to vote rested on grounds precisely similar to the above, was consolidated with the principal case.

[8] Keane, for the appellant. The only distinction between the former case and this is, that here the house is of less than the clear yearly value of 10l. In addition to what has been already urged, it will only be necessary to invite attention to two other sections of the 2 W. 4, c. 45, viz. the 30th and the 68th. The 30th section enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, and in every place sharing in the election for such city or borough, it shall be lawful for any person occupying any house, warehouse, counting-house, shop, or other building, either separately, or jointly with any land occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, in any parish or township in which there shall be a rate for the relief of the poor, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and, upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate, are hereby required to put the name of such occupier upon the rate for the time being; and, in case such overseer shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this act, be deemed to have been rated to the relief of the poor, in respect of such premises, from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid." No provision is here made for the contingency of the two properties being situate in different parishes. The words are in the singular number throughout,—a circumstance that is much relied on by Tindal, C. J., in *Dewhurst, App., Fielden, Resp.* [V. **[9]** Williams, J. Suppose,—which is not infrequent,—the house is partly in one parish and partly in another?] In that case, the rating would be in one parish only. [Maule, J. The natural meaning of the 30th section certainly seems to be, that the party must occupy both house and land as owner, or as tenant under the same landlord.] That view is very much confirmed by the 68th section, which provides for the erection of polling booths, and enacts, that the returning officer "shall cause to be affixed on the most conspicuous part of each of the said booths the names of the several parishes, districts, and parts, for which such booth is respectively allotted; and that no person shall be admitted to vote at any such election, except at the booth allotted for the parish, district, or part wherein the property may be situate in respect of which he claims to vote, or, in case he does not claim to vote in respect of property, then wherein his place of abode, as described in the register, may be." If the voter's qualification consists of property in one parish, and a tenancy in another, there would be a difficulty in ascertaining where his vote is to be polled.

Mellor, for the respondents. There is nothing in the last objection: the party does not vote in respect of the land, which is the accessory only, but for the house, which is the principal qualification: he votes in the parish where the house is situate. [Wilde, C. J. How, in the case put, of a house situate partly in one parish and partly in another?] In that case, he may vote in either parish. The 30th section does not very much aid the construction of the 24th and 27th sections. [Maule, J. The words "under the same landlord" seem to be an exposition of the words "occupied therewith." In your way of reading the clause, the word "therewith" may be rejected altogether.] The word is satisfied by [10] saying that the premises must have been occupied together during the period required by s. 27 to confer a right to be on the register.

Keane, was heard in reply.

Cur. adv. vult.

Wilde, C. J., now delivered the opinion of the court. These were appeals from the decision of the revising barrister for the northern division of the county of Warwick, whereby he disallowed the claims of the appellants to be placed on the register as voters for the county, in respect of freehold land occupied by themselves within the borough of Birmingham, of more than the yearly value of 40s. In each case, the appellant occupied a house, as tenant, within the borough, and also occupied his own freehold land within the borough, but situate at a distance from the house, and in a different parish; the house, in each case, being in the parish of Birmingham, and the land in the parish of Aston. The cases differ only in this circumstance, that, in the case of Capell, the house of which he is tenant, is of the annual value of 10l., and, therefore, confers the borough qualification without the land in question; in that of Burton, the value of the house is, alone, less than 10l., but, with the addition of the value of the land, amounts to that sum. Although this difference would create an inconvenient result in the former case, which does not arise in the latter, if the decision of the revising barrister be correct, it appears to us that both depend on the same question of construction, and must be governed by the same principle. As in these cases the ownership of the land confers a right to vote for the county, unless taken away by 2 W. 4, c. 45, the question turns on the construction to be given to the 24th section of that act, as connected with and expounded by [11] the 27th; the object of the first being to prevent land lying within a parliamentary borough from conferring a double franchise for the borough and the county, and the last defining the conditions of the borough franchise.

The object of the 24th section is, to exclude freehold estate occupied by the owner within the borough, which, by reason of its occupation, may confer the borough franchise, from also conferring a vote for the county within which it is situate. It enacts "that no person shall be entitled to vote in the election of a knight of the shire to serve in parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building, occupied by himself, or in any land occupied by himself together with any house, &c., such house, &c., being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any borough, whether he shall or shall not have actually acquired the right to vote for such borough in respect thereof."

On reading this section alone, there seems nothing to indicate that the legislature contemplated other than a freehold interest, either in the house or building which is the principal and essential part of the borough franchise, or in the land which may be added to it as accessory: but the words "together with" in the first part of the clause, and the word "therewith" in the latter part, seem to import either a local contiguity or a similarity of tenure. This section, however, by reference, incorporates the provisions of the 27th section, which defines the conditions of the borough franchise, and must be explained by it. That section confers the franchise on every person who shall occupy within any borough, as owner or tenant, any [12] house, warehouse, counting-house, shop, or other building, being, either separately, or jointly with any land within such borough, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10l.

The question on this section is, whether land occupied by a party as owner within a borough, can be united with a house, &c., occupied by him as tenant, although not in any manner connected with it. And it appears to us, that, in order to give effect to all the words of the section, it is necessary to read the clause as applicable to the tenant or owner distributively, and to construe the words "occupied by him therewith as owner," as importing an ownership as well of the house as of the land to be united with it, in harmony with the provision by which tenanted land, to be united with a tenanted house, must be occupied under the same landlord. In this point of view, to enable a party to acquire the borough franchise, by adding the value of land to that of a house or building in itself insufficient, both properties must be occupied as owner or as tenant under the same landlord.

Upon the whole, therefore, we think that the land in these cases was not capable of being applied to the purposes of the borough franchise under the 27th section; and, consequently, is not excluded, under the 24th, from conferring the county franchise on the freeholder.

The result is, that, the appeal in both cases must be allowed, and the names of the appellants, and of those other persons whose cases are dependent upon the decision, must be restored to the register.

Decisions reversed.

[13] Keane, for the appellants, asked for costs. He submitted, that, although the respondents were the overseers, they were volunteers in the attempt to sustain the decision of the revising barrister: and he cited *The Queen* v. *The Justices of Cumberland* (5 D. & L. 430), where it was held that a party who succeeds at the sessions upon an objection which turns out to be ill founded, and resists an application for a mandamus to correct the error, by shewing cause against it, is within the general rule for the payment of the costs by the unsuccessful party; subject to exceptions which the court may make in particular cases, in the exercise of their general jurisdiction over the costs.

Wilde, C. J. (after consulting with the other judges). It does not appear to the court that this is a case in which the respondents ought to pay costs.

Rule accordingly.

Borough of Newport, Isle of Wight.

White, *Appellant*; Pring, *Respondent*. Nov. 12, 1849.

Where the respondent appears, but the appellant does not,—the court will affirm the decision, with costs.

This case being called on, and no counsel appearing on behalf of the appellant,

A. M. Skinner, for the respondent, prayed the judgment of the court, and his costs; citing *Bage, App.*, *Pakins, Resp.* (7 M. & G. 156, 8 Scott, N. R. 983, 1 Lutw. Reg. Cas. 255), and *Crocker, App.*, *The Overseers of Lambeth, Resp.* (7 M. & G. 156, n., 8 Scott, N. R. 985, 1 Lutw. Reg. Cas. 255, n.).

Per curiam. Decision affirmed, with costs.

[14] Borough of Kidderminster.

Powell, *Appellant*; Caswell, *Respondent*. Nov. 12, 1849.

The only notice that need be served upon the respondent, is the ten days' notice required by the 62nd section of the 6 & 7 Vict. c. 18, of the appellants' intention duly to prosecute the appeal.—Where the decision of the revising barrister has been reversed, the respondent not appearing,—the court will not allow the matter to be reopened.

This case being called on, and no counsel appearing on behalf of the respondent,

Keating, for the appellant, upon an affidavit that the appellant had, on the 24th of October, given the respondent notice of his intention duly to prosecute the appeal, pursuant to the 62nd section of the 6 & 7 Vict. c. 18, prayed that the decision of the revising barrister might be reversed.

Per curiam. Decision reversed.

Nov. 26.—Willes, on a subsequent day, moved that the case might be restored to the paper, for argument, on the ground that no notice had been given, either to the respondent, or to his attorney, or to the agent, that the appeal had been set down. He admitted that due notice had been given of the appellant's intention duly to prosecute the appeal. [Wilde, C. J. That is all that is required.] The manner of proceeding upon these appeals is, by s. 62, to be "according to the ordinary rules and practice of the court with respect to special cases, so far as the same may be applicable, and not inconsistent with the provisions of this act." The rule of court (Hilary, 4 W. 4, r. 6) which dispenses with the **[15]** concilium, requires that notice shall be given to the opposite party, of the setting down of demurrers, special cases, and special verdicts. At all events, the case should not have been disposed of without a hearing: *Cooper, App., Harris, Resp.* (*Austin's case*, 7 M. & G. 97, 8 Scott, N. R. 921, 1 Lutw. Reg. Cas. 207). And, if the court had heard the appellant's case, it is quite impossible that they could have reversed the decision of the revising barrister. [Maule, J. It must be assumed that the court read the case, and thought it clear that the decision of the revising barrister was wrong. Talfourd, J. The only question in the case was, whether the residence of the objector was properly given: it was admitted that the objection was a valid one.] The court may, in its discretion, direct the case now to be argued.

Wilde, C. J. The ten days' notice required by s. 62 having been given, all was done that the practice of the court requires. That notice is given in substitution of the notice provided for by the rule of Hilary term 4 W. 4. Strong grounds should be laid before the court, to induce them to allow a case to be re-heard.

The rest of the court concurring,

Willes took nothing.

[16] Michaelmas Term, 1850.

County of Surrey—Eastern Division.

John Lee, *Appellant;* John Henry Hutchinson, *Respondent.* Nov. 12, 1850.

[S. C. 20 L. J. C. P. 4. Referred to, *Rolleston* v. *Cope*, 1871, L. R. 6 C. P. 298.]

A., possessed of a freehold estate of the yearly value of 5l., mortgaged it for 100l.: the deed was declared to be a security for the principal sum only; and the power of sale was for payment of that sum only, at a day long past: but it was found as a fact that interest had been regularly paid upon the 100l. at 5 per cent.: Held, that A. had not an interest in land "to the value of 40s. by the year at the least above all charges," within the 8 H. 6, c. 7, and therefore was not entitled to be registered for the county.

John Lee objected to the name of John Henry Hutchinson being retained on the list of voters for the parish of Croydon, in the eastern division of the county of Surrey.

The respondent was registered in respect of freehold land, the value of which was 5l. a year; and he was in possession of the estate. The property was mortgaged, to secure the repayment of 100l. lent to the respondent; but the mortgage did not extend to the interest on the loan.

The mortgage was dated in September, 1846; and recited that the respondent was indebted to the mortgagee in 100l. for money some time previously lent, but that all interest in the same had been paid up to the date of the mortgage. The proviso for redemption was, on payment of the principal money only, in September, 1848; and the respondent's covenant was for payment of 100l. sterling, in September, 1848. The power of sale became absolute on default in payment of the principal money in September, 1848; and the sole trust as to the **[17]** proceeds of the sale was, to retain the principal money only, and to pay the balance to the respondent.

In every respect, the mortgage was made a security for the principal money only: but it was admitted that the respondent had regularly paid interest on the loan, at the rate of 5l. per cent., from the date of the mortgage.

The appellant contended that the respondent's name ought to be expunged, because he had not 40s. a year from the land, clear of all charges, after payment of interest on the loan.

The respondent urged that the interest was not charged upon the land, but was merely a personal liability; and that, therefore, his income derived from the estate was not subject to the payment of it.

The revising barrister held, that there was no charge upon the land, operating in reduction of the annual value to the respondent, so as to affect his right to be registered; and that, as the mortgagee had not taken possession, the respondent was entitled to remain on the register: and he retained his name accordingly.

If the court were of opinion that the respondent had not a freehold estate of the annual value of 40s. clear of all charges, his name was to be expunged from the list.

Corner, for the appellant. This case is virtually decided by the decision of this court in *Copland, App., Bartlett Resp.* (ante, vol. vi. p. 18, 2 Lutw. Reg. Cas. 102), where it was held that a mortgagor in possession is not, under the 6 & 7 Vict. c. 18, s. 74, entitled to be registered as a voter, unless his estate in the land is of the value of 40s. per annum beyond the interest payable upon the mortgage. Wilde, C. J., there says: "The question is, whether the appellant is possessed of a freehold interest in land, to the value of **[18]** 40s. by the year at the least, above all charges, within the meaning of the statute 8 H. 6, c. 7. That statute has, upon various occasions, received the construction of a competent tribunal. The word 'charges' has for a very considerable period been understood to mean and include interest payable in respect of a mortgage. If a man receives 40s. with one hand, and with the other has to pay 30s. as a charge upon the land, can he be said to possess an interest in land to the value of 40s. beyond all charges? The payment in such case would clearly be a charge upon his estate, in the sense of so diminishing the amount of his interest therein, as to remove him from the position of one whom the legislature has thought fit to intrust with the privilege of voting. The statute 28 G. 3, c. 36, did not profess to vary the right of voting, but only to assist in carrying out the provisions of the 8 H. 6, c. 7, by compelling a party who claimed to vote in the election of a knight of the shire, to make a declaration that he had 'an estate of the clear yearly value of 40s. over and above the interest of any money secured by mortgage upon the said estate,' &c.,—giving a more distinct definition of the word 'charges' in the statute of 8 H. 6, c. 7." The only difference between that case and the present is, that here the mortgage is expressed to be made to secure the principal sum of 100l. only. But the case finds that "the respondent had regularly paid interest on the loan, at the rate of 5l. per cent. per annum, from the date of the mortgage." The day of payment was past: and there was an absolute power of sale. The 100l. is clearly a sum "secured by mortgage," within the terms of the statute 28 G. 3, c. 36. The case shews that the sum thus charged upon the land absorbed its entire value. [V. Williams, J. What do you say was the annual charge upon the land?] The sum which the **[19]** revising barrister finds to have been regularly paid from the date of the mortgage.

Byles, Serjt., for the respondent. The decision of the revising barrister was perfectly correct. The property is not charged with the payment of interest, though it may be that the mortgagor is personally liable for interest on the money borrowed. [Jervis, C. J. There is no doubt about that. The question is, what is the value of the party's estate after payment of the 100l. charged upon it. Maule, J. Can we infer necessarily from the facts found, that the voter has an interest in the land to the extent of 40s. a-year?] Upon whom does the onus probandi lie? [Jervis, C. J. The 27th section of the 2 W. 4, c. 45, requires the claimant to shew that he is entitled to vote. If the burthen lay on the respondent, to shew that he possessed an interest in land "to the value of 40s. by the year at the least, above all charges," has he, upon the statement submitted to us, substantiated his right to be put upon the register?] If the burthen of proof lay upon the respondent, it is submitted that the revising barrister has determined the fact affirmatively; for, he finds that "there was no charge upon the land operating in reduction of the annual value to the respondent, so as to affect his right to be registered." [Maule, J. That is not correct. The revising barrister holds, in effect, that, to whatever extent the land is burthened, unless it be an annual charge, there is no charge operating to reduce the value.] If there be no annual charge, it is no objection, though the land be mortgaged to an amount exceeding its value. [Maule, J. Can a man be said to have an estate of the clear yearly value of 40s., when he has mortgaged it for its value, or more?] He has here the freehold; and it is found to be worth 5l. a year. [Maule, J. Having the land, means, **[20]** having an interest in it, legal or equitable. To entitle him to vote, the party must have an interest in land of the clear yearly value of 40s.] The whole question depends upon the 8 H. 6, c. 7, and the 28 G. 3, c. 36, s. 6, which imposes the freeholder's oath. The case of *Copland, App., Bartlett, Resp.*, proceeded mainly upon the latter statute. The respondent here has, within the terms of that statute, "an estate of the clear yearly value of 40s., over and above the interest of any money secured by mortgage upon the said estate, and also over and above all rents and out-goings payable out of or in respect of the estate, other than parliamentary, public, or parochial taxes." Then, the 74th section of the 6 & 7 Vict. c. 18, enacts that no mortgagee of any lands or tenements, shall have any vote in the election of a knight or knights of the shire, or in the election of a member or members to serve in any future parliament for any city or borough in which freeholders now have a right to vote, for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that the mortgagor in actual possession, or in receipt of the rents and profits thereof, shall and may vote for the same, notwithstanding such mortgage," &c. But it is submitted that the onus of shewing the want of qualification is cast upon the appellant. The revising barrister finds that the respondent is in possession of an estate worth 5l. a year. It was for the other side to cut down the value, by shewing that some annual payment is charged upon it.

Corner, in reply. The case does not shew that there is an interest to the value of 40s. a year remaining in the mortgagor: it shews that interest at the rate of 5 per cent. has been paid, and that that was the whole value of the estate. [Jervis, C. J. The question reserved for the court is simply this,—whether the [21] respondent had a freehold estate of the annual value of 40s. clear of all charges. How can we say that?] If the court feels any difficulty in determining the value, upon the facts stated, the case may be sent back to the revising barrister for amendment. But it is tolerably clear, from the whole context, that he thought the amount of the charge was not to be deducted; and that, if it were, the value of the interest would be less than 40s. a year.

Jervis, C. J. Upon consideration, I do not think it necessary to send this case back to the revising barrister for amendment; but I think, that, upon the facts he has submitted to us, his conclusion is an incorrect one. The voter is the owner of an estate, of the yearly value of 5l., which he has mortgaged for 100l., the conveyance being defeasible on payment of the 100l., without interest, on a certain day, with a power of sale on default. The day of payment is past; and the case finds that interest on the 100l., at the rate of 5l. per cent. per annum, has been regularly paid from the date of the mortgage to the present time. So that, if the interest be a charge upon the land, the entire value of it is swallowed up. The question, then, is, whether these facts bring the case within the 8 H. 6, c. 7,—whether the voter had an interest in the land "to the value of 40s. by the year at the least, above all charges." The first point to be considered is, whether the interest which the party is admitted to have paid, be a charge upon his estate within the meaning of that statute. Now, it is clear that the 100l. is a charge upon the estate. In one view of the case, it might be unimportant to consider whether the interest was a charge or not. The 100l. beyond all doubt is a charge. But it is clear, upon the authority of *Copland, App., Bartlett, Resp.*, that, if the interest as well as the prin-[22]-cipal were secured by the mortgage, the payment of interest would go in reduction of the value of the estate, and the party would not be entitled to vote. How, then, are we to ascertain the value of the charge? Although not a charge by the deed, we are justified, by what appears in the case, in coming to the conclusion that there has been some agreement between the parties, that, if the mortgagor will pay interest on the 100l. at the rate of 5l. per cent. per annum, he shall remain in undisturbed possession. Does not that satisfy the 8 H. 6, c. 7? It falls within the express terms of the oath prescribed to the voter by the 28 G. 3, c. 36, viz. that he has "an estate of the clear yearly value of 40s., over and above the interest of any money secured by mortgage upon the said estate." What estate has the party here over and above the interest of the 100l. secured by the mortgage? The land is mortgaged for 100l.; the mortgagor, by a parol agreement, has engaged to pay 5l. per cent. interest thereon; and 5l. per annum is found to be the extreme value of the land. The real interest, therefore, which the voter has, is nothing. Consequently, I am of opinion that the respondent has failed to shew himself entitled to be registered, and that the decision must be reversed.

MAULE, J. I am of the same opinion. In dealing with these cases, we are not to treat them with the same strictness which we should apply to pleadings coming before us upon special demurrer; but must give them a fair and reasonable construction. Applying that principle to what is found in this case as to the payment of interest, I think we shall find no difficulty in coming to a right conclusion. It appears that the voter is possessed of an estate of the yearly value of 5l.; and that he borrows a sum of 100l., to secure which he mortgages his estate, the mortgage deed reciting that all in-**[23]**-terest had been paid up to the date of the mortgage (*a*). The deed is not made as a security for the future accruing interest: but the case finds that the mortgagor has in fact paid interest at 5l. per cent. upon the sum borrowed, down to the present time; and the day of payment of the principal sum is long past. Under these circumstances, I think we are justified in inferring that there was a contract between the parties, though not expressed in the mortgage deed, for the payment of 5l. per cent. interest. And I think that the interest so agreed to be paid is a charge upon the land, within the meaning of the statutes. The 28 G. 3, c. 36, may be considered as a legislative exposition of the former statutes upon the subject, adding another condition to the right of voting, viz. that the voter shall take a certain oath—that he has "an estate of the clear yearly value of 40s., over and above the interest of any money secured by mortgage upon the said estate." The true sense of that oath, as it seems to me, is this—that the voter has an interest in the land to the extent of 40s. a year, after payment of all interest of any money secured by mortgage upon the estate. It seems to me to be perfectly clear that the substantive to which the participle "secured" refers, is "money," and not "interest." That seems to me to be the literal construction of the words used by the legislature. If that literal construction led to any inconvenience or inconsistency, we should have to seek for some different mode of reading the statute: but it seems to me exactly to coincide with the spirit and intention of the legislature. The spirit of the act is, that voters shall have **[24]** a certain description of property, and shall be of a certain power of expenditure. If you hold that a man possessing property that would entitle him to vote, may contract for a loan of money, for which he is to pay interest to the full value of the land, and still retain his right to vote, because the instrument by which the money borrowed is secured makes the principal sum only a direct charge upon the land, you violate the whole spirit of the legislation upon this subject. Here, the voter is dependent upon the will of his creditor, who has power to turn him out of possession at any moment, if the interest is unpaid. I think that both the letter and the spirit of the statutes shew that a person so circumstanced is not a person who is in a situation to expend 40s. by the year, out of "free land or tenement," and therefore not entitled to vote.

V. WILLIAMS, J. I do not regret that this ingenious scheme invented for the purpose of evading the statutes, should fail. The different statutes that have since passed upon the subject, preclude us from taking the strict lawyer-like view of the word "charge" in the 8 H. 6, c. 7, and compel us to adopt the popular meaning. The interest of a mortgage debt being in this sense a charge upon the estate, I think it is not the less a charge because not in terms charged upon the land by the mortgage deed. In each case the value of the land to the party is reduced by the payment of interest upon the mortgage debt. The decision of the barrister is clearly wrong.

TALFOURD, J. I am of the same opinion. It is clear that this person retains possession of the land only so long as he pays the full value of the estate in the shape of interest.

Decision reversed.

End of the Registration Cases.

(*a*) Quære, whether it is not implied in this recital, that interest at the same rate as had been paid before, should continue to be payable from the date of the mortgage. If so, the interest up to September, 1848, might be recovered in debt or covenant, and subsequent interest as damages for the detention.

[25] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND UPON WRITS OF ERROR, IN TRINITY VACATION, IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during these sittings, were—Coltman, J., Maule, J., Cresswell, J., V. Williams, J.

MARIA PILGRIM, CHARLES HENRY PILGRIM, JOHN BUNCE PILGRIM, CHARLES PILGRIM, AND THOMAS PENROSE, Clerk, *v.* THE SOUTHAMPTON AND DORCHESTER RAILWAY COMPANY (*a*). June 12, 1849.

A cause having been made a remanet, a correspondence took place between the respective attorneys with a view to a reference, which failed:—Held, that the master exercised a proper discretion in disallowing copies of this correspondence, as part of the briefs, in taxing the costs of the cause.—Costs of preparing plans, for the better elucidating of the case before the court and jury, may be allowed, at the discretion of the master.—The master is the sole judge of the proper number of witnesses to be allowed in support of the same matters.—Upon the taxation of the defendants' costs of issues upon which he has succeeded, an affidavit that the witnesses whose expenses he claims were called exclusively to support those issues, is not indispensable, provided the master is satisfied of the fact by other means.

Covenant. The declaration stated, that, theretofore, to wit, on the 27th of June, 1846, by an indenture made between the defendants of the one [26] part, and the plaintiffs, therein described as trustees and executors appointed by the last will and testament of Charles Pilgrim, deceased, of the other part,—profert,—after reciting, amongst other things, that, by deed-poll in writing under the hands and seals of the said parties to the said indenture of the second part, bearing even date with the said indenture, the said parties to the said indenture of the second part, as such executors as aforesaid, did assign unto the said company, their successors and assigns, certain parcels of land situate in the parish of All Souls, in the town of Southampton, to hold to the said company, their successors and assigns, for all the residue then unexpired of the term of 50 years granted therein by indenture bearing date the 29th of September, 1807, and made between W. Fitzhugh of the one part, and Maria D. Grosvenor of the other part,—the defendants, for themselves, their successors and assigns, did covenant, promise, and agree, with and to the plaintiffs, and with each and every of them, and their respective executors, administrators, and assigns, that they the said company, their successors and assigns, should and would, at their own expense, make and construct a tunnel, for the purpose of the said railway, through or under such part of the said lands as lay eastward of the point marked A A on the plan indorsed on the said indenture; and also that the said tunnel, or such part thereof as should pass or be made under such part of the said [27] lands as should be used as a lawn or shrubbery, should be made in such manner as to occasion as little disturbance of the trees or shrubs planted or growing thereon as practicable, and in case any damage should happen to the said trees or shrubs, or the said lawn, through the making or constructing of the said tunnel, the same should be made good and repaired by the said company, and be placed in all respects in the same state and condition as the same were previously to such damage having taken place; and also that they, the said company, their successors or assigns, should and would, as soon as practicable after the formation of the said tunnel, cover in the same with good earth mould, to the then present level of the said land, and so as to make the same even with the surface of the adjoining land, except in such places where the upper part of the said tunnel should be above the then present level of the said land, in which places the same should be in like manner covered to the depth of at least two feet, and should in all respects be sloped or formed to the satisfaction of the said parties thereto of the second part, their executors, administrators, or assigns, or of their surveyor; and also that they, the said company, their successors or assigns,

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(*a*) This and the four following cases were disposed of during the term.

would, upon the request of the said parties thereto of the second part, their executors or administrators, but at the expense in all things of the said company, their successors or assigns, make, execute, and deliver unto the said parties thereto of the second part, their executors, administrators, or assigns, a good, valid, and effectual lease in the law of such part of the said piece of land through or under which the said tunnel should be so made, including all the land conveyed by the said deed-poll eastward of and from the point marked A A in the said plan, for all the residue which should be then unexpired of the **[28]** said term of fifty years (except the last day thereof), at and under the yearly rent of 6d., which said lease should contain all usual or necessary covenants, clauses, and stipulations,—as by the said indenture, &c.: That they, the plaintiffs, had performed and observed all things in the said indenture contained on their part to be observed and performed: Yet that the defendants broke their said covenant, in this, to wit, that, although a reasonable time for the making and constructing of the said tunnel, had elapsed before the commencement of this suit, yet the defendants did not nor would make or construct a tunnel for the purpose of the said railway through or under such part of the said lands as lay eastward of the point marked A A on the said plan, but, on the contrary thereof, after the making of the said indenture, to wit, on the 30th of June, 1846, and on divers days between that day and the commencement of the suit, made and constructed, instead of such tunnel as aforesaid, a cutting of great length, depth, and width, to wit, of the length of 1000 feet, of the depth of thirty feet, and of the width of forty feet, through a large part of the said portion of land lying eastward of the said point, for the purpose of the said railway; and that, by reason and in consequence thereof, a great quantity of the earth and soil of certain closes of the plaintiffs, lying and being respectively on each side of the said land, was cut and dug and carried away, a great quantity of the surface of the said closes respectively was removed and destroyed, and divers trees, shrubs, and underwood of the plaintiffs then growing and being upon the said surface so removed and destroyed, to wit, one hundred trees, three thousand shrubs, one rood of underwood, and ten roods of turf, of great value, to wit, of the value of 200l., were cut down, prostrated, felled, rooted up, destroyed, and **[29]** carried away: That the defendants further broke their covenant, in this, to wit, that, although the said company did, after the making of the said indenture, in part performance of their said covenant in that behalf, make and construct a tunnel, to wit, of the length of one hundred feet and of the breadth of fifty feet, under a certain portion of that part of the said lands so as aforesaid assigned and conveyed to the said company, which lay eastward of the said point marked A A[2]; and, although the said last-mentioned portion of the said lands, before and at the time of making the said indenture, and from thence continually to and at the time of the commencing of the making of the said tunnel, was used as a lawn or shrubbery, and there were then planted and growing thereon divers trees and shrubs, to wit, two hundred trees and five hundred shrubs, of great value, to wit, of the value of 500l., yet that the said tunnel so made as aforesaid, was not, nor was any part thereof, made in such manner as to occasion as little disturbance of the said trees and shrubs as practicable, but that, on the contrary thereof, the said company, after the making of the said indenture, to wit, on the 30th of June, 1846, and on divers other days and times between that day and the commencement of this suit, made and constructed the said tunnel in so careless, unskilful, and improper a manner, and conducted themselves so improperly in that behalf, that, by and through the mere negligence and improper behaviour of the defendants in that behalf, divers, to wit, one hundred trees and one thousand shrubs of the plaintiffs, then growing and being on the said portion of land through and under which the said tunnel so passed as aforesaid, and of great value, to wit, of the value of 100l., were wholly destroyed, and divers, to wit, one hundred other trees and one thousand other shrubs of the plaintiffs **[30]** then growing and being in and upon the said portion of the said lands, and of great value, to wit, of the value of 100l., were greatly injured and damaged: That the defendants further broke their covenant, in this, to wit, that, although, after the making of the said indenture, to wit, on the day, and year last aforesaid, great damage, to wit, to the amount of 200l., happened and was done to the said last-mentioned trees and shrubs and lawn, in and through the making and constructing of the said tunnel, yet that the same was not, nor was any part thereof, made good or repaired by the defendants, nor were the said trees, shrubs, and lawn placed in all respects, or in any respect, in the same state or condition as the same were in previously to such damage having taken place, although a reasonable time for making good and repairing the said damage, and reinstating the said trees, shrubs, and lawn, had elapsed before the commencement of the suit, to wit, on the day and year last aforesaid: That the defendants further broke their covenant, in this, to wit, that, although the upper part of the said tunnel so made and constructed by the said company as last aforesaid in and under the portion of the said lands in divers parts of the said tunnel, at the time of making the said indenture, and of commencing the said tunnel, was not above the level of the said lands, and was below the surface of the adjoining lands, and although a reasonable time for covering in the said tunnel had elapsed, and it was practicable for the said company to have covered in the same before the commencement of this suit, to wit, on the day and year last aforesaid, yet that the defendants did not nor would, at any time before the commencement of this suit, cover in the said tunnel with good earth mould, to the level of the said land at the time of making the said indenture, and so as to make the same even with the surface **[31]** of the adjoining land in the said parts aforesaid, but wholly neglected and refused so to do; and although the upper part of the said tunnel, in other parts thereof, at the several times last aforesaid, was above the level of the said land, and although such reasonable time as aforesaid had elapsed, and it was practicable to cover in the said last-mentioned parts before the commencement of the suit, to wit, on the day and year last aforesaid, yet the defendants did not nor would then, or at any other time, cover in the said tunnel, at the said last-mentioned parts, or any of them, with good earth mould, to the depth of at least two feet, and did not nor would slope or form the same to the reasonable satisfaction of the plaintiffs, or of their surveyor, but then wholly neglected and refused so to do: And that the defendants further broke their covenant, in this, to wit, that, although the defendants, after the making of the said indenture, and before the commencement of the suit, made and constructed such tunnel as aforesaid, in, through, and under part of the said lands lying eastward of the said point marked A A; and although the plaintiffs were, at all times before the commencement of the suit, ready and willing to accept from the defendants a good, valid, and effectual lease of such part of the said piece of land through or under which the said tunnel was so made as aforesaid, including all the land conveyed by the said before-recited deed-poll, eastward of and from the said point marked A A, for the said residue of the said term, except the last day thereof, in the terms so as aforesaid covenanted and agreed,—whereof the defendants then and always had notice; and although a reasonable time after the making of the said tunnel had elapsed before the commencement of the suit, to wit, on the day and year last aforesaid; and although more than the last day of the said term was still unexpired; yet the defendants did not nor would make, execute, **[32]** or deliver unto the plaintiffs such good, valid, and effectual lease in the law, of such part of the said piece of land through or under which the said tunnel had been made, including all the land conveyed by the said deed-poll, eastward of and from the point marked A A in the said plan, for all the residue then unexpired of the said term of fifty years, except the last day thereof, on the terms aforesaid, but then wholly neglected and refused, and still did wholly neglect and refuse so to do: to the damage of the plaintiffs of 1000l., &c.

The defendants pleaded,—first, to the whole declaration, non est factum.

Secondly,—to the first breach,—that the defendants, after the making of the said indenture in the declaration mentioned, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the 30th of June, 1846, did, at their own expense, make and construct a tunnel, for the purpose of the said railway, through and under such part of the said lands as lay eastward of the point marked A A on the said plan in the said indenture mentioned, according to the terms of the said indenture and the said covenant of the defendants in that behalf; concluding to the country.

Thirdly,—to the same breach,—that they the defendants, did not make or construct, instead of such tunnel as aforesaid, a cutting of great length and width, as in the declaration in that behalf mentioned, through a part of the said portion of land lying eastward of the said point, for the purpose of the said railway, in manner and form as the plaintiffs had in their said declaration in that behalf alleged; concluding to the country.

Fourthly,—to the second breach,—that the said tunnel in the declaration in that behalf mentioned, was made in such manner as to occasion as little disturbance of the said trees and shrubs there planted and growing, **[33]** as practicable, according to the terms of the said indenture and the said covenant of the defendants in that behalf; and that the defendants made and constructed the said tunnel in a careful, skilful, and proper manner, and without any negligence or improper behaviour in that behalf; concluding to the country.

Fifthly,—to the third breach,—that the said trees and shrubs and lawn therein in that behalf mentioned, were not, nor were any of them, damaged or injured in and through the making and constructing of the said tunnel, in manner and form, &c.; concluding to the country.

Sixthly,—to the same breach,—that the damage so done to the said trees, shrubs, and lawn, in and through the making and constructing of the said tunnel, as in the declaration in that behalf mentioned, was, after the making and constructing of the said tunnel, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the day and year last aforesaid, made good and repaired by the defendants, and the said trees and shrubs and lawn were placed in all respects in the same state and condition as the same were previously to such damage having taken place; concluding to the country.

Seventhly,—to the fourth breach,—that, after the making of the said indenture, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the day and year last aforesaid, the defendants did cover in the said tunnel where the same was not above the level of the said lands, and was below the level of the adjoining lands, with good earth mould, to the level of the said land at the time of the making of the said indenture, and so as to make the same even with the surface of the adjoining land, in the parts in that behalf aforesaid; and, where the said tunnel was above the level of the said land, they the defendants did **[34]** also then cover in the said tunnel at the said last-mentioned parts with good earth mould, to the depth of at least two feet, and did then slope and form the same to the reasonable satisfaction of the plaintiffs and their surveyor, according to the terms of the said indenture, and the said covenant of the defendants in that behalf; concluding to the country.

Eighthly—to the fifth breach,—that, although the defendants were always after the making of the said indenture ready and willing to make and execute and deliver to the plaintiffs a good, valid, and effectual lease in the law of such part of the said piece of land through or under which the said tunnel was so made as aforesaid, including all the land conveyed by the said deed-poll, eastward of and from the said point marked A A, for the residue of the said term, except the last day thereof, according to the terms of the said indenture and the said covenant of the defendants in that behalf, whereof the plaintiffs continually had notice, yet that the defendants were not, at any time before the commencement of this suit, requested by the plaintiffs, or any of them, to make, execute, or deliver to the plaintiffs such good, valid, and effectual lease as aforesaid, according to the terms of the said indenture; verification.

Ninthly,—to the same breach,—that, although the defendants were always, after the making of the said indenture, ready and willing to make and execute and deliver to the plaintiffs, a good, valid, and effectual lease in the law, of such part of the said piece of land through or under which the said tunnel had been made, including all the land conveyed by the said deed-poll, eastward of and from the said point marked A A, for the said residue of the said term, except the last day thereof, according to the terms of the said indenture and the said covenant of the defendants in that behalf, whereof the plaintiffs continually had notice, yet that the plain-**[35]**-tiffs were not at any time ready and willing to accept the same, in manner and form as the plaintiffs had in that behalf alleged, but, on the contrary thereof, the plaintiffs refused continually to accept the same, and hindered and prevented the defendants from making and executing and delivering the said lease; concluding to the country.

Tenthly,—to the first four breaches,—that, after the making of the said indenture, and after the committing of the said several alleged breaches of covenant, and before the commencement of this suit, to wit, on the 1st of July, 1846, they the defendants paid to the plaintiffs, and the plaintiffs then accepted and received of and from the defendants, a large sum of money, to wit, 500l., in full satisfaction and discharge of the same alleged breaches of covenant, and of all damages in respect thereof; verification.

The plaintiffs joined issue on the first, second, third, fourth, fifth, sixth, and seventh pleas, and traversed the tenth plea, and entered a nolle prosequi as to the fifth breach. The defendants joined issue upon the traverse to the tenth plea.

The cause was tried before Coleridge, J., at the Winchester summer assizes, 1848, when a verdict was found for the plaintiffs, with one farthing damages, on the first, fifth, sixth, seventh, and tenth issues, and for the defendants on the second, third, and fourth issues.

Upon taxing the costs of the plaintiffs upon the issues found for them, the master disallowed the following items:—

The cause had been taken down for trial at the spring assises, 1848, and was made a remanet. In the interim, considerable correspondence took place between the attorneys for the parties respecting this and another action then pending between the company and one of [36] the present plaintiffs, with a view to a settlement of all the matters in difference, by reference or otherwise. An order to admit these letters was obtained by the plaintiffs; and an order was likewise obtained by the defendants to admit the correspondence, and also a long affidavit made by one of the plaintiffs upon an application for an injunction to restrain the company from building a station on part of the land in question. The plaintiffs' attorneys caused copies of these several documents to be made for counsel, amounting together to thirty-four brief sheets,—which, with the additional fee thereon, the master declined to allow.

At the trial, three plans were produced by the plaintiffs, and used by the court and jury,—one shewing the state of the premises in question before the works were commenced by the company,—the second, their state during the progress of the works,—and the third, their condition when the works were completed. The costs of these plans, as well as those of the attendance (to prove their accuracy) of the surveyor who had prepared them,—about twenty guineas in the whole,—the master disallowed.

The master also allowed the expenses of one only of two witnesses named Stannard and Burt, both in the employ of the company, who were both called to prove the same facts in support of the seventh issue.

Upon the taxation of the defendants' costs of the issues found for them, they claimed a sum of 100l. 9s. 3d., for payments to seven witnesses, viz. Moorsom, Clegg, Beatty, and Curtis, civil engineers, Connor and Steinhausier, surveyors, and Walton, surveyor of railway-works. With regard to these witnesses, the affidavit of increase stated that "all the said witnesses were, in the judgment and belief of the deponent, material and necessary for the defendants." On the part of the plaintiffs, it was objected that this was insufficient, and [37] that the affidavit ought to have alleged expressly that the witnesses were material and necessary exclusively in respect of the issues found for the defendants, and that they did not attend to give evidence, nor did they give any evidence, in respect of the issues found for the plaintiffs. Two of these, viz. Curtis and Steinhausier, were not called (*a*). The master, having looked at the pleadings, and at the evidence that was given by such of these witnesses as were called, allowed the whole; observing that the issues on which the plaintiffs had succeeded, were immaterial issues, and that the defendants had substantially succeeded in the cause,—the plaintiffs having obtained a verdict for a farthing merely upon a point of law.

Greenwood, in Trinity term last, on behalf of the plaintiffs, moved that the master might be directed to review his taxation. The affidavit upon which he moved, in addition to the facts above set forth, stated that four of the witnesses allowed in the defendants' costs, gave material evidence for the defendants at the trial on some of the issues that were found for the plaintiffs, and particularly on the seventh. t. He submitted, that, under the circumstances, it was essential that the plaintiffs' counsel should have copies of the correspondence and affidavit, and therefore that they ought to have been allowed as part of the briefs,—especially as the defendant's attorneys had made them, and particularly the affidavit, material, by getting an order to admit. The plaintiffs' attorneys would hardly have exercised a sound discretion if they had omitted to [38] furnish them. [Maule, J. The correspondence and affidavit may have been very proper to submit to counsel, though not material to the cause. Whether or not it was proper to allow the expense of these copies, was purely a question for

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(*a*) Vide *Bagnall* v. *Underwood*, 11 Price, 510; *Hanhorn* v. *Thomas*, 3 J. P. Smith, 361; *Adamson* v. *Noel*, 2 Chitt. Rep. 200; *Benson* v. *Schneider*, 7 Taunt. 337, 1 J. B. Moore, 76, (S. C., not S. P., 7 Taunt. 272), Holt, N. P. C. 116; *Morison* v. *Harmer*, 5 Scott, 410.

the discretion of the master. Suppose the plaintiffs had been called on to admit the company's deed, would it have been requisite to brief it all?] That clearly would be a case of excess.

2. The plans clearly ought to have been allowed. They were most material, and almost indispensable to enable the court and jury to understand the merits of the case. Generally, speaking no doubt, surveys and experiments that are preparatory to the action, or made with a view to qualify the witnesses to give their evidence at the trial, are not allowed: but it is otherwise with respect to plans, which, in many cases, most materially assist the court, and save the expense of numerous witnesses. [Maule, J. I own I think the master may have been somewhat over strict in disallowing for the plans, which one naturally looks for in many cases.]

3. The expenses of several of the plaintiffs' witnesses, who were called to prove the issues on which the plaintiffs succeeded, were disallowed, because the master thought they were called only to prove damage, and the plaintiffs recovered nominal damages only. That clearly was no ground for their disallowance.

4. As to the evidence of Stannard and Burt, seeing that they were servants of the company, it certainly was not unreasonable to call both of them, though they proved the same facts. The plaintiffs' attorneys would hardly have been justified in relying upon one of them only.

5. With respect to the defendants' costs, the affidavit of increase was insufficient; it should have alleged positively that the witnesses whose expenses were **[39]** claimed, were called exclusively to support the issues on which the defendants succeeded at the trial: *Crowther* v. *Elwell* (4 M. & W. 71). A reference to the notes will shew that their evidence was not so limited.

Wilde, C. J. The correspondence as to the proposed reference, and the affidavit in Chancery, clearly were not material to the merits of the cause, though it may have been prudent to put counsel in possession of them. It is exceedingly difficult to draw the line in such cases; and, if the master had allowed that part of the briefs, I should not have felt disposed to quarrel with his determination. The result of the complaint in this respect is, that the master has not allowed a sufficient length of brief. That is a matter which is so exclusively within the discretion of the master, that the court will not interfere without some very special reasons (*b*)[1]. And we are of opinion that none have been shewn, to take this case out of the ordinary rule. The rule ought not, I think, to be granted as to that: but, upon the other points, it may go.

Barstow now shewed cause. It was for the master to determine whether or not the plans ought to be allowed. The courts have equally declined to interfere, where he has allowed and where he has disallowed expenses falling within that class: *May* v. *Selby* (4 M. & G. 142, 4 Scott, N. R. 727): *Ormerod* v. *Thompson* (16 M. & W. 860). A plaintiff must not cast upon his opponent the expense of putting a man in the situation of acquiring knowledge to make him a witness in the cause. Besides, the master was of opinion that the plans were as useful in support of the issues on **[40]** which the plaintiffs failed, as in support of those upon which they succeeded: they therefore fell within the ordinary rule. [The master (Mr. Ray) intimated that that was in fact the ground upon which he had proceeded: and he stated, that, in another case, between the same parties, arising out of the same matter, he had allowed the expense of plans.]

No precise form of affidavit is requisite before the master. He generally looks at the briefs, to see what were the issues, and what the evidence applicable to each, and regulates his discretion accordingly.

The rule as to the disallowance of witnesses whose evidence is applicable as well to issues upon which the party fails as upon those on which he succeeds, is not disputed. The master, in taxing the defendants' costs, was satisfied that all the witnesses whom he allowed were substantially called only in support of the issues upon which the defendants succeeded. There is no ground to find fault with the manner in which he has applied the principle.

Greenwood, in support of his rule. In *Holmes* v. *Holmes* (2 Bingh. 75, 9 J. B. Moore, 158), it was distinctly held that the allowance of preparing plans, even where the cause does not proceed to trial, is for the discretion of the master. The cases of preliminary experiments stand altogether upon a different footing (*b*)[2]. It would have

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(*b*) Vide *Sharp* v. *Ashby*, 12 M. & W. 732.

(*b*)[2] Vide *Severn* v. *Olive*, 3 B. & B. 72, 6 J. B. Moore, 235; *Bayley* v. *Beaumont*, 11 J. B Moore, 497.

been impossible to try a cause of this description in a satisfactory manner without the aid of plans.

2. The master disallowed the costs of several witnesses who were called in support of issues upon which the plaintiffs succeeded, on the ground that they [41] were called merely to speak to damage. That clearly was not a ground upon which the master could legitimately proceed.

3. The master has not exercised a sound discretion in refusing to allow the costs of both the witnesses Stannard and Burt,—for the reasons already urged.

4. The affidavit of increase ought distinctly to shew that the witnesses whose expenses are claimed, were called exclusively in support of issues upon which the party calling them has been successful (*a*), so as to bring them within the rule in *Lardner* v. *Dick* (2 C. & M. 389, 2 Dowl. P. C. 333 (per nom. *Larnder* v. *Dick*), *Crowther* v. *Elwell* (4 M. & W. 71), and *Freeman* v. *Rosher* (18 Law Journ., Q. B., N. S. 105).

Wilde, C. J. This rule was obtained on four several grounds,—first, that, in taxing the plaintiffs' costs, the master improperly disallowed the expense of plans,—secondly, that several witnesses called for the plaintiffs were disallowed, on the ground that they were called to prove damage, whereas the damages were assessed at a farthing only,—thirdly, that the master allowed only one of two witnesses (both being servants of the company) who were called to speak to the same facts,—fourthly, that, in taxing the defendants' costs of the issues found for them, the master allowed several [42] witnesses whose evidence it is suggested was equally applicable to issues found for the plaintiffs as to issues found for the defendants, and that the usual affidavit, that the witnesses were called exclusively to support the issues upon which the defendants succeeded, was not produced.

1. It was contended that plans are generally useful to aid the jury in coming to a right conclusion, and are not to be looked upon in the same light as surveys or experiments made by scientific persons in order to qualify themselves to give evidence. And I am inclined to think that argument correct. But, at the same time, it must depend upon the circumstances of the particular case, whether plans should or should not be allowed. The court is always disposed to attend very much to what passes before the master, who has generally the best means of coming to a satisfactory conclusion upon that which is merely a matter of discretion. Here, the master has carefully looked into the matter; and he reports to us that he was of opinion, that, although the plans might have been convenient as to other parts of the case, yet they were so decidedly useful upon the issues on which the plaintiffs failed, that they fell within the general rule which has been adverted to, and ought not to be allowed. I think he was right.

2. With respect to the second objection, if the ground of the disallowance of these witnesses was, that they were called to speak to damages, I own I should have thought that the matter was fit to be reconsidered. But that appears not to have been so. A plaintiff is not justified in burthening a case with an unnecessary number of witnesses. There is no reason why he should be allowed to disregard the expense to be thrown upon his opponent. The master has allowed what he thought a sufficient number of witnesses. The number of witnesses to be allowed, is obviously one of the fittest [43] matters to be left to the master's discretion,—a matter on which he is peculiarly called upon to exercise a cautious judgment. I cannot see that the master has here exercised an unsound discretion in that respect.

3. With regard to the witnesses Stannard and Burt, it is said, that, they being servants of the company, it would not have been safe for the plaintiffs to rely upon one of them only. If the master had had any grounds laid before him to shew that it was reasonable to call them both to prove the same facts, he would undoubtedly

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(*a*) The rule is thus stated in Dax's Practice of the Masters' Office, p. 273:—"Where witnesses are claimed on immaterial issues, the master requires an affidavit of increase, stating clearly and positively that such witnesses were material and necessary for the plaintiff or defendant, as the case may be, upon the particular issues found for him, and that they did not attend in respect of any of the issues found against him. For the party who is entitled to the general costs of the cause, the affidavit of increase need only extend to the fact that the witnesses were material and necessary upon the issues found for him." For a form of affidavit applicable to such cases, see Richard's Costs, Appendix.

have allowed the expenses of both. No such ground having been laid before him, I think he very properly declined to allow more than one.

4. As to the last ground of objection,—it is undoubtedly true that an affidavit such as is suggested by Mr. Greenwood, has usually been produced before the master. But it is for the master to say whether or not such an affidavit is necessary. Upon the present occasion, the master seems to have thought that he had ample means to regulate his judgment, without such affidavit. But, with respect to the witnesses whose allowance is objected to, my brother Cresswell, who has gone over the judge's notes, is of opinion that two of them, viz. Beatty and Connor, were called as well upon issues that were found for the plaintiffs as upon those that were found for the defendants. The expenses of these two witnesses, therefore, viz. 14l. 6s. and 6l. 10s., ought not to have been allowed.

Upon the whole, therefore, I am of opinion that all the objections fail, except that portion of the last one which relates to the evidence given by Beatty and Connor; and that the allocatur should be amended in this respect.

The rest of the court concurring,

Rule absolute accordingly.

[44] SMITH *v.* THOMPSON. June 8, 1849.

[S. C. 18 L. J. C. P. 314. See *Bank of New Zealand* v. *Simpson*, [1900] A. C. 189; *Addis* v. *Gramophone Company*, [1909] A. C. 499.

Primâ facie, the construction of written documents is for the judge: but, where it is shewn by extrinsic evidence that the terms are ambiguous, evidence is admissible to explain the ambiguity; and then it is for the jury to say in which sense the ambiguous expressions were used.—A. was engaged by B., as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ, it was the duty of A. to pay freight, dock-dues, &c., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of 140l., inclosing an account of the purposes for which it was required,—one of them being the payment of 30l. for salary due to himself. Ten days afterwards, B. sent A. 100l. inclosed in a letter directing him to apply the money for "business purposes." A. having appropriated 30l. of the money in satisfaction of his salary, B. discharged him.—In assumpsit by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying the discharge of A., on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B.'s orders to apply the money to "business purposes." The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders:—Held, that this was a proper direction; and that the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of the plaintiff, that he should have been guilty of any moral delinquency.—Held also, that, in awarding a sum equal to twelve months' salary, the plaintiff having been discharged after about one quarter's service,—the jury had not given excessive damages.

Assumpsit, on a contract of hiring. The first count (*a*) was abandoned at the trial. The second count stated, that, theretofore, and at the time of making the agreement thereinafter mentioned, the plaintiff had been for the space of six calendar months, and then was, in the service of the defendant, as clerk, and as such clerk had conducted, and was then conducting, the defendant's business of a custom-house and shipping agent, at Southampton; that, thereupon, afterwards, to wit, on the 29th of March, 1847, in consideration that the plaintiff, at the request of the de-**[45]**-fendant, would continue in the service of him, the defendant, as clerk, to conduct his, the defendant's, business of a custom-house and shipping agent, at Southampton aforesaid, for the term of two years, he, the defendant, then promised the plaintiff to continue him in such service for the said term of two years, and to pay him the annual salary of 150l. for the first year, and 160l. for the second year's service, and (with the

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(*a*) Vide ante, vol. v. p. 486.

exception of such overland agency business as the defendant was then in possession of) also to pay to the plaintiff a sum of money equal to 50l. per cent. on the gross profits (without deduction for expenses, except where payments should have been actually made in reference to the business itself), on all baggage business, insurance-agency business, and on all and every business whatsoever transacted by the defendant at Southampton aforesaid, during such term of two years as aforesaid, save and except only on such overland agency business as was then in the defendant's possession as aforesaid; that, although the plaintiff, confiding in the said promise of the defendant, did continue in the service of him, the defendant, as clerk, upon the terms aforesaid, for a long space of time, to wit, until the 13th of August, 1847, which had elapsed before the commencement of this suit, and although the plaintiff had always been ready and willing, and then offered, to continue in the service of the defendant for the residue of the said term of two years, upon the terms aforesaid; yet that the defendant, not regarding his said promise, did not nor would continue the plaintiff in the service of him, the defendant, as clerk, for the said term of two years, but, on the contrary thereof, afterwards, to wit, on the day and year last aforesaid, and before the expiration of the said term of two years, then wholly refused so to do, and then discharged him, the plaintiff, therefrom, and had from that time continually wholly **[46]** neglected and refused to retain or employ the plaintiff in his said service; and that, by means thereof, he, the plaintiff, had lost and had been deprived of all the salary, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the said service of the defendant for the said term of two years; and the plaintiff had been and was, by means of the premises, still wholly unemployed.

The declaration also contained a count for wages, commission, &c., and a count upon an account stated.

The defendant pleaded non assumpsit to the whole declaration, and several pleas to the first count. To the second count, he pleaded (sixthly), that the plaintiff was not ready and willing to continue in the defendant's service; and (seventhly), that, after the making of the promise in the second count mentioned, and after the expiration of the said space of six calendar months, he, the defendant, did take and retain the plaintiff in his service and employment, as clerk, as in that count alleged; that, whilst the plaintiff was in such service and employ of the defendant, and before the discharge of the plaintiff from the service and employ of him, the defendant, as in the second count mentioned, to wit, on, &c., and on divers other days and times between that day and the day when the plaintiff was so discharged as in the second count alleged, the plaintiff, in the course of his said service and employment as such clerk of the defendant, wrongfully, improperly, and wilfully made divers wrongful and improper payments with moneys of the defendant, and the plaintiff then also appropriated to his own use divers sums of money belonging to the defendant, amounting to a large sum, to wit, to the sum of 100l., which said several sums of money were received by the plaintiff from the defendant for and on account of the defendant, and which several **[47]** sums of money the defendant then ordered the plaintiff to use in the carrying on of the business of the said defendant, but which said moneys the plaintiff neglected and refused to use in manner and for the purpose above mentioned, and wrongfully and improperly misappropriated in discharge of salary or wages alleged to be due from the defendant to him, the said plaintiff; that the plaintiff misbehaved and misconducted himself in the said service and employ of the defendant, in this, to wit, that the plaintiff refused to obey an order of the defendant to the said plaintiff, as clerk to him the defendant, to use and dispose of certain moneys given by him to the plaintiff for and on account of the business of the defendant, but which said moneys the plaintiff wrongfully and improperly misappropriated in discharge of salary or wages alleged to be due from the defendant to him the said plaintiff, and which said moneys the plaintiff refused to use in the manner directed, although requested by the defendant so to do; and that thereupon the defendant, when and so soon as he discovered the premises aforesaid, to wit, on the 1st of August, 1847, refused to suffer or permit the plaintiff to continue any longer in his, the defendant's, service and employ, and discharged the plaintiff therefrom, and from thence hitherto refused to retain or continue the plaintiff in his, the defendant's, service and employ, as it was lawful for him to do for the cause in that plea alleged,—verification.

There were also a plea of set-off and a plea of payment, to the common counts.

The plaintiff replied de injuriâ to the seventh plea, and joined issue on all the other pleas.

The cause was tried before V. Williams, J., at the second sitting in Trinity term, 1848. The plaintiff put in two agreements,—under the first of which he had been engaged by the defendant for six months certain, **[48]** at a salary of 60l.,—and the second being that stated in the second count; that, in pursuance of that agreement, on the 28th of September, 1846, he proceeded to Southampton, where he hired and furnished a house, and continued to conduct the defendant's agency business down to the month of August, 1847, when he was dismissed, as hereinafter mentioned; that his duty principally was, the clearing of the baggage of steam-boat passengers, the payment of freight, dock-dues, porterage, and the like; that, during the period of his service, he was at times very inadequately supplied by the defendant with the funds necessary to conduct that description of business; and that, in May, 1847, there was a balance of 5l. 12s. 6d. due to him in respect of salary for the half year ending on the 28th of March, preceding.

Several letters which had passed between the parties were put in: of these, the most material were the following:—

"Southampton, June 5, 1847.

"Dear Sir,—I regret you should be annoyed at my retaining cash, at the end of May, due to me for salary in March last. I have difficulty in procuring money from you to meet the demands of the business; and, with larger funds, I could seek for more agency. I trust you will endeavour to keep me better supplied.—Yours, &c.

"THOMAS SMITH."

"London, June 7, 1847.

"Dear Sir,—In reply to your's of the 5th, I must state that it is my wish that all transactions shall be conducted without misunderstanding on either side. I therefore expect you to apply all moneys remitted by me, to the purposes for which they are remitted.—Yours, &c. "HENRY THOMPSON."

[49] "Southampton, July 25, 1847.

"Dear Sir,—I hand you a memorandum of cash required:—

"Cigars (Mackay)	£13	2	11
Freight (Dunlop)	27	18	2
Dock company and railway company	63	18	7
Stationery, &c.	8	6	9
T. Smith, as written for some days since	30	0	0
	£143	6	5

"I shall be much obliged by a remittance, on my account, of 30l., by return of post, as I wrote you I required the same by last Wednesday; to which I have received no reply.—Yours, &c. "THOMAS SMITH."

"Southampton, August 4, 1847.

"Dear Sir,—I shipped only one package by the 'Pacha.' The West India packet is in the river, and we get no goods delivered till the owing freight is paid to Mr. Dunlop. I shall discontinue writing you for cash, as I do not even get any reply to my letters of nearly a month back.—Yours, &c. "THOMAS SMITH."

"London, August 5, 1847.

"Dear Sir,—Inclosed is 100l. for business purposes. I shall be glad to hear of its safe arrival; also bills of lading for cigars to London Docks, as usual. I inclose a memorandum, which please attend to, and send up word about it.—Yours, &c.

"H. GUNTHORPE,
"for MR. H. THOMPSON."

"Southampton, August 6, 1847.

"Dear Sir,—The 100l. safe to hand this morning. I have paid Dunlop, and have placed 30l. to my ac-[50]-count, for balance of salary due to me on the 24th of July last. The other matters shall be duly attended to.—Yours, &c.

"THOMAS SMITH."

"London, August 7, 1847.

"Sir,—I am much surprised at the receipt of your letter this morning, finding that you have placed 30l. to your own account, out of the 100l. sent down specially for business purposes. I beg, therefore, you will immediately replace it, and expend it as originally ordered by me, for business purposes, and shall expect to hear that such is the case by Tuesday morning.—Yours, &c. "HENRY THOMPSON."

"Southampton, August 8, 1847.

"Dear Sir,—I beg to state that I consider I have complied with your order as to the application of the 100l. sent me for business purposes; particularly as my salary has been due some time, and surely must come under the head of 'business purposes.' With every respect,—Yours, &c. "THOMAS SMITH."

"London, August 9, 1847.

"Sir,—As you have not complied with my orders, I have not any further occasion for your services, and will send some person down to take charge of my office, &c., immediately.—Yours, &c. "HENRY THOMPSON."

It also appeared, that, upon the plaintiff's father-in-law calling on the defendant, and asking him why he had dismissed the plaintiff from his employ, he assigned as his reason the misappropriation of the 30l. towards payment of his salary, out of the 100l. remitted on the 5th of August, expressly for business purposes.

[51] On the part of the defendant, it was insisted that the plea justifying the dismissal was fully sustained by the evidence; for, that, to warrant the defendant in putting an end to the contract, it was enough to shew that the plaintiff had been guilty of a wilful disobedience of a lawful command; and that it was not necessary to shew that there had been any fraudulent conduct,—any moral obliquity, pecuniary or otherwise. *Callo* v. *Brouncker* (4 C. & P. 518) and *Turner* v. *Mason* (14 M. & W. 112) were referred to.

The learned judge left it to the jury, in the terms of the seventh plea, to say, whether the plaintiff had been guilty of any wrongful or improper misappropriation of moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders with regard to the disposal of the money: telling them, that, if they should affirm either of those propositions, they must find for the defendant; otherwise, for the plaintiff.

The jury returned a verdict for the plaintiff, damages 185l. 12s. 6d., being twelve months' salary, and twelve months' share of profits.

Murphy, Serjt., in the course of the same term, obtained a rule nisi for a new trial, on the grounds of misdirection, that the damages were excessive, that the computation of damages had proceeded upon an erroneous principle, and that the verdict was against the evidence.

Byles, Serjt., and E. James, now shewed cause. There clearly was no misdirection in this case. Salary was due to the plaintiff; his employer knew it, and had been urged to pay it. He remits money to his clerk, with a general intimation that it is remitted for [52] "business purposes:" and it was for the jury to say whether the plaintiff was not justified in thinking that he was obeying that direction when he appropriated a portion of it in discharge of salary. [Wilde, C. J. It must be borne in mind that there had previously been a complaint of a similar appropriation.] The whole matter was before the jury. [Maule, J. Did it appear that the employer had sustained any injury or inconvenience from the plaintiff's mode of dealing with the money? Was anything left unpaid in consequence, that was pressing?] There was no evidence that there was. The matter was properly submitted to the jury: and there is no pretence for quarrelling with the way in which they have dealt with it. [Cresswell, J. It was for the jury to say whether or not there was a wilful misappropriation of the money; and for the judge to say whether such a misappropriation, when proved, would justify the plaintiff's discharge.]

Murphy, Serjt., and Pitt Taylor, in support of the rule. The principle of law which governs cases of this description, is well laid down by Parke, B., in *Callo* v. *Brouncker* (4 C. & P. 518), where that learned judge ruled, that, to justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. That doctrine is confirmed by *Turner* v. *Mason* (14 M. & W. 112). That was an action of assumpsit for the wrongful dismissal of a domestic servant, without a month's notice, or payment of a month's wages. The defendant pleaded, that the plaintiff requested him to give her leave to absent herself from his service during the night, that he refused such leave, and forbade her from so absenting herself, and that, against his will, she nevertheless **[53]** absented herself for the night, and until the following day, whereupon he discharged her. To this plea the plaintiff replied, that, when she requested the plaintiff to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness, and was in imminent danger of death, and, believing herself likely to die, requested the plaintiff to visit her, to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and, because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c. It was held, on demurrer, that the plea was good, as shewing a dismissal for disobedience to a lawful order of the master; and that the replication was bad, as shewing no sufficient excuse for such disobedience. "The contract," says Parke, B., "between the master and a domestic servant, is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. It was laid down by Lord Ellenborough, in *Spain* v. *Arnott* (2 Stark. N. P. C. 256), and by me in *Callo* v. *Brouncker*, and confirmed by the court of Queen's Bench in *Amor* v. **[54]** *Fearon* (9 Ad. & E. 548, 1 P. & D. 398), that the wilful disobedience of any lawful order of the master is a good cause of discharge. Here, the plea discloses a perfectly lawful order, viz. that the plaintiff should not absent herself from the service during a night, and the plaintiff's disobedence thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. Primâ facie, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication shewed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order: there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her." And Alderson, B., said: "The plea is a good answer to the action, because it shews the discharge of the plaintiff to have been for wilful disobedience of the defendant's order to stay in his house all night. Then, is the replication a good answer to the plea? It is informal, because it does not shew that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But, if this were otherwise, these circumstances would amount only to a mere moral duty, and do not shew any legal right. We are to decide according to the legal obligations of parties. Where is the decision founded upon mere moral obligation, to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties." Here, the learned judge, in effect, told the jury that the language of the seventh plea required the defendant to make out that the act com-**[55]**-plained of, was an act of moral turpitude. That clearly was wrong: he should have told them, in accordance with the authorities above cited, that the mere disobedience of a lawful order was a justification for the dismissal. [Maule, J. I do not so clearly see that the judge ought to have done as suggested. You admit, that, to justify his dismissal, it was necessary to shew that the plaintiff intended to disobey a lawful command of his master.] The learned judge should have told the jury, that, to sustain the plea, it was not necessary that the conduct of the plaintiff should have been morally wrong: and he altogether omitted to call the attention of the jury to that part of the plea which charged wilful disobedience of orders. What did the jury understand by "wrongful and improper?" In their minds, it could refer to no other than moral delinquency. The summing up mixes up two matters which were in their nature essentially distinct,—the one, a wrongful misappropriation of the money,—the other, a wilful disobedience of orders: the former, being a moral offence, amounting to embezzlement; the latter, though equally a ground for dismissal, scarcely amounting to a breach of morality: *Spain* v. *Arnott*. It was the duty of the judge to take upon himself the construction of the correspondence, and to say what was meant and understood by the parties by the words "for business purposes." He ought not to have left that to the jury. The rule upon this subject is thus laid down by Parke, B., in *Neilson* v. *Harford* (8 M. & W. 806, 823): "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury: and it is **[56]** the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for, a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually."

It was further contended that the damages were excessive, and that the verdict was not warranted by the evidence.

WILDE, C. J. This is a rule by which the defendant seeks to set aside the verdict found for the plaintiff, and to have a new trial,—first, on the ground of misdirection,—secondly, that the verdict was against the evidence,—thirdly, that the damages were excessive, and were estimated upon an erroneous principle.

1. The misdirection is charged in two respects; first, that the learned judge improperly left to the jury the construction of certain letters, whereas he ought himself to have interpreted them, and told the jury their effect; secondly, that he presented the wrong question to the jury upon the issue raised on the seventh plea. It does not appear to me that the present case is at all affected by the authorities which have been referred to. There is no question here whether a servant may with impunity disobey the lawful orders of his master: the question is simply one of fact, whether the plaintiff did, in the terms of the seventh plea, wilfully disobey his employer's lawful orders. The plea in substance charges the plaintiff with having, in disobedience of his employer's orders, wrongfully and improperly misappro-**[57]**-priated in discharge of salary alleged to be due to himself, moneys which had been specifically remitted to him for other purposes. In the course of the cause, it had been contended on the part of the plaintiff that the evidence did not sustain the plea, for that the reasonable construction of the plaintiff's orders warranted the appropriation of the money that was made by the plaintiff. On the other hand, it was insisted, for the defendant, that the directions given to the plaintiff with regard to the application of the remittance, were so plain and distinct, that a departure from them must of necessity amount to wilful disobedience. Such were the views presented by the counsel on the one side and on the other; each urging that which he conceived best calculated to advance the interests of his client. Now, undoubtedly, there may be cases where it is the duty of the judge to present the points to the jury under an aspect different from that assumed by the counsel: but, ordinarily, I apprehend he does right in putting the case as the parties themselves have put it. Here, the learned judge did so. He told the jury to look at the letter of the 5th of August, and to say whether, regard being had to all the circumstances, and the nature of the dealings between the parties, the "business purposes" to which the plaintiff was directed to apply the 100l., were necessarily such as to exclude the salary due to the plaintiff. It is clear that the letter itself would not enable any one to determine that. Nobody would doubt that such an expression would warrant the application of the money to the payment of any charge on the business. In ascertaining the net profits of a business, the salary of a clerk necessarily forms an item in the sum deducted as expenses of the business. It is the defendant, therefore, who in this case requires you

to look dehors the letter, for the purpose of ascertaining the true meaning of his directions: he insists, that, as [58] between himself and the plaintiff, and with reference to the course of dealing between them, the words "for business purposes" have a more limited and restricted meaning, and were meant to exclude salary. The case is, therefore, taken out of the ordinary rule, that the construction of written documents is for the court, and not for the jury. The question was, what was the plaintiff warranted in understanding to be the meaning of that letter: and, how was that to be determined, but by looking at the letter, in connection with all the surrounding circumstances? The learned judge, in effect, left it to the jury to say whether the construction put upon the letter by the plaintiff, was justified by its language; or whether, as the defendant contended, the language was so plain and unambiguous that the plaintiff must be taken to have been guilty of a wilful disobedience of orders. I apprehend that was the proper question to leave to the jury. It has been urged that the learned judge erred in leaving it to the jury to say, whether the application of the funds intrusted to the plaintiff was wrongful and improper, in such a way as to induce the jury to suppose, that, to support the plea, there must of necessity be some moral delinquency in the plaintiff. I do not, however, so understand the direction. Taking the whole of it together, and construing it in a fair spirit, coupled with the arguments that had been urged by counsel before the jury, they could not possibly have been misled by it. It is to be observed that there is no plea alleging simply a disobedience of lawful orders: the charge is of a wrongful and improper disobedience of orders: the question left to the jury was, whether the disobedience was wrongful, in the sense of being intentional. For these reasons, I think the first ground of the motion fails.

2. The next ground is, that the verdict was against evidence. In answer to this, it is enough to say that [59] there was evidence on both sides, that the whole was fairly submitted to the jury, and that the learned judge does not report to us that he was dissatisfied with the verdict: and, although I am free to confess that I should have come to a different conclusion had I been upon the jury, I cannot say that the verdict is so entirely wrong as to justify me in saying that the matter ought to undergo another investigation.

3. With respect to the amount of damages, I cannot discover any erroneous computation of figures. It was for the jury to say what amount of compensation the plaintiff was entitled to for the defendant's breach of contract. Upon this point also I am of opinion that the defendant has failed to establish any ground for making the rule absolute.

MAULE, J. I also think this rule should be discharged. The alleged misdirection is two-fold. In the first place, it is said that the judge improperly left to the jury the construction of a written document, viz., a letter addressed by the defendant to the plaintiff, his clerk, whereby he directed him to apply a sum of 100l. remitted to him therein "for business purposes." I agree, that, generally speaking, the construction of a written contract is for the court: but, when it is shewn by extrinsic evidence, that the terms of the contract are ambiguous, evidence is admissible to explain the ambiguity, and to shew what the parties really meant. That is one of Lord Bacon's maxims. Where there is an election between two meanings, it is properly a question for the jury. So, if a man devise land to his "cousin John," and it appears that he has two cousins named John, extrinsic evidence is admissible to shew to which of them he meant the land to go. If the letter of the 5th of August is to be construed by what appears within the four corners of it, the direction to [60] apply the money remitted to "business purposes," clearly would not exclude the application of a portion of it to the payment of the clerk's salary. But I agree that it was competent to the defendant to shew by extrinsic evidence, what orders had been previously given. I think the defendant was quite right in saying that "business purposes" might bear a restricted sense, and mean business purposes exclusive of clerk's salary. That duplicity of sense is the very foundation of the defendant's view of the case. The ambiguity, being introduced by extrinsic evidence, may be explained by evidence. The letter of the 5th of August was in answer to two very pressing applications for money, one of them describing the purposes for which it was required,—amongst others, the identical sum in question, 30l., for salary due to the plaintiff: and I am very far from saying that the plaintiff was wrong in concluding that he might fairly apply a portion of the remittance in discharge of his own claim. The general replication de injuriâ, puts in issue each of the several matters that are materially alleged in the seventh plea. The only material matter in the plea, that has been relied on as a defence to the action is, that the plaintiff, in the course of his service and employment as such clerk of the defendant, wrongfully, improperly, and wilfully made divers wrongful and improper payments with moneys of the defendant, and then also appropriated to his own use divers sums of money belonging to the defendant, amounting to a large sum, to wit, 100l., which said several sums of money were received by the plaintiff from the defendant for and on account of the defendant, and which several sums of money the defendant then ordered the plaintiff to use in the carrying on of the business of the defendant, but which said moneys the plaintiff neglected and refused to use in manner and for the purpose above mentioned, **[61]** and wrongfully and improperly misappropriated in discharge of salary or wages alleged to be due from the defendant to him the plaintiff. Suppose, instead of that being put in issue by de injuriâ, the allegation had been traversed in terms, there can be no doubt that it would have been the duty of the judge to leave the issue in those very terms to the jury. It was necessary to leave it to the jury to say whether the conduct of the plaintiff had been wrongful and improper; and it was necessary also to explain to them the sense in which those expressions were used: and I think the jury might most correctly and properly come to the conclusion that they involved a charge of something more than mere disobedience of orders. On the part of the defendant, it had been insisted the plaintiff's appropriation of the money was wrongful and improper, inasmuch as it was a wilful disobedience of the injunctions given to him by the letter. The plaintiff, on the other hand, contended that the direction in the letter was not such that he was bound to understand it in the sense insisted on by the defendant, viz. as excluding the application of any portion of the money in discharge of his own salary. The wrong and impropriety, therefore, were left to the jury precisely in the sense in which they were understood by the parties: and it seems to me that the proper instruction was given to them, to guide them to a proper consideration and a right conclusion of the true question at issue. I therefore think the first and main ground upon which this rule was obtained is answered.

2. As to the verdict being against evidence, I feel even more difficulty than the lord chief justice feels; for, I am unable to see that the conclusion the jury came to was wrong.

3. I also think there is no ground for saying that **[62]** the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff.

Cresswell, J. I also am of opinion that the rule in this case should be discharged. It appears to me that the learned judge did not, as it is suggested he did, leave to the jury the construction of the letter of the 5th of August, treating it as a written instrument. There was a latent ambiguity in the letter, which was shewn by extrinsic evidence, and which it was therefore competent to explain by evidence. The learned judge appears to have left it to the jury to say what was the sense in which the parties had used the expression "for business purposes," in that letter,—pointing their attention to the arguments that had been urged on the one side and on the other. The defendant's counsel had insisted that the plaintiff was bound to understand the expression as excluding the application of any portion of the remittance to the payment of arrears of salary: the plaintiff's counsel, on the other hand, insisted that payment of salary was fairly and legitimately a business purpose. My brother Murphy, when he moved for the rule, seems to have understood the learned judge to have told the jury, that, to satisfy the words "wrongfully, improperly, and wilfully," it was necessary that the plaintiff should have been guilty of an act of moral turpitude; whereas, he insisted, the dismissal was justified, if the plaintiff had been guilty of any wilful disobedience of a lawful order. Now, the word "wilful" does not occur in that part of the seventh plea; neither does it in the note of my brother Williams of the way in which he left the question: and I have looked through the short-hand notes of the summing up, and I do not find the word used even there. The plea states that the plaintiff refused to obey an order of the defendant to the plaintiff to dispose of certain moneys given by **[63]** him to the plaintiff for and on account of the business of the defendant, but which moneys the plaintiff wrongfully and improperly misappropriated in discharge of salary alleged to be due to the plaintiff. The substance of the issue was, whether the plaintiff wilfully disobeyed orders in that respect. The words must be taken to have been used in the same sense in the summing up as in the plea. I therefore think the direction was right.

Upon the other points, I concur with the lord chief justice and my brother Maule.

V. WILLIAMS, J., concurred.

Rule discharged.

LLOYD v. HARRIS. June 11, 1849.

[S. C. 7 D. & L. 118.]

To constitute a proper service of an award, a copy must be delivered to the party, and the original must, at the same time, be shewn to him.—Where the copy was personally delivered to the party on the 21st of October, and a demand of performance made on the 23rd, the original being then for the first time shewn:—Held, that this was not such a service as to form the foundation either of an attachment or of a rule under the 1 & 2 Vict. c. 100, s. 18 (*a*).

In this case a verdict was taken for the plaintiff, by consent, damages 500l., subject to the award of a barrister, to whom were referred the cause and all matters in difference between the parties; and the order contained a direction "that the contract of purchase between the parties be completed forthwith, and the purchase-money be brought into court to abide the event of the arbitration;" the costs of the cause to abide the event of the award, and the costs of the reference to be in the arbitrator's discretion.

On the 10th of June, 1848, the following order was made by Coltman, J.: "Upon hearing the attorneys **[64]** or agents for the plaintiff, and the defendant in person, and by consent, I do order, that, notwithstanding the terms in the order of nisi prius of the 29th of February, 1848, that the contract of purchase between the parties be completed forthwith, and the purchase-money be brought into court to abide the event of this arbitration, the arbitrator shall have power and authority to direct what shall and ought to be done by either party as to carrying out the said contract of purchase of leasehold property at Hayes, referred to in the said original order, and as to the purchase-money for the same being brought into court, either wholly or in part; and the arbitrator shall have power, in every respect, to award and direct what shall be done between the parties, relating to the matters referred to him, except that the costs of the cause shall abide the event, as provided for in the said original order."

The arbitrator made his award on the 30th of September, 1848. After reciting the order of nisi prius, and the order of Coltman, J., of the 10th of June, 1848, the award proceeded as follows:—"And whereas a certain other action was commenced on the 8th of January now last past, in the said court of Common Pleas, in which the said H. G. Harris was the plaintiff, and the said John Lloyd was the defendant, and certain issues were, on or about the 8th of February now last past, joined therein between the said parties: And whereas a certain agreement was entered into on the 15th of October, 1847, between the said John Lloyd of the one part, and the said H. G. Harris of the other part, in the words following, that is to say—'The said John Lloyd agrees to purchase at the price to be fixed as hereinafter mentioned, and the said H. G. Harris to sell to him (subject to the mortgage of 700l. now charged thereon in favour of P. C. J. Smith), all those two leasehold messuages or dwelling-houses, situate at Hayes, **[65]** in the county of Middlesex, and known as Alpha Villas; and also that piece of leasehold meadow land adjoining the said two messuages, containing three acres and three quarters, or thereabouts; and it is agreed that the said premises shall be forthwith valued by a competent surveyor, to be fixed upon by the said parties, and that his valuation shall be the price (subject to reduction by the amount of the said mortgage) to be paid and received by the said parties respectively, as the purchase-money of the said premises; the said purchase to be completed with all convenient speed after such valuation; and the said H. G. Harris is to take, in part payment of the said purchase-money, warrants for three pipes of port wine, and for seven butts of sherry, clear of all charges (duty excepted), at prices to be respectively fixed by a competent wine-broker to be selected by the said parties; the expense of both the said

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(*a*) As to rules under this statute, vide post, 74 (*a*).

valuations to be borne by the said parties equally, and the expenses of the perfecting of Mr. Harris's title, and of this agreement, and conveyance, to be borne by the said parties in the following proportions—two thirds to be paid by the said John Lloyd, and the remaining one third by the said H. G. Harris:' And whereas the said premises were valued by a competent surveyor, in pursuance of the said agreement, at the sum of 1575l.: And whereas the said parties have, in the course of the said arbitration before me, dispensed with the stipulation that part of the said purchase-money should consist of certain wine-warrants, and have agreed, in consideration thereof, that the value of the said premises should be considered and taken to be 1527l., instead of the above-mentioned sum of 1575l.: And whereas a certain other agreement was also entered into on the said 15th of October, 1847, between the said John Lloyd, of the one part, and the said H. G. Harris, of the other part, by which agreement, &c., &c.: And whereas, by indenture bearing date [66] the 27th of September, 1845, a term of twenty-one years was granted by one Thomas Pitts to the said H. G. Harris, in certain premises situate at Chiswick, in the county of Middlesex; and whereas the said indenture was deposited by the said H. G. Harris with the said John Lloyd, some time in the year 1847, as a collateral security for a certain loan of money; and whereas the said indenture cannot now be found, and it is uncertain whether the same is wholly lost or not: And whereas there are certain other matters in difference between the said parties, which were brought under my consideration, but which it is not necessary to particularise: Now, I, the said arbitrator, &c., do make and publish this my award in writing of and concerning the premises, that is to say, I do award and direct, with respect to the first-mentioned action, in which the said John Lloyd was plaintiff, and the said H. G. Harris defendant, that the verdict entered for the plaintiff, damages 500l., be set aside, and that, instead thereof, a verdict be entered for the plaintiff upon the issues raised by the first, second, third, fourth, sixth, seventh, tenth, eleventh, and thirteenth pleas, and so much of the twelfth plea (non assumpsit) as is pleaded to the fourth count of the declaration in the said cause, and for the defendant on the issues raised by the fifth, eighth, ninth, and fourteenth pleas, and so much of the twelfth plea as is pleaded to the fifth and sixth counts of the declaration: With respect to the action secondly above mentioned, in which the said H. G. Harris was plaintiff, and the said John Lloyd was defendant, I do find and award for the plaintiff on the issues raised by the first and second pleas, and for the defendant on the issue raised by the third plea; and I do award and direct that each party shall bear and sustain his own costs of and concerning the said action: With respect to the agreement of the [67] 15th of October, 1847, first above mentioned, I award and direct that the said John Lloyd shall pay to the said H. G. Harris, on the 23rd of October next, the sum of 785l. as the price and value of all the interest of the said H. G. Harris in the property at Hayes, and that a conveyance of all such interest, shall be prepared by the said John Lloyd, and executed by the said H. G. Harris at the time of the payment by the said John Lloyd of the said sum of 785l.; and I further award and direct, that the expenses, if any, of perfecting the title of the said H. G. Harris, and the expenses of the said agreement of purchase, and of and concerning and in any way relating to the conveyance above directed, shall be taxed and ascertained by one of the taxing masters in Chancery, and that, after such taxation, the amount of costs in relation hereto, of each solicitor for the said parties respectively, shall be added together, and make a gross sum, and that two thirds of such gross sum shall be paid, borne, and sustained by the said John Lloyd, and the remaining one third by the said H. G. Harris:" [The award then provided for payment of arrears of interest on the mortgage referred to in the agreement of the 15th of October, 1847, and of the expenses of the surveyor's valuation: it then proceeded as follows:]—"With respect to the indenture bearing date the 27th of September, 1845, for a term of years in certain premises at Chiswick aforesaid, I do find and assess the value of such indenture to the said H. G. Harris at the sum of 360l.; and I do award and direct that the said John Lloyd shall pay that sum to the said H. G. Harris on the 23rd of January, 1849, unless in the meantime he can obtain from the said Thomas Pitts a fresh or duplicate indenture granting to the said H. G. Harris the same term of years from the said 27th of September, 1845, and containing in every respect the same covenants as were contained in [68] the said original indenture, in which case he is to deliver such fresh or duplicate indenture to the said H. G. Harris, and the said H. G. Harris shall receive the same in substitution for the one now supposed to be lost, and, on so receiving such fresh or duplicate indenture, the said H. G. Harris shall not be entitled to receive the said sum of 360l., or any part thereof; and I do award and direct that all expenses whatsoever in any manner relating to the obtaining and executing of such fresh or duplicate indenture, shall be borne and defrayed by the said John Lloyd alone: And, with respect to the said second agreement of the 15th of October, 1847, relating to the carrying on of the wine trade, and with respect to all other matters in difference between the said parties, of every kind soever, save and except those hereinbefore specified, I do award and direct that the said John Lloyd shall pay to the said H. G. Harris, on the said 23rd of January, 1849, the sum of 152l. 15s.: And I do award and direct,—save and except as hereinbefore awarded and directed,—that each party shall bear and sustain his own costs of the said reference, but that the costs of this my award shall be wholly borne and sustained by the said John Lloyd: and I do finally award and direct, that, after payment of the several sums hereinbefore directed to be paid, and the costs aforesaid, each of the said parties, if required so to do, shall, at the costs and charges of the other of them, execute to the other of them, a release of the matters so referred to me as aforesaid. In witness," &c.

Lloyd was personally served with a copy of the award on the 21st of October, 1848, the original not being at that time shewn to him; and, on the 23rd, the 785l., and 77l. 16s. 6d. the costs of the award, were personally demanded of him by Harris, and notice given to him that Harris was ready to execute a con-**[69]**-veyance of the leasehold premises at Hayes, mentioned in the agreement of the 15th of October, 1847; and the original award was then for the first time shewn to him. But the order of reference and the order of Coltman, J., were not made a rule of court until the 6th of November.

On the 23rd of January, 1849, Harris called at the residence, and also at the place of business, of Lloyd, for the purpose of demanding the 512l. 15s. directed to be paid on that day, but was informed by a servant of Lloyd that he was not in town. And, on the 14th of May, 1849, Lloyd was duly served with a copy of the rule of court, and the 512l. 15s. was then demanded of him personally.

Upon an affidavit of the above facts, and also stating that no portion of the money directed by the award to be paid by Lloyd, or the costs of the award, had been received by Harris, or by any other person on his behalf, and that no deed of conveyance of the leasehold property at Hayes had been tendered to Harris for execution, and that no fresh or duplicate lease of the premises at Chiswick had been offered to him,

Channell, Serjt., on behalf of Harris, moved for a rule (under the 1 & 2 Vict. c. 110, s. 18), calling upon Lloyd to shew cause why he should not forthwith pay to Harris the several sums directed by the award to be paid. He submitted, that, although there might be some difficulty as to the 785l., the award not being, simpliciter, for the payment of that sum (*a*), there could be none as to the two sums of 360l. and 152l. 15s. [Maule, J. When the 785l. was demanded, the orders had not been made a rule of court, therefore the party did not go properly armed to make a demand; and, **[70]** when the two last-mentioned sums were demanded, there was no due service of the award.] At the time the 512l. 15s. was demanded, Lloyd had been duly served with the award and rule of court. It is not necessary, in order to obtain a rule under this statute, that the party to whom the money is directed to be paid, should be strictly in a position to move for an attachment. [Wilde, C. J. It certainly seems odd to say that you shall have all the difficulties in the way of obtaining a remedy against the goods, which you had when the remedy was sought against the person of the debtor.]

A rule nisi having been granted as to the 360l. and 152l. 15s. only,

Byles, Serjt., now shewed cause. Since the case of *Jones* v. *Williams* (11 Ad. & E. 175, 4 P. D. 217), no doubt, the courts will make rules, for the payment of money under an award, to enable the party to avail himself of the 18th section of the 1 & 2 Vict. c. 110, where the award is for the payment of a specific sum absolutely and unconditionally, and the party has been duly served with the award and rule of court. But the statute does not apply where, as here, the court would have to try upon affidavit the performance or non-performance of an alternative condition: nor is there any authority for severing an award in the manner here proposed. What would be the party's remedy for the rest? an attachment? or an action on the award? To

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(*a*) Vide *Graham* v. *Darcey*, ante, vol. vi. p. 537.

entitle himself to a rule under this act, it has repeatedly been held, that the party to whom the money is directed to be paid, must be as regular in all respects as if he were moving for an attachment: *Neale* v. *Postlethwaite* (1 Q. B. 243, 4 P. & D. 623); *Abrahams* v. **[71]** *Taunton* (1 D. & L. 319); *Wilson* v. *Foster* (6 M. & G. 149, 6 Scott, N. R. 936, 1 D. & L. 496); *Hawkins* v. *Benton* (2 D. & L. 465). The party called upon to pay, should be served with a copy of the award, the original being at the same time shewn to him, when the money is demanded of him: *The King* v. *The Inhabitants of Alnwick* (5 B. & Ald. 184); *Pearson* v. *Archbold* (11 M. & W. 108, 477). That was not done here. [Channell, Serjt. He had been previously served with a copy of the award. Maule, J. That is like serving a man with a copy of a writ on one day, and offering to shew him the original upon a subsequent day.]

Channell, Serjt., in support of his rule. The doctrine of the court of Queen's Bench in *Jones* v. *Williams* has since been followed in numerous cases. In *Doe* v. *Amey* (8 M. & W. 565, 1 Dowl. N. S. 23), Lord Abinger, C. B., says (1 Dowl. N. S. 23): "The rule laid down by Lord Denman in *Jones* v. *Williams* is a sound one; the practice in this respect depends on the general jurisdiction of the court, and the form in which the court shall order obedience, must depend upon its discretion. Formerly, the practice was, to order the party to perform the award: in that case, the sum of money to be paid was not mentioned in the rule, and, consequently, according to the decision of the court of Queen's Bench, in which I entirely concur, was not a rule or order upon which execution could issue, within the meaning of the act; but the substance is the same, for, if the court could order a party to perform an award which directed him to pay a certain sum, it could, in a more direct way, order him to pay that sum." And the courts have repeatedly decided, that the formalities required on moving for an **[72]** attachment may, under some circumstances, be dispensed with: *Rickards* v. *Patterson* (8 M. & W. 313, 1 Dowl. N. S. 52); *Jordan* v. *Berwick* (9 M. & W. 3, 1 Dowl. N. S. 271); *Doe d. Moody* v. *Squire* (2 Dowl. N. S. 327); *Hawkins* v. *Benton* (2 Dowl. & L. 465). In *Doe d. Moody* v. *Squire*, Wightman, J., says: "An attachment is in the nature of a penalty against a man for not obeying that which is, in effect, the order of the court: this rule, however, is not of the same character. By this rule, it is only sought to give the award the value and effect of a judgment. It may be that an attachment will in future be unnecessary for practical purposes. I think enough is done in obtaining this rule, without going through the forms which were necessary in cases of attachment." In *Wilson* v. *Foster*, the main objection was, to the proposed mode of service of the rule, viz. by sticking it up in the office. [Cresswell, J. In *Bower, In re* (1 B. & C. 264), it was held that personal knowledge of an award and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.] In *Abrahams* v. *Taunton*, there was no evidence that the award had come to the party's knowledge. [Maule, J. The service of the copy and exhibiting of the original, must be contemporaneous. A man upon whom a copy is served is not bound to keep it in his pocket until the original is shewn to him.] It is enough if he has substantial information as to what is required of him.

Wilde, C. J. It is highly inexpedient that any uncertainty should exist as to the practice upon applications of this sort: at the same time, it is not easy to lay down any general rule. Without, therefore, **[73]** saying how far these rules are to be considered analogous to motions for attachment, it is enough to say that there has been a clear and recognised mode of service of an award, in order to bring the party into contempt for not performing it, and which is only to be departed from under very special circumstances, viz. by personally delivering to him a copy of the award, and at the same time shewing him the original. Here, a copy was served at the time when a demand was made in respect of a subject-matter totally different from that to which this rules relates. It seems to me that the award has not been well served, and that there is an entire absence of circumstances which might dispense with regular service. The rule, therefore, cannot be made absolute.

Coltman, J. I am of the same opinion. It is essential that there should be an intelligible and well-understood rule upon this subject: and there undoubtedly is a well-established rule; and that is, that, in the absence of special circumstances to dispense with it, there must be a personal service of the award, by delivering a copy and shewing the original at the same time. That course has not been adopted here, and there are no special circumstances to justify a departure from it.

Maule, J. This is an application for a rule of court, in order to enforce the summary remedy given by the statute 1 & 2 Vict. c. 110, s. 18, which enacts, amongst other things, that all rules of courts of common law, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be **[74]** deemed judgment-creditors within the meaning of the act; and all remedies thereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses are by such orders or rules respectively directed to be paid. This practice was first introduced by a dictum of the court of Queen's Bench in the case of *Jones* v. *Williams;* and it has since been adopted by all the courts, and may now be considered as established (*a*). I think, however, that this summary remedy,—or, rather, the proceeding that leads to it,—ought not to be granted, unless the party against whom the application is made, has knowingly refused to do something which he was bound by a rule of court to do. The present rule calls upon Mr. Lloyd to pay 512l. 15s., which it is said he has been directed by an award to pay. Now, I think that both principle and justice require that a man should not be subjected to an order of this sort, unless it is made to appear that he has wilfully refused to do what the award requires of him, with full knowledge, or means of knowledge, of his liability to do it: he cannot be said to have wilfully refused to perform the award, unless he has had due notice of the award and of the rule of court, and has been properly called upon to perform it. There is but one known and established mode of giving notice of the award. If this were res integra, I should say the good sense of the thing requires that the party should be furnished with a copy, and at **[75]** the same time be shewn the original. And that is the practice in all cases. In *The King* v. *The Inhabitants of Alnwick*, where the question was, whether an order of removal of a pauper had been well served, Abbott, C. J., says: "The service, in order to be valid, must be either by delivery of the order itself, or by leaving a copy of the order, and at the same time producing the original." In order to constitute a proper demand of a sum of money under an award, the party should be personally served with a copy, and should have an opportunity of satisfying himself at the time that it is a true copy, by comparing it with the original. Here, the copy was delivered on the 21st of October, no offer being then made to shew the original; two days afterwards, when the money was demanded, the original was for the first time produced. That clearly is not a good service: and this is not a mere technical rule, but one that is essential to the due administration of justice. I think the party has not had that sort of notice which is essential to found a summary proceeding of this nature; and therefore I agree with the lord chief justice that this rule should be discharged.

The rest of the court concurring,

Rule discharged, with costs.

[76] Dunn *v.* Loftus. June 4, 1849.

A defendant, who after issue joined obtained his discharge under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was allowed to plead such discharge puis darrein continuance, without an affidavit (under reg. gen. Hilary term, 4 W. 4), that the matter of the plea arose within eight days next before the pleading thereof,—it being shewn that the omission to plead within the prescribed time, had not arisen from any culpable conduct on his part, and had occasioned no disadvantage to the plaintiff: but (Maule, J., dissentiente,) the court allowed the plaintiff the costs of opposing the rule for that purpose.

Assumpsit by the indorsee, against the drawer and maker respectively, of a bill of exchange for 250l., and a promissory note for 300l.

(*a*) Further consideration, however, has at length inclined this court to take a more strict, and probably more correct, view of the statute, and to throw some doubt upon this "established practice;" for, in a recent case of *Creswick* v. *Harrison*, M. T. 1850 (Nov. 22), they construed the statute as merely intending to give a new and additional force to such rulers and orders as the courts were already in the habit of granting, but not to authorise them to make rules which they never thought of making before.

The writ of summons was issued on the 11th of May, 1847. The declaration was delivered on the 5th of June in the same year. The defendant having pleaded several pleas, issue was joined on the 10th of June, 1848, and notice of trial was given for the sittings after Trinity term in that year, but was afterwards countermanded.

On the 14th of December, 1848, the defendant filed a petition for relief under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the plaintiff's claim being inserted in his schedule as disputed.

On the 9th of March, 1849, the defendant was adjudged entitled to his discharge. The claim of the plaintiff was on that occasion investigated before the commissioner, who decided that it was unfounded, the securities having been satisfied in 1844.

Under these circumstances, the defendant, under an impression that the plaintiff would not further proceed with the action (*a*)[1], omitted to plead his discharge puis darrein continuance within the time prescribed by the rule of court. The plaintiff, however, having, on the **[77]** 10th of May last, given a fresh notice of trial for the first sitting in the present term, a summons was taken out before Coltman, J., at chambers, on the 18th, for leave to plead the discharge puis darrein continuance, without an affidavit that the matter of the plea arose within eight days next before the pleading thereof (*a*)[2]. The learned judge at the hearing, on the 21st, declined to make the order. The defendant, on the 22nd of May, made the cause a special jury cause, and, on the 23rd,

G. S. Evans obtained a rule nisi in the terms of the summons. He cited *Kibblewhite* v. *Reynolds* (7 Scott, 232), where the court permitted one of two defendants to plead his bankruptcy and certificate puis darrein continuance, without the affidavit required by the rule of court,—it appearing that the defendants had had reason to believe that the action would not be proceeded with; and this, although it did not appear whether or not the demand in respect of which the action was brought, was provable under the fiat.

Peacock now shewed cause. In *Sharp* v. *D'Almaine* (8 Dowl. P. C. 664), it was held, that, if a defendant is guilty of unreasonable delay in availing himself of his certificate, in an action for a debt barred by the certificate, the **[78]** court will not relieve him. There, an action on an annuity deed was commenced against the defendant in May, 1839. A fiat issued against him in June in that year, and he obtained his certificate in December. In July, he pleaded non est factum. In January following, he applied to a judge to be allowed to plead his certificate puis darrein continuance, and was refused. In March, he made another unsuccessful application at chambers. The plaintiff obtained a verdict at the next assizes, and afterwards signed judgment. The defendant applied to the court to stay proceedings, pursuant to the 6 G. 4, c. 16, s. 121, and the application was refused. Coleridge, J., there says: "When the statute says that the bankrupt shall be discharged, it must mean discharged according to some regular course known in the practice of the courts; the court in which the application is made, is to intervene, and the party seeking to have the benefit of the provision, must take the necessary steps at the proper time. If this be not held to, the consequence might be, that a bankrupt, obtaining his certificate before any plea pleaded, might first plead only to the merits, and, failing in this, might, at any later stage apply for the summary interference of the court. This point was not made in either of the cases cited above (*a*)[3]; nor is it clear, according to the facts stated, that it could have been in either: but all legal analogy shews that such a course could not be allowed. This view of the case proves what at first sight did not appear—the correctness of the answer of the lord chief justice at chambers, that this, in truth, was

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(*a*)[1] There were contradictory statements in the affidavits, as to the purport and effect of conversations between the managing clerks of the respective attorneys.

(*a*)[2] Under the rule of Hilary term, 4 W. 4, I. 2, which provides, "that, in all cases in which a plea puis darrein continuance is now by law pleadable in banc, or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be: provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order." See *Powell* v. *Duncan*, 5 Dowl. P. C. 550.

(*a*)[3] *Davis* v. *Shapley*, 1 B. & Ad. 54, and *Sadler* v. *Cleaver*, 7 Bingh. 769, 5 M. & P. 706.

substantially the same application which was made to my brother Patteson: though varied in phrase, it is really an attempt to get over the consequences of the de-**[79]**-fendant's own laches, and to have the benefit of the statute at a later stage, and in a summary manner, which in an earlier stage the defendant might have had by a regular plea, to be tried as to the facts before a jury. I think, upon this ground, the rule ought to be discharged." Here, the defendant's conduct throughout has been so vexatious that he is not entitled to ask any indulgence at the hands of the court (*a*). The plaintiff has no claim under the insolvency, her claim having been disallowed by the commissioner, whose decision she has no means of reviewing. [Wilde, C. J. Is the adjudication a bar to the action?] If pleaded, it undoubtedly is. If the defendant's case is a true one, he has a good defence to the action, independently of the discharge under the insolvent debtors acts; and no injustice will be done by discharging this rule.

Evans, in support of his rule, relied on *Kibblewhite* v. *Reynolds*.

Wilde, C. J. The ground of this application is, that it was thought unnecessary to plead the plea now sought to be put upon the record, at the time required by the rule of court, the defendant's attorneys conceiving that the plaintiff would not, under the circumstances, further proceed with the action, seeing that the defendant's discharge under the acts for the relief of insolvent debtors, was a complete bar. No suggestion is even now offered to the court that such discharge would not so operate. The only doubt on my mind has been whether the case of *Sharp* v. *D'Almaine* is an au-**[80]**-thority to shew that the court will in such a case confine its attention to the strict rights of the parties, or whether it is proper to consider in each case whether the conduct of the defendant has been such as to deprive him of what is in one sense an indulgence. I have looked attentively at the case; and I must confess that it does not appear to me to be an authority at all. My brother Patteson at first refused the application at chambers; and, when the parties afterwards went before chief justice Tindal, he treated it as an appeal from a single judge to a single judge, and on that ground declined to interfere: but he added an expression of opinion that the conduct of the defendant had been vexatious towards the plaintiff. Now, I cannot treat that as an authority, that, if the conduct of the defendant had been vexatious, that would have been ground enough for refusing to allow him to avail himself of the proposed defence. If the party comes to the court and shews that his omission to plead within the proper time was not the result of any culpable conduct on his part, and has occasioned no disadvantage to the plaintiff, I apprehend he is entitled to be let in. It seems to me that the defendant in this case had reasonable cause for not pleading his discharge within the time prescribed by the rule of court. It would have been useless for the plaintiff to go on with the action, seeing that there was a complete answer. For these reasons, I think sufficient cause has not been shewn against this rule, and consequently that it must be made absolute.

The rest of the court concurred.

Peacock, for the plaintiff, submitted, that, under the circumstances, the rule ought only to be made absolute upon payment of costs.

[81] Wilde, C. J. I am inclined to think it reasonable that the rule should be made absolute only upon the terms of the defendant paying the costs. The party has a certain time within which to plead, as of right. It is discretionary with the court to allow him to plead after that time, upon proper grounds being laid for it. But the plaintiff has a right to come and contest the defendant's reasons for not pleading according to the strict course and practice of the court, and to take the opinion of the court thereon. Here, the parties differed as to whether or not certain conversations took place between the managing clerks of the respective attorneys, and as to what would be the effect of such conversations, with reference to the sufficiency of the defendant's excuse. Besides, the plaintiff might assume, from the dictum of Tindal, C. J., in the case referred to, that it was competent to her to be heard upon that subject. I think she had a right to be heard: and I know of no case in which, a certain time

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(*a*) The affidavits in opposition to the rule shewed that the plaintiff had been put to considerable expense in getting rid of an injunction to stay proceedings in the action,—defendant's bill having been dismissed with costs, which costs had never been paid by him.

being limited for an act to be done, and the court having a discretion as to allowing it to be done afterwards, the party coming to oppose the grant of such indulgence is not allowed his costs. I therefore think this rule should be made absolute, but upon payment of costs.

COLTMAN, J. I also think the defendant must pay the penalty of his omission to avail himself at the proper time of the defence he now proposes to place upon the record. The party who has by his neglect caused the waste of money, should be made to bear the loss.

MAULE, J. I agree that the person who has caused the waste of money, should bear the loss of it. But in this case I think it is the plaintiff, and not the defendant, who has occasioned unnecessary and useless expense. The plaintiff's claim has already been inquired **[82]** into before a competent tribunal, and has been negatived. The defendant, therefore, had a right to anticipate, and did anticipate, that the plaintiff would not further proceed with the action. A man may very reasonably presume that another will do that which it is his interest as well as his duty to do. I therefore think it was a perfectly correct course for the defendant to abstain from incurring the expense of pleading his discharge puis darrein continuance, within the eight days required by the rule of court. The decision, however, to which the court is now about to come, will make it necessary for a prudent man in all such cases to incur that expense. It is said to be an invariable rule, that, if a time is limited for taking a step, and the court in its discretion sees fit to permit it to be taken at a later period, the indulgence is only granted on payment of costs by the party applying for it. But I am not aware of the existence of any such general rule: and, if there be any such, I cannot think this case falls within it. Continuances being abolished, or nearly so, it became necessary to provide for pleading puis darrein continuance. The rule of court requires that such a plea shall be accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, unless the court or a judge shall otherwise order. That does not give the court or the judge any original power to allow the plea: but, if an order of the court or of a judge is obtained for the purpose, it is not the allowance of a favour, but a matter of right. It seems to me, that, where the matter to be pleaded affords an unquestionable answer to the action, it is the defendant's duty to obtain an order for the plea only if he finds the plaintiff is going on. And in this he is not asking any thing in the nature of a favour or indulgence; he places himself in the situation of a person seeking to enforce a right,—to avail himself of **[83]** a perfectly legal defence, to which he is driven by the conduct of the opposite party. I think the defendant here was quite in time, and that, if the plaintiff chose to come and oppose an undeniable right, she ought not to call upon the defendant to pay her costs. I think the costs of this rule should, like the costs of an order for time to plead, and the like, be costs in the cause.

CRESSWELL, J. I think this is, in substance, an application to the indulgence of the court, to relieve the defendant from the consequence of his omission to plead in proper time, and therefore that the defendant should pay the costs.

Rule absolute, on payment of costs.

The master, in taxing the plaintiff's costs, upon the rule, allowed only the costs of opposing the motion.

June 11.—Peacock moved for a rule to shew cause why the master should not review the taxation. It appeared, that, after Coltman, J., had refused to make any order upon the summons of the 18th of May last, the plaintiff's attorney prepared and delivered briefs on the issues as they then stood. It was therefore submitted, that, inasmuch as, in consequence of the new plea allowed to be pleaded, the briefs would require to be altered, the costs of preparing those briefs should have been allowed as part of the costs of and occasioned by the rule. [Maule, J. The plea is a plea in discharge. Does the plaintiff mean to go to trial?] Yes. [Maule, J. Then, I do not think the costs now asked for should be given.]

Per curiam. Rule refused.

[84] CARPENTER AND ANOTHER v. HALL. June 2, 1849.

Obtaining time to plead (without any order or consent-summons), is a waiver of any irregularity in the rule to plead.

The declaration in this cause was delivered on the 9th of May, with a rule to plead intituled "*Carpenter* v. *Hall*." On the 14th,—the day on which the rule to plead, if correct, would have expired,—the defendant obtained from the plaintiff's attorney two days' further time to plead; and, on the 17th, no plea having been delivered, judgment was signed, and execution issued, and a levy under it made on the 21st. On the 23rd,

Parry obtained a rule nisi to set aside the judgment, and all subsequent proceedings, for irregularity. The affidavit upon which the rule was obtained, stated, that the declaration was filed on the 9th of May, 1849, and that judgment was signed on the 17th, as for want of a plea; that there had been no rule to plead given in the cause, nor had there been any order for time, or other proceeding in the cause which would render the giving a rule to plead unnecessary; but that, upon searching the files of the court, the deponent found, that, on the said 9th of May, a rule to plead was given by the plaintiff's attorney in a cause of "*Carpenter* v. *Hall;*" and that the defendant had a good defence to the action upon the merits. The case of *Warne* v. *Beresford* (4 Dowl. P. C. 361) was cited.

Byles, Serjt., now shewed cause. There has been no irregularity: and, if there has been, it has been waived by the act of the defendant in obtaining a **[85]** consent to further time to plead, and by the delay in coming to the court. The irregularity complained of is, that judgment was signed without a rule to plead,—the entry in the rule book being "*Carpenter* v. *Hall*," instead of "*Carpenter and Another* v. *Hall*." In *Christie* v. *Walker* (1 Bingh. 187, 7 J. B. Moore, 599), where the plaintiff had signed judgment as for want of a plea, because the rule to plead several matters was erroneously intituled "*Christie* v. *Walker*," instead of "*Christie* v. *Walker and Another*," the court set aside the judgment without costs, it being sworn that the pleas were true, and that the defendant had a good defence. *Davies* v. *Edmeades* (1 Dowl. N. S. 423) comes very near to this case: there, the rules to plead in two separate actions, being intituled "*Davies* v. *Tidmarsh*," and "*Same* v. *Edmeades*," it was urged that there was no such cause as "*Same* v. *Edmeades;*" but the court held it to be no irregularity, there being no affidavit on the part of the defendant that he had been misled. There is no suggestion here that the defendant was misled.

Assuming this to have been an irregularity, the defendant was bound to complain of it promptly. [Wilde, C. J. What amounts to a waiver of an irregularity in a rule to plead? Is taking out a summons for time to plead, a waiver? Or, is simply asking for time, a waiver?"] Taking out a summons for time, is a waiver: *Nugee* v. *M'Donell* (3 Dowl. P. C. 579); *Bolton* v. *Manning* (5 Dowl. P. C. 769): and so, it is submitted, is asking for, and obtaining time. [Cresswell, J. In *Nias* v. *Spratley* (4 B. & C. 386, 6 D. & R. 390), it was held, that, after a judge's order making it imperative for a defendant to plead within a given time, and no plea being pleaded within that time, the plaintiff may sign **[86]** judgment without giving a rule to plead.] The defendant was bound to come promptly after the irregularity complained of was committed: and he must be assumed to have known of it; or, at all events, it lay on him to shew that he did not. In Archbold's Practice (8th edit., by Chitty, p. 1273) it is said: "It rests upon the party complaining of the irregularity to shew that he had no knowledge of it: *Anderdon* v. *The Earl of Stirling* (2 Dowl. P. C. 267); *Herbert* v. *Darley* (4 Dowl. P. C. 726). And it would seem to follow from one case, that, at least where the irregularity is apparent on the face of the proceeding, the applicant is bound to come promptly after he knows of the proceeding, and not merely after he knows of the irregularity itself:" *Esdaile* v. *Davis* (6 Dowl. P. C. 465); *Tarber* v. *French* (5 N. & M. 658). [Maule, J. Having the declaration, or the notice of it, the presumption is that the defendant knows of the irregularity.]

Parry, in support of the rule. This clearly was not a rule to plead in the cause. In *Warne* v. *Beresford*, it was distinctly held that a rule to plead in a wrong name, is a nullity. If an order had been obtained for time to plead, or even a consent indorsed upon a summons, it may be conceded that the irregularity would have been waived. But nothing of the sort has occurred here. In no case has it been held that the mere asking for time, waives an irregularity of this kind: nothing less than a step which puts the opposite party to expense, has ever been held to have that effect. [Wilde, C. J. That is not so: agreements of parties have been held, over and over again, to operate as a waiver of irregularities.] There must be an act done. [Maule, J. The defendant has obtained all the advantage he would have obtained from a judge's order, or an indorsement [87] on a summons.] Possibly he may, but the plaintiff was not bound to give it (*a*)[1].

Wilde, C. J. It seems to me that this case falls within a very ordinary rule. The defendant asks us to set aside the judgment, on the ground that there has been no rule to plead. The plaintiff's answer to that, in effect, is, "I did not think it necessary to take steps to compel the defendant to do that which he agreed to do." The affidavit upon which the motion is founded is made by a person who is perfectly well aware of the answer that might be expected. He says that "there hath been no rule to plead given in this cause, nor hath there been any order for time, or other proceeding in this cause which would render the giving a rule to plead unnecessary,"—a very unusual clause to find in an affidavit of this kind. The defendant applied for and obtained the assent of the plaintiff's attorney to his having two days' further time to plead. He has had all the benefit that was contemplated. The effect of that agreement, I think, was, to waive any previous irregularity in the rule to plead. Irregularities in process are constantly waived by agreement of the parties. It appears to me, therefore, that this judgment was perfectly regular, notwithstanding there was no rule to plead. And, coming, as he does, to set aside the proceedings, against good faith, I think the rule should be discharged with costs.

Parry proposing,—merits being sworn to,—to bring the money into court within a week, and pay the costs, the court on those terms made the

Rule absolute accordingly.

[88] Greene *v.* Reece. June 19, 1849.

The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act.

Assumpsit. The declaration stated that the defendant was indebted to the plaintiff in the sum of 400l., for the work and labour, care, diligence, journeys, and attendances of the plaintiff, before then done, performed, and bestowed by the plaintiff as the attorney and solicitor of and for the defendant, and otherwise for the defendant, on his retainer, and at his request, and for fees due and of right payable from the defendant to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work and labour, for the defendant, and at his request; and for money lent, &c.; and for money had and received, &c.

There was a second count, for money found due upon an account stated (*a*)[2].

The defendant pleaded, amongst other pleas,—fourthly, as to the sum of 63l. 8s. 6d., parcel of the said sum of 400l. in the first count mentioned, that the said debt or sum of 63l. 8s. 6d., parcel, &c., was and is composed, and consists, of certain fees, rewards, and disbursements alleged to be due to the plaintiff for and in respect of business, matters, and things done in England by him, the plaintiff, as an attorney and solicitor for him, the defendant, after the passing of the [89] said act of parliament (6 & 7 Vict. c. 73, referred to in a preceding plea) relating to attorneys and solicitors practising in England and Wales; that the plaintiff had not, at the times when the

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(*a*)[1] "Asking for time, is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular." Per Parke, J., *Anonymous*, 1 Dowl. P. C. 23. It seems, rather an assent to the further, progress of the cause, whether the step was irregular or not.

(*a*)[2] The particulars of demand, which were annexed to the paper-book, claimed 270l. 0s. 2d. "for work done during the years 1847 and 1848, by the plaintiff, as an attorney, solicitor, and otherwise, materials provided, money paid, &c., the full particulars whereof were contained in a signed bill of costs delivered to the defendant on the 6th of September, 1848," and 67l. for money paid to the defendant, or at his request.

said business, matters, and things were done by him as such attorney and solicitor as aforesaid, or at any or either of such times, obtained a stamped certificate authorising him to practise as such attorney or solicitor, which was then in force; and that the said business, matters, and things, and each and every of them, were and was done while the plaintiff was without such certificate as last aforesaid,—verification.

To this plea, the plaintiff demurred specially, assigning the following causes,—that it was not alleged in, nor did it appear from, the plea, that the said business, matters, and things therein mentioned were done by the plaintiff as an attorney or solicitor in or relating to the suing, prosecuting, defending, or carrying on of any action or suit, or other proceeding or proceedings, in any court whatsoever; that, although the first count related, not only to the work and labour, care, diligence, journeys, and attendances of the plaintiff, done, performed, and bestowed by the plaintiff as an attorney and solicitor, but also to work and labour, care, diligence, journeys, and attendances done, performed, and bestowed by the plaintiff otherwise than as an attorney or solicitor, the said plea was pleaded generally as to the sum of 63l. 8s. 6d., parcel of the sum of money in the said first count mentioned, without any limitation of the said fourth plea to such of the said work and labour, care, diligence, journeys, and attendances in the said first count mentioned, as were done, performed, and bestowed by the plaintiff as an attorney and solicitor, and not otherwise;—and that, although the first count included causes of action for **[90]** money lent by the plaintiff to the defendant, and for money received by the defendant for the use of the plaintiff, as to which causes of action the plea could be no answer, the said plea was pleaded generally as to the said sum of 63l. 8s. 6d., parcel, &c., without excepting or excluding from the application of the said fourth plea such last-mentioned causes of action, &c.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The main objection to the plea is, that it does not shew that the work and labour was done by the plaintiff as attorney or solicitor in the conduct of any proceeding at law or in equity: it merely alleges that the debt as to which the plea is pleaded, consists of fees, rewards, and disbursements alleged to be due to the plaintiff for and in respect of business done by him as an attorney and solicitor for the defendant, after the passing of the 6 & 7 Vict. c. 73, and that, at the time the said business was so done, the plaintiff was uncertificated. The defence is founded upon the 27th section of the statute, which enacts "that no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit or any proceedings in any of the courts aforesaid (*a*), without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid." This question has already been before the court of Exchequer in a case of *Richards* v. *Lord Suffield* (2 Exch. 616), where it was held that the 26th **[91]** section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. Parke, B., in delivering the judgment of the court, said: "The question is, what meaning we are to attribute to the words of reference in the expression 'as an attorney as aforesaid.' We think they must necessarily refer either to an attorney or solicitor acting as described in the commencement of that section, or to the previous description of an attorney and solicitor in the 2nd section; and, in the former case, the disability will be confined to suits for fees, &c., due for business done as an attorney, in suing, prosecuting, defending, or carrying on any action or suit, or any proceedings, in any of the courts aforesaid; in the latter, for fees due to an attorney, &c., acting as such in suing out any writ or process, or commencing, carrying on, soliciting, or defending any action, suit, or other proceeding in the name of any other person, or in his own name, in any of the courts mentioned in the 2nd section, including proceedings before one or more justices; so that it really makes no difference whether the words 'as aforesaid' relate either to the beginning of the 26th section or to the 2nd. To one or the other they certainly do refer; and, in either, the

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(*a*) The superior courts of common law and equity.

disability to sue is confined to fees, &c., connected with a suit. It was, however, argued that the difference of the language of the legislature, in the 35th and 36th sections, from that in the 26th, indicated a different intention in the legislature. It appears to us that the words of reference 'as an attorney or solicitor as aforesaid' confine the liability to the same class of fees, rewards, and disbursements as those pointed **[92]** out expressly in the 35th and 36th sections. This being so, the plea is, in our opinion, defective, in not averring that the fees, &c., were due to the plaintiff as an attorney, in prosecuting or defending a suit or proceeding in a court; they are not even stated to be due to him as an attorney-at-law, and they might be payable to him as an attorney acting before arbitrators or a compensation jury, or transacting business under a power of attorney for the defendant." It is impossible to distinguish that case from the present. A party may be the attorney of another, without being an officer of any court.

J. Brown, contrà, prayed leave to amend; which was granted, upon the usual terms.

Rule accordingly.

ELIZABETH DAKIN, Administratrix of William Dakin, Deceased, *v.* BROWN AND MUNT. June 19, 1849.

In case against engineers for so negligently constructing and erecting a machine, that it exploded, and killed the husband of the plaintiff, the defendants pleaded, that, at the time of the accident, the machine was unfit for use, by reason of the dampness of the brick-work in which it was set; that they so informed the deceased, and cautioned him not to use it; and that, by reason of the premises, the machine exploded, as in the declaration mentioned,—concluding with a verification:—Held, that the plea did not present a confession and avoidance of the whole cause of action, but was an informal traverse of a part only, and therefore bad.

Case. The declaration stated that William Dakin, in his life-time, to wit, on the 17th of January, 1847, retained and employed the defendants, at their request, in the way of their trade and business, to make and construct for him the said William Dakin a certain coffee-roasting apparatus, and to erect and affix the **[93]** same for him in and upon certain premises of him the said William Dakin, to wit, situate, &c., for the purpose of roasting coffee therewith, for certain pecuniary remuneration and reward to be therefore paid to the defendants by the said William Dakin; that the defendants then, to wit, on the day and year aforesaid, accepted the said retainer and employment, and then agreed with the said William Dakin, to make and construct, erect, and affix the said coffee-roasting apparatus for the purpose, upon the terms, and in the manner aforesaid; that afterwards, to wit, on the day and year aforesaid, the defendants did, in pretended pursuance of their said retainer and employment, and in pretended performance of their said agreement, make and construct a certain coffee roasting apparatus, for the purpose of roasting coffee therewith, and did then erect and affix the same in and upon the said premises of the said William Dakin for the said purpose; nevertheless, that the defendants, disregarding their duty in and about the premises, behaved and conducted themselves so wrongfully, negligently, carelessly, and improperly in and about the said making and constructing, erecting and affixing of the last-mentioned apparatus, and made and constructed the same of such bad, insufficient, and improper materials, and in so bad, improper, and unskilful a manner, and erected and affixed the same so badly, improperly, and unskilfully, and conducted themselves with such gross carelessness, negligence, and want of skill, that, by and through the defendant's wrongful acts, neglect, and default, in and about the premises, and not otherwise, the said apparatus so made and constructed, erected, and affixed by the defendants as aforesaid, was not reasonably fit for the said purpose of roasting coffee therewith; but that, on the contrary thereof, the same was then, by and through the defendant's said wrongful acts, neglect, and default, and not otherwise, **[94]** wholly unfit and improper for the said purpose; and that, by reason thereof, and of the defendant's said wrongful acts, neglect, and default, and of the said bad and improper making, construction, erection, and affixing of the said apparatus, and not otherwise, the said apparatus afterwards, and in the life-time of the said William Dakin, and whilst he was using the same for the purpose of roasting coffee therewith, and not otherwise, in a lawful, proper, and reasonable manner in that behalf, to wit, on the day and year aforesaid, without any neglect or default of the said William Dakin, exploded and was shattered and blown to pieces; and that thereby, and by means thereof, and not otherwise, the said William Dakin, in his life-time, was then and there, and within twelve calendar months before the commencement of this suit, by reason thereof, and not otherwise, killed: To the damage, &c.; and thereupon the plaintiff, as such administratrix as aforesaid, for the benefit of herself, the wife of the said William Dakin, and of Mary Dakin, his infant daughter, of the age of fourteen years, and of Elizabeth Emma Dakin, his infant daughter, of the age of ten years, according to the form of the statute in such case made and provided, brought her suit, &c.—Profert of letters of administration.

The defendants pleaded, amongst other pleas—fourthly, that, at the said time of the said using by the said William Dakin of the said coffee-roasting apparatus, and of the same exploding and being shattered and blown to pieces as in the declaration mentioned, the said coffee-roasting apparatus was in a state unfit and improper and unsafe and dangerous to be used for the roasting of coffee, by reason of certain brick-work which had just before then been necessarily erected for and in and about the fixing of the said coffee-roasting apparatus, being then in a wet and damp state and condition, from the same having been then so recently erected as [95] aforesaid, and from a sufficient time for the necessary drying thereof not having then elapsed, to wit, since the said erecting thereof,—of all which premises in that plea mentioned, the defendants, before and at the time of the said using by the said William Dakin of the said coffee-roasting apparatus, to wit, on the day and year in the declaration in that behalf mentioned, gave notice to the said William Dakin, and just before the said time of his said using of the said coffee-roasting apparatus, to wit, on the day and year in the declaration in that behalf mentioned, informed the said William Dakin, that, for the cause aforesaid, the said apparatus then was not, and would not be, fit to be used on that day, for the roasting of coffee, and requested and warned and cautioned the said William Dakin not so to use the same; and that, by reason of the same premises, the said coffee-roasting apparatus, upon and in the said using thereof by the said William Dakin as aforesaid, exploded and was shattered and blown to pieces, as in the declaration mentioned,—verification.

To this plea, the plaintiff demurred specially, assigning for causes, amongst others, the following,—That the plea neither properly traversed, nor confessed and avoided, the declaration, or any of the matters therein; that, as a traverse, it was bad for argumentativeness, inasmuch as it alleged matter which might be inconsistent with the plaintiff's right of action, without denying in direct and positive terms any of the material allegations of the declaration; and that it was also bad, as a traverse, for concluding with a verification;—that it was bad as in confession and avoidance, for not giving colour to the plaintiff, or confessing any primâ facie or colourable right in her to maintain the action, and also, if it did confess any colourable right, for not sufficiently avoiding it;—that, either it ad-[96]-mitted negligence in the defendants' causing the intestate's death, or it did not; if it did admit such negligence, the matter set forth in the plea was immaterial, idle, and irrelevant, and afforded no answer or ground of defence whatever to the action; if it did not admit it, it in effect denied the alleged breach of duty, and amounted to not guilty; if it neither admitted nor denied the alleged breach of duty of the defendants, it was bad on that ground;—that, if it was intended to exonerate the defendants from liability, by imputing the intestate's death to his own act, it amounted to the general issue; if it did not intend to exonerate the defendants, it was immaterial, and tended to an immaterial issue;—that, if the plea was not co-extensive with the general issue, not guilty, it tended improperly and unfairly to narrow the issue, and was bad on that ground;—that it was ambiguous, as it might or might not mean that the explosion was caused by the alleged dampness of the brickwork, or by the negligence of the intestate; that, if it was intended to mean that the death of the deceased was the result of either of those causes, it amounted to the general issue; that, if it did not mean this, it was no defence; and that, in either view, it was bad, for not shewing clearly what it meant, or was intended to mean;—that it did not shew that the intestate's death was caused solely by or through the alleged premises, nor did it shew to what degree they were contributive to the death, or enable the court to determine whether it was the result of those causes or of the defendants' negligence;—and that the plea amounted to the general issue.

Joinder in demurrer.

Needham, in support of the demurrer. Whatever the meaning of the plea in question,—whether it sets [97] up negligence on the part of the deceased, or that his own voluntary act was contributory to the accident which caused his death,—it is equally open to objection. In *Bridge* v. *The Grand Junction Railway Company* (*a*)[1], in case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was riding, and injured him,—the defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendants' negligence, the defendants' train ran against the other, and caused the injuries to the plaintiff: and it was held, that the plea was bad in form, as amounting to not guilty, and in substance, for not shewing, not only that the parties under whose management the plaintiff was, were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. *Holden* v. *The Liverpool New Gas Company* (ante, vol. iii. p. 1) is also an authority to shew that this plea amounts to not guilty. There, a gas company incorporated by act of parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied gas to a house belonging to the plaintiff; the only means of shutting it off being by a stop-cock within the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the company that he should not require any further supply; and one of their workmen, at his request, removed a chandelier from one of the rooms, leaving [98] the end of the pipe properly secured. The internal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas by some unexplained means escaped, and an explosion took place, by which the house was considerably damaged. In case against the company, alleging a breach of duty on their part, in not taking proper means to prevent the influx of gas into the house,—it was held, upon the authority of *Bridge* v. *The Grand Junction Railway Company*, that negligence on the part of the plaintiff, was an admissible defence under not guilty. If that be so, it is difficult to see how the plea, confessing what it must be admitted it does confess, shews any avoidance of the matter confessed. On the other hand, the declaration avers that the accident happened through the negligence and unskilfulness of the defendant, and not otherwise: the plea, admitting that, sets up matter which at the best only shews a degree of negligence on the part of the deceased, or something which, by negativing what is alleged in the declaration, removes the defendant's liability. The plea improperly narrows the issue to be presented to the jury. [Maule, J. It is in that respect more favourable for the plaintiff: no doubt, if the defendant were put to his election between this plea and not guilty, he would choose the latter.] The plea is bad in substance. There is nothing to shew that there was any negligence on the part of the deceased, or that the accident might have been averted by the use of ordinary and reasonable care on his part. Upon this point, the judgment of Parke, B., in *Bridge* v. *The Grand Junction Railway Company*, is conclusive.

Dowling, Serjt., contrà (*a*)[2]. The plea is good in sub-[99]-stance and in form: in truth, it is framed in strict accordance with the suggestion thrown out by Parke, B. in *Bridge* v. *The Grand Junction Railway Company*. In that case, as in the case of *Holden* v. *The Liverpool New Gas Company*, the substance of the defence was, that the

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(*a*)[1] 3 M. & W. 244, S. C. nom. *Armitage* v. *The Grand Junction Railway Company*, 6 Dowl. P. C. 340. And see *Gough* v. *Bryan*, 2 M. & W. 770; *Woolf* v. *Beard*, 8 C. & P. 373.

(*a*)[2] The points marked for argument on the part of the defendants, were,—"That the defence contained in the fourth plea, could not be given in evidence under not guilty;—that the plea was a good plea in confession and avoidance, confessing the primâ facie case charged against the defendants in respect of the unfitness, at the said time when, &c., of the apparatus, for the purpose in the declaratoin mentioned, and avoiding the same by reason of the special circumstances and notice mentioned in the plea:—and that, even if the matter of defence contained in the fourth plea were admissible under not guilty, the plea was good, inasmuch as it gave sufficient colour."

plaintiff, or those for whose acts he was responsible, was contributory with the defendant to the damage. Here, the defendants seek to excuse themselves from the consequences of their unlawful act, by reason of the negligent conduct of the deceased. The plea contains a good confession and avoidance. It admits, that, by reason of the dampness of the brickwork, the apparatus was unsafe: it admits an imperfect performance of the defendants' duty. [Cresswell, J. The charge in the declaration is, that the intestate's death was caused by the negligence and want of skill of the defendants. Does the plea admit that?] Not in terms. [Cresswell, J. Then it does not confess the cause of action. Maule, J. The plea certainly does not confess the whole of the cause of action; and, if it traverse a part, it should conclude with a verification.]

Coltman, J. In substance, the fourth plea is a traverse of part of the cause of action, informally pleaded.

The rest of the court concurring,

Judgment for the plaintiff (*a*).

[100] Masters *v.* Ibberson. June 19, 1849.

[S. C. 18 L. J. C. P. 348.]

To a count on a promissory note made by the defendant, payable to the order of A., and indorsed by A. to B., and by B. to the plaintiff, the defendant pleaded that the note was obtained from him by D. and others in collusion with him, by fraud; that there was no consideration for the indorsement by A. to B.; and that the plaintiff had notice of the fraud:—Held, bad, there being nothing to impeach A.'s title to the note.—A further plea stated that the consideration for the note was the forbearance to prosecute the defendant's son upon a charge of felony,—not averring that a felony had been committed, or affecting A., the payee, with notice of the alleged illegality of the consideration:—Held, bad.

Assumpsit. The first count stated that the defendant, on the 19th of August, 1848, made his promissory note in writing, and thereby promised to pay to the order of Mary Jones, 85l., five months after the date thereof,—which period had elapsed, and the said note had become due and payable before the commencement of this suit,—and then delivered the said note to the said Mary Jones, who then indorsed the same to a person on the said note designated as W. L. Vincent, who then, by that designation, indorsed the same to the plaintiff; and the defendant then promised the plaintiff to pay him the amount of the said note, according to the tenor and effect thereof, and of the said indorsements.

Fifth plea,—that the said promissory note in the said first count mentioned, was obtained from the defendant by one George Bromfield, and others in collusion with him, by fraud and covin practised upon him the defendant by the said George Bromfield and the said others in collusion with him; and that there never was any value or consideration for the said indorsement of the said note by the said Mary Jones to the said person designated as W. L. Vincent, or for the said indorsement by him to the plaintiff, or for the said W. L. Vincent, or the plaintiff, being the holder of the said note,—verification.

Special demurrer, assigning for causes,—that the **[101]** plea contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged fraud, or had any notice of it, or was not a bonâ fide holder for value;—that, if the general allegation of there never having been any consideration for the plaintiff's being the holder of the note, were taken to include absence of consideration to her, then the plea was bad for generality, in not shewing how she held it, whether as trustee for Bromfield or any other parties to the alleged fraud, or otherwise, as, by way of loan to her, or for her accommodation; and, in such case, the plea was also bad for duplicity, as setting up two distinct defences, the one of fraud and want of consideration as respected some only of the parties to the note, and the other the defence of total want of consideration as respected all the parties to the note, including the payee and first indorser.

Sixth plea,—that the said promissory note in the first count mentioned, was

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(*a*) Vide post, p. 115.

obtained from the defendant by the said George Bromfield, and others in collusion with him, by fraud and covin practised upon him, the defendant, by Bromfield, and the said others in collusion with him; and that the said W. L. Vincent and the plaintiff, respectively, before and at the several times when the said note was first indorsed to them respectively, and when each of them first received the same, had notice of the premises in this plea aforesaid,—verification.

Special demurrer, assigning for causes,—that the plea did not aver that Mary Jones, the payee of the note in the first count mentioned, did not give full value for the note, or had any notice of the fraud at the time she took it, nor did it shew in what character she held the note, whether as trustee for Bromfield or any of the said other parties, or otherwise.

[102] Seventh plea,—that the said promissory note in the said first count mentioned was obtained from the defendant by the said George Bromfield, and others in collusion with him, by fraud and covin practised upon the defendant by Bromfield and the said others in collusion with him; and that the said note was payable and overdue, according to the tenor and effect thereof, before and at the time when the same was first indorsed by Mary Jones to W. L. Vincent, and before and at the time when the same was first indorsed by Vincent to the plaintiff, and before and at the time when Vincent and the plaintiff, respectively, first took and received the same,—verification.

Special demurrer, assigning for cause,—that it was not shewn in the plea, that Mary Jones, the payee of the note in the first count mentioned, was not a bonâ fide holder for value of the said note, or that she had any notice of fraud alleged, if any existed, or could not have sued upon the note, or had not capacity to transfer a right of action to the party to whom she indorsed it, or in what character she held it.

Eighth plea,—that, just before the making of the said promissory note in the said first count mentioned, to wit, on the 19th of August, 1848, one George Bromfield accused one Christopher Ibberson, the son of the defendant, and then being the servant of the said George Bromfield, of a certain felony, to wit, of having feloniously stolen, taken, and carried away divers moneys of the said George Bromfield, and then threatened to indict and prosecute the said Christopher Ibberson for the said supposed felony; that thereupon the defendant, in consideration that the said George Bromfield would forbear to prosecute the said Christopher Ibberson for the said supposed felony, made the said promissory note in the said first count mentioned, and there never was any other consideration for the making of the said note, [103] or for the payment by the defendant of the amount thereof, or of any part thereof*; that the said Mary Jones indorsed the said note to the said person thereon designated as W. L. Vincent, without any value or consideration; and that the said person designated as W. L. Vincent indorsed the same to the plaintiff without any value or consideration, and there never was any value or consideration either for the indorsement of the said note by Mary Jones to the said W. L. Vincent, or for the said indorsement thereof by the said W. L. Vincent to the plaintiff, or for the said W. L. Vincent or the plaintiff being the holder of the said note,—verification.

Special demurrer, assigning for causes,—that it did not appear on the face of the plea, whether Christopher Ibberson was or was not guilty of felony: so that it was left uncertain whether the defence intended to be set up was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a bonâ fide holder for value of the said note;—that, if the general allegation of there never having been any consideration for the plaintiff's being the holder of the note, were taken to include absence of consideration to her, then the plea was bad for generality, in not shewing how she held it, whether as trustee for Bromfield or any of the other parties to the alleged illegal arrangement, or otherwise, as, by way of loan to her, or for her accommodation;—and that, in such case, the plea was also bad for duplicity, in setting up two distinct defences, the one, of illegality and want of consideration as respected some only of the parties to the note, and the other, the defence of total want of consideration as [104] respected all the parties to the note, including the payee and first indorser.

Ninth plea,—like the eighth, down to the asterisk, except that the ninth plea stated that Christopher Ibberson, the son, was the servant of the defendant. It then alleged, that there never was any other consideration for the making of the said note, or for the payment by the defendant of the amount thereof, or of any part thereof; and that the said person designated as W. L. Vincent, and the plaintiff, before and at the several times when the said note was first indorsed to them respectively, and when they respectively first received the same, had notice of the premises in this plea aforesaid,—verification.

Special demurrer, assigning for causes,—that it did not appear on the face of the plea, whether the said Christopher Ibberson was or was not guilty of felony; so that it was left uncertain whether the defence intended to be set up, was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a bonâ fide holder for value of the said note; nor did it shew in what character she held it, whether as trustee for Bromfield or any of the other parties to the alleged illegal arrangement, or otherwise, or that she had not full capacity to transfer by indorsement a right of action upon the said note.

Tenth plea,—like the eighth plea, down to the asterisk: it then proceeded to aver, that the said note was payable and overdue, according to the tenor and effect thereof, before and at the time when the same was first indorsed by Mary Jones to W. L. Vincent, and before and at the time when the same was first indorsed by **[105]** Vincent to the plaintiff, and before and at the respective times when Vincent and the plaintiff respectively first took and received the same,—verification.

Special demurrer, assigning for causes, that it did not appear upon the face of the plea, whether the said Christopher Ibberson was or was not guilty of felony; so that it was left uncertain whether the defence intended to be set up was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a bonâ fide holder for value of the said note, or could not have sued upon it herself, or had not capacity to transfer a right of action upon it to the person to whom she indorsed it, or anything to shew that the said indorsement was not a valid one; and that the plea was defective, in not shewing how she held the note, whether as trustee for Bromfield, or otherwise, as, by way of loan to her, or for her accommodation.

Joinder in demurrer.

Fortescue, in support of the demurrers. The fifth, sixth, and seventh pleas allege that the note was obtained from the defendant by fraud, and that there was no consideration for the indorsement: but there is nothing to implicate Mary Jones, the payee, in the fraud, or to affect her with notice. A bill or note payable to the order of a person, is payable to himself: *Sheldon* v. *Occarsen* (Bayley on Bills, 6th edit. p. 414); *Smith* v. *M'Clure* (5 East, 476, 2 J. P. Smith, 43). [Cresswell, J. There is no doubt about that.] Then, here is a party on the record whose title as a bonâ fide **[106]** holder stands unimpeached. In *May* v. *Chapman* (16 M. & W. 355), to an action by indorsee against A. and B. as drawers of a bill of exchange, indorsed to C., and by him to the plaintiff,—A. pleaded that he and B. were in co-partnership as brewers; that B. made and indorsed the bill, using the name of the firm, in fraud of A., and not for the purposes of the co-partnership, but for his own private purposes, viz. for a private debt due from him to C., and without the knowledge or consent of A.; that there was no consideration or value for him, A., for the drawing or indorsement of the bill; that, at the time of the indorsement to him, C. had knowledge and notice of the premises; and that, at the time when the note was indorsed and delivered to the plaintiff, he had full knowledge and notice of all the premises in the plea aforesaid. The plaintiff replied, that, at the time when the bill was indorsed and delivered to the plaintiff, he had not any such knowledge or notice as in the plea mentioned,—whereupon issue was joined. At the trial, the jury found that C. had no knowledge of the original fraud in the drawing of the bill, but that the plaintiff, at the time of the indorsement to him, had knowledge of that fraud: and it was held that the plea was not proved. *Gill* v. *Cubitt* (3 B. & C. 466, 5 D. & R. 324, 1 C. & P. 163, 487),—where it was held that a broker who had taken a bill under circumstances of suspicion, could not recover on it,—being there cited, Parke, B., observed that that case must be considered as overruled. One who takes by indorsement from a party having good title, must be presumed to be an innocent indorsee: *Bramah* v. *Roberts* (3 N. C. 963, 5 Scott, 172). The plaintiff could neither traverse these pleas nor take issue on them.

The eighth, ninth, and tenth pleas are open to the **[107]** same objection, and also to another, viz. that they do not allege that a felony had in fact been committed.

Prentice, contrà. No one can avail himself of a contract that is based in fraud. In *Cornfoot* v. *Fowke* (6 M. & W. 358), in assumpsit for the non-performance of an agreement to take a ready-furnished house, the defendant pleaded that the plaintiff caused and procured the defendant to enter into the agreement, by means of fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; on which issue was joined. It appeared at the trial, that the plaintiff had employed one C. to let the house in question, and the defendant, being in treaty with C. for taking it, asked him "if there was any objection to the house," to which C. answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not. It was held (per Lord Abinger, C. B.), that it was not sufficient, to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that, as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. Parke, B., in the course of the argument, says: "The difficulty here is, that, under this plea, you are to make out fraud in the plaintiff or his agent; but it is not shewn that the agent **[108]** knew of the existence of this objection to the house, and the plaintiff did not make the representation, or know of its having been made. If you could make out that the plaintiff knew that Clarke was ignorant of it, and had employed him on purpose that he might make that answer, then it might have been a fraud in the plaintiff." The counsel then submitted "that the knowledge of the principal is the knowledge of the agent, and vice versâ; if so, it is the same as if the representations were made by the plaintiff himself. In *Fitzherbert* v. *Mather* (1 T. R. 12), it was so held: and Ashhurst, J., says, 'On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows:' and Buller, J., says, 'Though the plaintiff be innocent, yet, if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer.' In *Doe d. Willis* v. *Martin* (4 T. R. 39), the doctrine that the knowledge of the agent is the knowledge of the principal, is fully recognised; and Lord Kenyon there says, 'The maxim that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity.'" Upon which Parke, B., adds: "That was the fraud of the agent, and it cannot be disputed that that would vitiate the transaction." So, here, the person by whom the fraud was committed must be assumed to be the agent of Mary Jones: and it is quite clear, that, if the contract is obtained by the fraud of the agent, the principal cannot enforce it. In *Raphael* v. *Goodman* (8 Ad. & E. 565, 3 N. & P. 547) to an action by a sheriff against an execution-creditor, on a bond of indemnity for seizing goods under a fi. fa., the defendant pleaded **[109]** that the bond was obtained from him, by the plaintiff and others in collusion with him, by fraud and misrepresentation: it was held that the defendant supported this plea by proof that the sheriff's officer who executed the process, obtained the bond by fraud and misrepresentation, though the plaintiff did not appear to have been personally cognisant of any part of the transaction. [Cresswell, J. I cannot discover that that case has the slightest bearing upon this.] There is enough on the face of the fifth plea to shew that Mary Jones could not have sued upon this note. [Maule, J. The plea does not state that the delivery of the note to Mary Jones was obtained by fraud: it merely states that the note, in the course of its existence, was the subject of a fraud by Bromfield.] Delivery is an essential part of the making of a note. And, if the delivery in the declaration mentioned was obtained by the fraud even of a stranger, Mary Jones could found no title upon it.

The eighth, ninth, and tenth pleas are clearly good. They state, in substance, that the consideration for the note was, the stifling a prosecution for felony: and the transaction is by proper averments brought home to the plaintiff. It is no objection, that the pleas do not distinctly allege that a felony had actually been committed: it is equally improper to compromise a charge, whether the party be really guilty or not. In *Collins* v. *Blantern* (2 Wils. 341 (1 Smith's Leading Cases, 154)), to an action of debt on bond, the defendant pleaded, that, before and at the time of the making of the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded not guilty before the making of the bond and note; that the several traverses on the indictments were, at the time of the making the unlawful agreement after mentioned, and **[110]** the note and the bond, viz. on the same day the bond was made, were about to come on to be tried at Stafford; that thereupon it was then corruptly agreed between Rudge, the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for 350l., in consideration of his not appearing to give evidence at the trial of the said traverses; and that the obligors should execute the bond to the plaintiff of the same date as the note, as an indemnity to the plaintiff for giving such note. The plea then averred that the plaintiff gave to Rudge, the prosecutor, the note for 350l., for not appearing as prosecutor, and giving evidence; that the obligors, on the giving of the note, executed the bond as an indemnity to the plaintiff for giving such note; that the bond was given for the said consideration, and no other; and that the obligors were not indebted to the plaintiff; and therefore the bond was void in law. There was nothing there to shew whether the parties were guilty or not. Wilmot, C. J., delivering the judgment of the court, said: "It hath been insisted, for the plaintiff, that he was not privy to the bargain and agreement, so, as to him, there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement; for, the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was, to gild over and conceal the truth: and, whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, —a crime most detrimental to the commonwealth; for, it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury; **[111]** and, therefore, to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void: what right, then, had the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful." So, in *Keir* v. *Leeman* (6 Q. B. 308), it was held, that no agreement can be valid that is founded on the consideration of stifling a prosecution for an offence of a public nature. Although, therefore, the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on the plaintiff and a riot, and of an action for a wrongful levy under a fi. fa.,—which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the fi. fa.,—is altogether invalid, as grounded on an illegal consideration; and this notwithstanding the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial. Lord Denman, in delivering the judgment of the court, there says: "The principle of law is laid down by Wilmot, C. J., in *Collins* v. *Blantern*, that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration, and void. On the soundness of this decision, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe." Here, the corrupt agreement was the only consideration for the making of the note: and there was no necessity to aver that Mary Jones had notice of it. [Coltman, J. It is quite consistent with this plea, that the note was given to Mary Jones, in **[112]** satisfaction of a just debt, and without any knowledge on her part that any illegality had occurred.]

Fortescue, in reply, was stopped by the court.

Coltman, J. It seems to me that neither of these pleas affords any defence. [Prentice here interposed, asking leave to amend: but the court held him too late.]

The fifth plea alleges that the note was obtained from the defendant by one George Bromfield, and others in collusion with him, by fraud and covin practised on the defendant by Bromfield and the others; and that there was no consideration for the indorsement by Mary Jones to Vincent, or by Vincent to the plaintiff. This plea is bad in substance, for not shewing that the note might not have been delivered over by the defendant to Mary Jones upon a good consideration. Although a fraud might have been practised on the defendant, it is not alleged that Mary Jones was a party to or cognisant of such fraud. A promissory note, like a bill of exchange, is a contract of a peculiar nature: a party who has himself no good title, may yet transfer a good title to another. The plea contains an averment that there never was any value or consideration for the indorsement of the note by Mary Jones to Vincent, or for the indorsement by him to the plaintiff, or for Vincent or the plaintiff being the holder of the said note. But it is not alleged that there was no consideration for the delivery of the note to Mary Jones, who, for any thing that appears, may have been a holder for value, without fraud. For these reasons, I am of opinion that the plaintiff is entitled to judgment on the demurrer to the fifth plea, as well as upon all the other demurrers.

The rest of the court concurring,

Judgment for the plaintiff.

[113] WILLIAM CATTERALL, Administrator of Ann Catterall, *v.* LEES. June 19, 1849.

The general traverse de injuriâ can be replied to those pleas only which shew that the plaintiff had not at any time a cause of action against the defendant.

Debt, for money lent by Ann Catterall, in her lifetime, to the defendant, and for money found due from the defendant to Ann Catterall upon an account stated, &c.

Plea,—as to the sum of 150l., parcel of the moneys in the declaration mentioned,—that, after the contracting of the said debts, and the accruing of the causes of action, in the declaration mentioned, and in the lifetime of the said Ann Catterall, to wit, on, &c., the defendant made his promissory note in writing, bearing date, to wit, the day and year aforesaid, and thereby promised to pay to the said Ann Catterall, or order, 150l., with lawful interest for the same, on demand; that the defendant then delivered the said note to the said Ann Catterall, and the said Ann Catterall then accepted and received the said note of and from the defendant, for and on account of the said sum of 150l., parcel, &c., and all causes of action in respect thereof; that, afterwards, and before the commencement of this suit, to wit, on the day and year aforesaid, the said Ann Catterall indorsed the said note in blank, and afterwards, to wit, on the day and year aforesaid, lost the same out of her possession; that the said note still continued and remained lost; and that the plaintiff was not, as administrator as aforesaid, at the time of the commencement of this suit, nor was he then, the holder, or possessed, of the said note, nor had he ever found the same,—verification.

To this plea, the plaintiff replied that the defendant, [114] without the cause by him in his said plea alleged, neglected to, and did not, pay the said sum of 150l., parcel as aforesaid, or any part thereof, in manner and form as the plaintiff had above thereof complained against him,—concluding to the country.

Special demurrer, assigning for causes,—that the said replication was double and multifarious, in this, to wit, that it not only put in issue the delivery of the note in the plea mentioned to the said Ann Catterall, and the acceptance and receipt of the said note by her for and on account of the said sum of 150l., parcel, &c., but also the allegation that the note was indorsed by Ann Catterall, and was lost by her after the same had been so indorsed, and also the allegation that the plaintiff was not the holder of the note at the time of the commencement of the suit;—that the plea consisted of matter in discharge of the cause of action in the introductory part of the plea mentioned, or it consisted of facts which went to shew that the right of action in respect of the causes of action in the introductory part of the plea mentioned, was suspended by facts which occurred subsequently to the vesting of such right of action, and did not contain any matter which went to shew that the defendant was excused from paying the debt in the introductory part of the plea mentioned;—and that the replication ought to have traversed or denied some one or more of the material facts stated and set forth in the plea, in express words, &c.

Joinder in demurrer.

James, in support of the demurrer. The general replication de injuriâ is inapplicable here. The fallacy is, in confounding an exemption from liability existing at the time of the act done, with an exemption from liability at the time of the action brought. De injuriâ can only be replied where the plea sets up matter ex-**[115]**-isting at the time of the act done which gives a primâ facie and apparent cause of action. The defendant, by his plea, does not say, that, at the time at which the cause of action is alleged to have accrued, he was not liable: he admits the cause of action, and sets up matter of subsequent discharge.

Kennedy, contrà. The plea does not allege that the bill was given in discharge of the debt as to which it is pleaded: it is rather a suspension of the remedy.

MAULE, J. The replication de injuriâ is applicable only to a plea which shews that the plaintiff never at any time had a cause of action against the defendant.

Kennedy prayed leave to amend.

Per curiam. The plaintiff may amend on the usual terms.

Rule accordingly.

SARAH THOROGOOD, Administratrix of Charles Abraham Thorogood, *v.* BRYAN. CATTLIN *v.* HILLS AND OTHERS. June 20, 1849.

[S. C. 18 L. J. C. P. 336. Doubted, *Waite* v. *North Eastern Railway Company*, 1859, El. Bl. & El. 728. Not followed, *The Milan*, 1861, Lush. 388. Referred to, *Child* v. *Hearn*, 1874, L. R. 9 Ex. 182. Approved, *Armstrong* v. *Lancashire and Yorkshire Railway Company*, 1875, L. R. 10 Ex. 47. Not applied, *Spaight* v. *Tedcastle*, 1881, 6 App. Cas. 222; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 1883, 10 Q. B. D. 545. Overruled, *The Bernina*, 1887-88, 12 P. D. 58; 13 App. Cas. 1. Referred to, *The Sara*, 1887-89, 12 P. D. 164; 14 App. Cas. 209. See *Mathews* v. *London Street Tramways Company*, 1888, 58 L. J. Q. B. 13. Discussed, *The Drumlanrig*, [1910] P. 260; [1911] A. C. 21. Referred to, *Cory* v. *France*, [1911] 1 K. B. 134; *The Devonshire*, [1912] P. 43; [1912] A. C. 645.]

One who sustains an injury from a collision with a carriage or a vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his own part, or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part.

The first of these was an action upon the case brought by the plaintiff Sarah Thorogood, as administratrix of her late husband, Charles Abraham Thorogood, under the statute 10 Vict. c. 93, to recover **[116]** damages against the defendant for negligently causing the intestate's death.

The declaration stated that Charles Abraham Thorogood, in his life-time, and before the committing of the grievances thereinafter mentioned, was lawfully passing along a certain public highway; that the defendant, at the time of the committing of the grievance, was possessed of a certain carriage, called an omnibus, and of two horses then drawing the same along the said highway, which said carriage and horses were under the care and direction of a certain servant of the defendant: yet that the defendant, after the passing of a certain act of parliament made and passed, &c., intituled "An act to compensate the families of persons killed by accident," to wit, on, &c., by her said servant, so carelessly drove and directed the said carriage and horses, that, by the negligence and improper conduct of the defendant, by her said servant, in that behalf, they ran against the said Charles Abraham Thorogood, so then lawfully passing along the said highway, and knocked him down, and passed over him, and thereby greatly crushed and injured him; and, by reason of the premises, the said Charles Abraham Thorogood, within twelve calendar months next before the commencement of the suit, to wit, on, &c., died, leaving him surviving the plaintiff, who at the time of his death, was his wife, and John, Sarah, Esther, and Emma, his children, &c., &c.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before V. Williams, J., at the sittings in Middlesex, after Trinity term, 1848. The facts that appeared in evidence were as follows:—On the 3rd of January, 1848, Charles Abraham Thorogood, the husband of the plaintiff (whose administratrix she was), was a passenger in an omnibus belonging to one Barber, in which he was proceeding towards Clapton, about eight o'clock in the evening. The defendant, **[117]** Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up at the kerb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, the deceased was unable to get out of the way, and was knocked down and run over, and, seven days afterwards, died of the injuries he so sustained.

On the part of the defendant, it was submitted,—upon the authority of *Butterfield* v. *Forrester* (11 East, 60), and *Bridge* v. *The Grand Junction Railway Company* (*b*),—that the plaintiff was not entitled to recover, inasmuch as the evidence shewed that the accident was, at least in part, occasioned by the negligence of the driver of Barber's omnibus, in permitting a passenger to alight without drawing up at the kerb, and whilst the vehicle was in motion, and by want of care and caution on the part of the deceased himself.

The learned judge told the jury, that, if they were of opinion that the injuries sustained by the deceased were purely the result of accident, they must find for the defendant: and he further told them, that, if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases,—notwithstanding the defendant (by her servant) had been guilty of negligence, their verdict must be for the defendant.

[118] The jury returned a verdict for the defendant.

Humfrey, in Trinity term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection. He submitted that the ruling of the learned judge would necessarily lead to this absurd result,—that a passenger who is injured by a collision between two omnibuses has no remedy against the proprietor of either, if the drivers of both are guilty of negligence or improper conduct. And he cited *Lynch* v. *Nurdin* (1 Q. B. 29, 4 P. & D. 672), *Pluckwell* v. *Wilson* (5 C. & P. 375), and *Luxford* v. *Large* (5 C. & P. 421).

Talfourd, Serjt., now shewed cause. The direction of the learned judge was perfectly correct. The true principle which governs these cases, is to be found in the statement of the cause of action in the declaration,—which, in substance, is, that the injury was the result solely of negligence and improper conduct on the part of the defendant's servant. The question is, whether the injury of which the plaintiff complains, proceeded from negligence on the part of the defendant, or from something over which the defendant had no control. Many cases might be put, in which a party, though himself in fault, might still be entitled to compensation for damage sustained through another's negligence: for instance, suppose a drunken man lying in a carriage-way, and a carriage recklessly driven along the road, passed over and injured him,—the inebriety of the plaintiff would be no defence to an action. The true inquiry is—whether the injury complained of is fairly attributable to the wrongful act of the defendant. *Butterfield* v. *Forrester* was the first case in which this doctrine was discussed. It was there held, that one who is injured by an obstruction in a highway, against **[119]** which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. "A party," says Lord Ellenborough, "is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." [V. Williams, J. The objection to the summing up applies to that part of it which relates to the want of care and caution on the part of the driver of Barber's omnibus. I acted upon the dictum of the court of Exchequer in *Bridge* v. *The Grand*

(*b*) 3 M. & W. 244, S. C. per nom. *Armitage* v. *The Grand Junction Railway Company*, 6 Dowl. P. C. 340.

Junction Railway Company: if that be correct, I was right.] That was an action upon the case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was, and injured him. The defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff. The court held the plea bad, both in form and in substance. And Parke, B., says: "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester;* and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care, is applicable to questions of this kind." That case is followed by *Davies* v. *Mann* (10 M. & W. 546). **[120]** There, the defendant negligently drove his horses and waggon against, and killed, an ass, which had been left in the highway fettered in the fore feet, and thus unable to get out of the way of the waggon, which was going at a "smartish" pace along the road: and it was held that the jury were properly directed, that, although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. And Parke, B., said "This subject was fully considered by this court in *Bridge* v. *The Grand Junction Railway Company,* where, as appears to me, the correct rule is laid down concerning negligence, viz., that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. In that case, there was a plea imputing negligence on both sides: here, it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury: and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road, would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." [Cresswell, J. Must not the negligence which is to exonerate the defendant, be **[121]** negligence of the plaintiff or of his agent?] It is submitted, not: at all events, the driver of the omnibus in which the deceased was a passenger, must be taken to be his agent. [Cresswell, J. Suppose two omnibuses are racing, and one of them runs over a man who is crossing the road, and has not time to get out of the way,—has not the injured party a remedy against the proprietor of either omnibus?] No doubt he has. [Cresswell, J. It seems strange to say that A. shall not be responsible for his negligence, because B. has been negligent likewise, —C. being the party injured. The principle of *Butterfield* v. *Forrester* is, that one who receives an injury from the negligent act of another, shall not have an action, if by the exercise of ordinary care he might have escaped the injury.] It is not necessary in this case to contend for a proposition so wide as that suggested. The point did not arise in *Bridge* v. *The Grand Junction Railway Company.* [Cresswell, J. It could not: the plea amounted to not guilty, or nothing.]

Humfrey (with whom was Cobbett), in support of the rule. *Bridge* v. *The Grand Junction Railway Company* does not apply: it was enough there to decide that the plea was bad in point of form: but the court go on to say, unnecessarily, that it is also bad in substance. Adopting the suggestion of Parke, B., in that case, the learned judge, upon this occasion, told the jury, that, if, in their opinion, the accident might have been avoided by the exercise of ordinary care on the part of the deceased, or of the driver of the omnibus in which he was, the defendant was entitled to their verdict. [Cresswell, J. It appears that the deceased got out whilst the omnibus was moving; and, consequently, he had not sufficient command of his legs to be able to get out of the way of the defendant's om-**[122]**-nibus, the driver of which could not reasonably be expected to be prepared for such a state of things.] If the fact were so, no ordinary care on Thorogood's part could have saved him. [Cresswell, J. What degree of caution could have enabled the driver of Barber's omnibus to avoid the accident?] It is enough to shew that there might be a state of things which makes the direction wrong. We may assume that the deceased was in the right, and the drivers of both omnibuses wrong. [Cresswell, J. Wrong in what?] In omnibus. It would be monstrous to say that the plaintiff is without remedy against either party. Put the case of a passenger on board a steam-boat, sitting in a place appropriated for passengers, and getting his leg broken by another steam-boat coming in collision with them,—what remedy would he have against the proprietors of the boat he was on board of? [V. Williams, J. A coachman is responsible to his master for the due management of the carriage in which he is driven by him. Suppose the master injured by the coachman's want of care, though by an accident which would not have happened, but for the want of proper care on the part of a third person,—would the coachman be liable?] It is submitted that he would. The rule as laid down in *Butterfield* v. *Forrester*, and followed in *Bridge* v. *The Grand Junction Railway Company*, and *Davies* v. *Mann*, is not so large as the summing up in this case assumes. The negligence, to operate an excuse, must be negligence in the particular thing which leads to the accident.

The court, before pronouncing judgment in this case, desired to hear the argument of *Cattlin* v. *Hills and Others*, a case involving very much the same question.

Cur. adv. vult.

[123] Cattlin v. Hills and Others. 1849.

This was an action upon the case brought by the plaintiff, who carried on the business of a seal-engraver, to recover damages from the defendants, the registered owners of the "Diamond" Gravesend steam-boats, for an injury sustained by him whilst a passenger on board another steam-vessel, in consequence of alleged negligence on the part of the servants of the defendants.

The cause was tried before Cresswell, J., at the sittings at Westminster, after Michaelmas term, 1848. The facts were as follows:—The plaintiff was a passenger on board a vessel called the "Sons of the Thames," which left London Bridge, for Gravesend, at nine o'clock in the morning. Having arrived off Northfleet Point, the "Sons of the Thames" was overtaken by the defendant's vessel the "Sapphire." Both vessels being on the Essex side, and both wishing to cross to Rosherville Pier, the master of the "Sapphire," in consequence, as it was said, of the "Sons of the Thames" having driven her too far on the Essex side, was compelled, in order to avoid overshooting the pier, to port her helm; and, when about two thirds across, she rubbed against the "Sons of the Thames," and, coming in contact with the anchor of the latter, which projected a little over her larboard bow, knocked it down upon the plaintiff's leg, and so crushed it as to render amputation necessary.

There was contradictory evidence as to whether or not the anchor on board the "Sons of the Thames" was properly stowed; the defendants contending that it ought to have been lashed, in which case the accident could not have happened.

The learned judge told the jury that the plaintiff was not entitled to recover, if they were of opinion that [124] the damage sustained by the plaintiff had been occasioned by negligence on the part of those intrusted with the conduct and management of the "Sons of the Thames;" but that they must dismiss from their minds all that had been said about the stowing of the anchor, for that the plaintiff would be entitled to a verdict, even though they should think the anchor had improperly been left unfastened.

The jury, under this direction, returned a verdict for the plaintiff, damages 900l.

Montagu Chambers, in Hilary term last, moved for a new trial, on the ground of misdirection, that the verdict was against evidence, and that the damages were excessive. *Butterfield* v. *Forrester* (11 East, 60), *Bridge* v. *The Grand Junction Railway Company* (3 M. & W. 244), *Davies* v. *Mann* (10 M. & W. 546), and *Luxmore* v. *Large* (5 C. & P. 421), are distinct authorities to shew that the action will not lie, where the injury is in part attributable to the negligence or want of due care and caution of the plaintiff, or of those having the management and control of the carriage, train, or vessel in which he was being conveyed. The way in which the anchor was stowed was clearly a part of the management of the vessel, and ought not to have been withdrawn from the consideration of the jury. [Cresswell, J. I certainly took that upon myself. There was no evidence as to the duty or the necessity of having the anchor lashed in that part of the river where the accident happened. The harbour-master gave very strong evidence that it was neither necessary nor usual. Maule, J. Suppose the anchor was negligently and improperly stowed by the owners of the "Sons of the Thames," and, in consequence of that negligence, and also in consequence of negligence on the **[125]** part of those navigating the "Sapphire," the plaintiff,—an innocent third party,—was injured; against whom must he seek redress?] He would have a clear right of action against the owners of the "Sons of the Thames," who were bound by their contract to convey him safely. But it by no means follows that he has also a right of action against the owners of the "Sapphire," whose only fault is, that they accidentally struck against something on board the other vessel, which was placed where it ought not to have been.

It was clear, from the evidence on both sides, that the two vessels were struggling each to get first in to Rosherville. The "Sons of the Thames" having pressed the "Sapphire" on the Essex shore beyond the point where, according to the proper course of navigation, she should have turned off to cross the river, the latter vessel was compelled to keep her helm ported, or she would have gone beyond the Rosherville Pier. There was no collision: the vessels merely grazed each other; and no injury could have occurred, but for the improper stowage of the anchor. [Cresswell, J. I thought it was an open question for the jury. They probably thought it fair racing on the part of the "Sons of the Thames," and jostling on the part of the "Sapphire."]

The damages were clearly excessive. It is true, the plaintiff sustained the severe inconvenience of losing a leg; but that does not very much interfere with the means of living of a man of his trade. [Maule, J. 500l. was in one case held not to be an excessive sum for merely holding a stick over the plaintiff (*a*). Cresswell, J. I certainly am not dissatisfied with the verdict. The amount of damages was for the jury.]

WILDE, C. J. Upon the first point,—which is one of very general importance, and of some nicety,—we **[126]** think the rule may go. As to the second, there was evidence on both sides, and the judge reports himself not dissatisfied with the verdict: under these circumstances, we cannot interfere. The damages are so peculiarly within the province of the jury, that it is only under very particular circumstances that a motion on the ground of excess can be entertained. The loss of a leg is certainly a very serious thing, and one deserving of large compensation. The rule, therefore, will go upon the ground of misdirection only.

Wilkins, Serjt., R. Miller, and Wordsworth, now shewed cause. They submitted that the rule laid down in *Butterfield* v. *Forrester*, and since extended to the case of servants and agents under the immediate control of the party, was inapplicable to persons travelling by public conveyances, over the management of which they have no control. And they referred to *Sills* v. *Brown* (9 C. & P. 601), *Smith* v. *Dobson* (3 M. & G. 59, 3 Scott, N. R. 336), *Davies* v. *Mann* (10 M. & W. 546), *Lynch* v. *Nurdin* (1 Q. B. 29, 4 P. & D. 672), and *Bridge* v. *The Grand Junction Railway Company* (3 M. & W. 244), and to the observations upon the last-mentioned case, in the notes to *Ashby* v. *White*, 1 Smith's Leading Cases (3rd edit., by Keating and Willes, p. 132 *a*.), where the learned annotators say:—"A hasty perusal of the report of that case might lead to the supposition, that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could, by ordinary care, have avoided the accident: but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, **[127]** safely be asserted that the plea was at all events bad in substance, for not alleging that the passenger who brought the action was guilty of negligence. If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to pay for his own carriage, no doubt; but it is inconceivable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer."

M. Chambers and Bramwell, in support of the rule. It must now be assumed

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(*a*) Per Heath, J., in *Merest* v. *Harvey*, 5 Taunt. 442, 1 Marsh. 139.

that the "Sapphire" was negligently navigated, so as to produce a collision with the "Sons of the Thames:" but it is not so clear that the displacement of the anchor on board the latter vessel, was wholly attributable to the negligence of the crew of the former. The accident occurred, partly in consequence of the collision, and partly in consequence of the improper stowage of the anchor. This latter cause, therefore, should not have been withdrawn from the attention of the jury; it was a most important ingredient for their consideration. [Maule, J. You must say that the allegation in a special plea that the plaintiff was contributory to the accident, would be sustained by shewing that there was negligence on the part of those having the management of the "Sons of the Thames," and that the plaintiff was a passenger therein.] Precisely so. If there has been any negligence conducive to the injury, on the part of those whom he employs to carry him, the plaintiff cannot complain of negligence on the part of the defendants. In *Flower* v. *Adam* (2 Taunt. 314), it was held, that, if the proximate cause of damage be, the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, the plaintiff cannot recover: **[128]** at least, if the mischief be in part occasioned by the misfeasance of a third person not sued. There, A. placed lime-rubbish in a highway, the dust blown from it frightened the horse of B., and nearly carried him into contact with a passing waggon, in avoiding which he unskilfully drove over other rubbish placed in the road by C., and was overthrown and hurt: it was held, that, upon a count stating these facts, B. could not recover against A. The question there left to the jury, as well as in *Davies* v. *Mann*, was, to whose want of care was the proximate cause of the injury attributable. In *Sills* v. *Brown* (9 C. & P. 601), a brig was carrying her anchor in a position contrary to the by-laws of the river Thames, at the time when she came in collision with a barge; and it was held that the improper carrying of the anchor, would not, of itself, be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. Coleridge, J., in his summing up, told the jury, that, "if it was a pure accident, or if the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendant would be entitled to their verdict; but that, on the contrary, if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict." One of the jury asked the learned judge whether he had not told them that the way in which the anchor was placed had nothing to do with the question: to which his lordship answered,—"No. You must have misunderstood my **[129]** observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to the occurrence of the injury, not to its amount, but to the occurrence of it. The plaintiff says, that, if the anchor had not been in the position in which it was, no injury would have occurred at all: but that would not make the defendant liable, if the people on board the plaintiff's barge brought it by improper or careless navigation into the position in which it received the injury." Here, the learned judge withdrew from the jury what Coleridge, J., in that case, put most prominently before them. It can hardly be said that the injured party could maintain separate actions against the proprietors of each vessel: he could not urge, as against each, that the injury was occasioned by his negligence alone. [Maule, J. When a man has a wrong done to him by several tort-feasors, he clearly has a right of action against some of them.] No doubt. But, if this action be maintainable, the present defendants will, in truth, be paying damages for the negligence of the owners of the other vessel, as well as for their own negligence. [Cresswell, J. Though not lashed, the anchor would have done no harm, but for the default of the defendants. Admitting that the anchor ought to have been lashed, if the collision arose through the default of the defendants, without any fault on the part of the plaintiff, or the vessel he was in, the defendants are liable.] There can be no difference in degree of negligence between an improper stowage of the anchor, and improperly porting the helm (*a*).

(*a*) And see *Hullman* v. *Bennett*, 5 Esp. N. P. C. 226, and *Vanderplank* v. *Miller*, M. & M. 169.

Thorogood v. *Bryan.*—COLTMAN, J. The case of *Thorogood* v. *Bryan* seems distinctly to raise the question whether a passenger [130] in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. As I understand the law upon this subject, it is this,—that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse is, not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury (*a*). That being so, the summing up in this case,—which is in accordance with the opinion expressed by the court of Exchequer in *Bridge* v. *The Grand Junction Railway Company*, though not in terms with the decision of that case,—was correct. I therefore think the verdict should stand undisturbed.

With regard to the case of *Cattlin* v. *Hills*, that gives rise to a further point, upon which we are desirous of taking some little time for deliberation.

MAULE, J. I agree with my brother Coltman in thinking that the rule in *Thorogood* v. *Bryan* ought to [131] be discharged. This is an action brought to recover damages against an omnibus proprietor for, negligently causing the death of the plaintiff's husband, by knocking him down and driving over him as he had just alighted from another omnibus. My brother Williams, in leaving the case to the jury, told them, that, if they should be of opinion that the occurrence was purely accidental, or that the deceased, or the driver of the omnibus by which he was carried, had by any negligence or want of care on their part contributed to the accident, they must find for the defendant. The jury having, upon that direction, found for the defendant, it must be assumed that they found that there had been negligence on the part of the driver of the omnibus in which he was a passenger. The case is an important one, inasmuch as it is in some degree novel, though somewhat similar in principle to *Bridge* v. *The Grand Junction Railway Company*, where, in case against a railway company for the negligent management of a train, whereby it ran against another train in which the plaintiff was a passenger, and injured him, a plea that the persons having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, the defendants' train did the mischief, —was held bad. The court of Exchequer there seem to have thought,—though it was not necessary to decide it,—that, where there is negligence on both sides, the action cannot be maintained. Although I at one time entertained a contrary impression, upon further consideration I incline to think, that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free [132] from doubt. So, there could have been no doubt, had the driver been employed to drive him, and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, who, by his servant the driver, he employs to drive them. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel,—which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems

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(*a*) This seems to be the supposition which the learned editors of the third edition of Smith's Leading Cases (supra, p. 126) designate as "inconceivable."

strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust. For these reasons, it seems to me that the direction of my brother Williams was quite correct, and that the rule should be discharged.

CRESSWELL, J. I am of the same opinion. I must own I should not have been sorry if the point could have been raised upon a bill of exceptions. The sub-[133]-ject is an important one, and ought to be definitively set at rest. I incline to think that the opinion thrown out by the court of Exchequer in *Bridge* v. *The Grand Junction Railway Company*, is the correct one. If the driver of the omnibus the deceased was in had, by his negligence, or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him, stands in any better position. For these reasons, I think the plaintiff in this case was not entitled to recover.

V. WILLIAMS, J. I am of the same opinion. I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by.

Rule discharged (*a*).
As to *Cattlin* v. *Hills*,
Cur. adv. vult.

Cattlin v. *Hills.*—On Monday, the 25th of June, 1849, the court were prepared to give judgment in this case,—discharging the rule, as it was understood,—but they were informed that the parties had agreed to a compromise: consequently, no judgment was given.

[134] WORTHINGTON *v.* WARRINGTON. June 21, 1849.

[S. C. 18 L. J. C. P. 350. Referred to, *Engell* v. *Fitch*, 1868-69, L. R. 3 Q. B. 328; L. R. 4 Q. B. 659. Adopted, *Bain* v. *Fothergill*, 1874, L. R. 7 H. L. 188. Followed, *Schreiber* v. *Dinkell*, 1886, 54 L. T. 911.]

A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50l., with liberty to him to make, at his own expense, such alterations and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises, at any time during the two years, for 600l.—"it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought assumpsit to recover damages for the breach of contract, and also compensation for the money expended by him in improvements:—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements.

This was an action of assumpsit. The declaration stated, that, on the 7th of November, 1844, by an agreement in writing of that date, the defendant agreed to let, and the plaintiff then agreed to take of the defendant, for two years from the 9th of October, 1844, at the rent of 50l. a year, the house, garden, &c., situate at Bromborough, in the county of Chester, then in the occupation of the plaintiff; and it was agreed that the plaintiff might, at his own expense, make such alterations and additions to the premises as he might think proper, the same being improvements; that the plaintiff should have the right of purchasing the said premises at the end of, or at any time during, the said term of two years, it being then understood by and between the said parties that the defendant was possessed of the said premises for his own life and the life of one Mrs. Manwaring, and of the survivor of them: that, the agreement

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(*a*) See the cases upon this subject collected and carefully arranged in Oliphant on Horses and Gaming, pp. 157, et seq.

having been so made as aforesaid, in consideration thereof, &c., the defendant promised to perform the agreement; and that he was possessed of the said premises for his own life and for the life of the said Mrs. Manwaring, and that he, the defendant, would, if the plaintiff elected to purchase, according to the said agreement, make and deduce to the plaintiff a good and **[135]** valid title to the said estate and interest of the plaintiff thereinbefore mentioned in and to the said premises: Averment, that the plaintiff, confiding in the said agreement and promise of the defendant, did, to wit, on, &c. take possession of the said house, garden, &c., and enter into occupation thereof on the terms aforesaid, and that, during the said term, to wit, on, &c., he gave notice to the defendant that he elected to purchase the said premises for 600l., according to the said agreement; and the plaintiff then requested the defendant to make him a good and valid title as mentioned in the said agreement: that, although a reasonable time had elapsed, before the suit, for the defendant to make a good and valid title, and the plaintiff had always been ready and willing to pay the purchase-money, and perform all other matters required of him, according to the said agreement; yet that the defendant wholly disregarded his promise, and was not, either at the time of making the said agreement, or within a reasonable time after he had notice of the plaintiff's election to purchase, or at any other time, possessed of the said premises, &c., according to the meaning of the said agreement, and the defendant did not nor would at any time make a good and valid title to such estate and interest in the said premises, according to the meaning of the said agreement,—by means whereof the plaintiff had been deprived of all the benefits which would have arisen to him from the completion of the said purchase: that the plaintiff, confiding in the promise of the defendant, and intending to purchase the said premises, &c., according to the said agreement, did, during the said term, at his own expense, make alterations and improvements in the said premises, and, in so doing, incurred great expense, to wit, 1000l., in and about the same alterations and improvements,—all which moneys were, by reason of the defendant's breach of promise, **[136]** wholly lost to the plaintiff; and the plaintiff, by reason of the premises, was otherwise greatly damnified, &c.

The defendant pleaded,—non assumpsit,—that the defendant was possessed of the premises for his own life and the life of Mrs. Manwaring, &c.,—and that he did, within a reasonable time, make a good title, &c.

The cause was tried before Wilde, C. J., at the summer assizes at Chester, in 1848. It appeared that the plaintiff took possession of the premises at the date of the agreement set out in the declaration, and immediately, and without any notice to the defendant, commenced making extensive alterations and improvements thereon, which were completed in the summer of 1845, at a cost of about 400l.; and that, on the 2nd of June, 1846, he gave the defendant notice of his intention to exercise the option of purchasing his interest in the premises. It turned out, upon an investigation of the defendant's title, that he had not the precise interest stated in the agreement, but that he was entitled to the premises for the life of Mrs. Manwaring, and for sixty-one years beyond. The plaintiff thereupon refused to complete the purchase, and brought this action to recover compensation, as well for the defendant's breach of contract, as for the expense he had incurred in improving the premises.

The learned judge told the jury that "improvements" meant "improvements with reference to pecuniary value:" and he propounded two questions to them,—first, what was the value of a lease such as the defendant by his contract professed to sell, without the improvements, on the day on which the plaintiff intimated his intention to take the lease, viz. on the 2nd of June, 1846?—secondly, what was the value of the lease, on the same day, with the improvements?

In answer to the first question, the jury found that the value was 40s.; and to the second, that the lease was worth 100l. A verdict was thereupon entered for **[137]** the plaintiff for 102l., subject to leave to the defendant to move to reduce it to 40s., if the court should be of opinion that the plaintiff was not entitled to recover in respect of the money expended by him upon the improvements.

Welsby, in Michaelmas term, 1848, accordingly obtained a rule nisi. He referred to *Flureau* v. *Thornhill* (a) and *Hopkins* v. *Grazebrook* (6 B. & C. 31, 9 Dowl. & Ryl. 22).

Crompton and Couch now shewed cause. As a general rule, one who sustains a loss by reason of a breach of contract for the sale of land, is entitled to damages to such extent as will place him in the same situation as he would have been in had the contract been duly performed. An exception was engrafted upon that rule by the case of *Flureau* v. *Thornhill*, where it was held that a contractor for a purchase of real estate, to which the title proves (without collusion) defective, is entitled to recover no satisfaction for the loss of his bargain. Lord Chief Justice De Grey there says: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And Blackstone, J., says: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." *Hopkins* v. *Grazebrook* introduces a further exception. There, a person who had contracted for the purchase of an estate, but had not obtained a [138] conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him: and it was held, that a purchaser of certain lots at the auction, might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect Abbott, C. J., says: "The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step, without ascertaining that he would be in a situation to offer some title; and, having entered into a contract to sell, without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Bayley, J., says: "Where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title; and, if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." In *Walker* v. *Moore* (10 B. & C. 416), A. having contracted with B. for the purchase of a real estate, the vendor, acting bonâ fide, delivered an abstract shewing a good title; and A., before he examined it with the original deeds, contracted to re-sell several portions of the property, at a considerable profit. Upon a subsequent examination of the abstract with the deeds, A. discovered that the title was defective, and the sub-purchasers refused to complete their purchases, and he refused to complete his purchase from B., and brought an action, wherein he claimed, as damages, the expenses which he had incurred in the investigation of the title, the profit which would [139] have accrued from the re-sale of the property, the expense attending the re-sale, and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. It was held that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. It is difficult to see how the question of bona fides can enter into the consideration of the vendee's rights. Bayley, J., there says: "The defendants undertook to make a good title, and they might honestly think that they should be able to do so. It turned out that they could not, and consequently the contract was broken, and they were liable to an action. The plaintiff, however, must shew that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste. . . . If there were mala fides in the original vendor (but not otherwise), I am not prepared to say that the purchaser might not recover the profit which would have arisen from the re-sale. But, if premises for which a party has contracted are by him offered for re-sale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor." And Littledale, J., says: "Where a contract for the purchase of land is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge." That case proceeded upon a ground which is not applicable here. All those cases are considered in *Robinson* v. *Harman* (1 Exch. 850), where it was held, that, where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action [140] for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. "The rule of common law," says Parke, B., "is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. The case of *Flureau* v. *Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate, are merely on condition that the vendor has a good title; so, that, where a person contracts to sell real property, there is an implied undertaking, that, if he fail to make a good title, the only damages recoverable, are, the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law; and I am unable to distinguish it from *Hopkins* v. *Grazebrook*." And Alderson, B., says: "The damages have been assessed according to the general rule of law, that, where a person makes a contract, and breaks it, he must pay the whole damage sustained. Upon that general rule, an exception was engrafted by the case of *Flureau* v. *Thornhill*, and upon that exception the case of *Hopkins* v. *Grazebrook* engrafted another exception. This case comes within the latter, by which the old common law rule has been restored. Therefore, the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted." In the present case, the expense incurred by the plaintiff in alterations and improvements, was matter which was in the contemplation of the parties at the time the contract was entered into. The real and only question is, **[141]** whether the consequential damages naturally and properly flowed from the defendant's breach of contract.

(a) 2 Sir W. Blac. 1078. And see *Bratt* v. *Ellis*, Sugd. V. & P. Appendix, No. vii.

Welsby, in support of the rule. The stipulation as to the making of alterations and improvements, was introduced into the contract merely to prevent the tenant from being made liable for waste. Immediately upon the execution of the agreement in November, 1844, the plaintiff, without any notice to the defendant, proceeded to make extensive alterations; and it was not until they were completed, in June, 1845, that he gave any intimation of his intention to avail himself of the option to purchase the defendant's interest. The plaintiff cannot recover damages for any fancied loss of bargain. It is not necessary to contend upon the present occasion, that he is only entitled to nominal damages. The question is, whether the money the plaintiff has expended in improvements constitutes a damage that naturally results from the defendant's breach of contract. In the case of goods, the only measure of damages would be the market value at the time of the breach. There is no reason why a different rule should prevail in the case of a sale of land.

Coltman, J. By this agreement, the plaintiff is to become tenant of the premises for two years, at a certain rent, with liberty to the tenant, at his own expense, to make such alterations and additions as he might think proper, the same being improvements; and the tenant to have the option, at the end of, or at any time during, the two years, to purchase the premises for a given sum. I think it would be extremely hard, if it were held that the plaintiff was at liberty at once to make alterations, and then to throw the expense of them upon the defendant in the event of his not being able to make a good title. Every one who purchases **[142]** land knows that difficulties may exist as to the making a title, which were not anticipated at the time of entering into the contract. But, if the purchaser thinks proper to enter into possession, and to incur expense in alterations, before the title is ascertained, he does so at his own risk. I see nothing in this case to distinguish it from the ordinary one. The plaintiff should have taken care to ascertain that the title was good, before he proceeded to lay out money upon the premises. The damages must be reduced to 40s.

The rest of the court concurring,

Rule absolute.

Wilby, a Pauper, *v.* Elston. June 21, 1849.

[S. C. 7 D. & L. 143; 18 L. J. C. P. 320; 13 Jur. 706.]

The words "You are living by imposture:" "You used to walk St. Paul's Church Yard for a living,"—spoken of a woman with the intention of imputing that she was a swindler and a prostitute,—are not actionable, without special damage.—In case for words not actionable per se, averring special damage, "not guilty" puts in issue not only the speaking of the words, but also the special damage alleged.

This was an action of slander. The first count of the declaration stated, that, before and at the time of the committing, &c., the plaintiff was an honest and respectable person, and possessed of divers acquirements of useful learning, and had always conducted herself with decorum, chastity, modesty, and propriety, and was intending, and about, and had publicly proposed, and was ready to receive, in a certain house in which she then resided with her mother, Maria Ann Wilby, widow, pupils to instruct in divers acquirements of useful learning, for certain reasonable reward to be paid to her in that behalf; yet the defendant, well knowing the premises, but contriving, &c., to injure the plaintiff in her good name, fame, and credit, and to cause it to be believed **[143]** that she was unfit to receive such pupils, and to prevent her from obtaining any such, theretofore, to wit, on the 24th of June, 1845, in a certain discourse which he, the defendant, then had of and concerning the plaintiff, in the presence and hearing to divers good and worthy subjects of our Lady the Queen, did, in the presence and hearing of those persons, falsely and maliciously speak and publish of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say "They (meaning the plaintiff and the said Maria Ann Wilby, the mother of the plaintiff) came here, setting themselves up for ladies, and taking every body in, and paid no one. They get their living by imposture, and going about with false petitions. They are nothing but impostors and swindlers. She (meaning thereby the plaintiff) used to walk St. Paul's Church Yard for her living (meaning thereby that the plaintiff did walk in and about St. Paul's Church Yard, in the city of London, as a common prostitute, for the purpose of getting her living by prostitution of her body); and that, by means of the committing of the said grievances by the defendant, the plaintiff had been prevented from obtaining and receiving divers pupils in the said house where she resided with her mother as aforesaid, which she otherwise would have obtained and received, and from obtaining and earning divers profits therefrom; and that divers persons, to wit, one Mary Tudor, one Harriett Harris, and one Henry Wetton who, were about to send, and, but for the committing of the said grievances by the defendant, would have sent, divers, to wit, nine children each, as pupils, to be instructed by the plaintiff in manner aforesaid, for certain reasonable remuneration and reward to be paid by each of the said parties to the plaintiff in that behalf, respectively wholly refused to send any of the said children to the plaintiff; and the plaintiff had, by means of the **[144]** premises, been, and was, deprived of all the reasonable remuneration and reward which she would otherwise have derived for the instruction of such children, and she had also, by means of the committing of the said grievances by the defendant, been shunned and avoided by, and deprived of the countenance and assistance of, divers persons who would otherwise have befriended and assisted her in the procuring of pupils for the purpose aforesaid, and especially of one Harriett Harris, one Henry Wetton, one Mary Tudor, and one Rev. John Curwin, who had, by means of the premises, been prevented from befriending and assisting her, in manner aforesaid.

There was a second count, charging the speaking of other words.

The defendant pleaded not guilty.

The cause was tried before Coltman, J., at the Essex summer assizes, 1848. The words proved to have been spoken, were,—"You are living by imposture. You used to walk St. Paul's Church Yard for your living." No special damage was proved. The learned judge allowed the declaration to be amended, according to the proof.

The jury returned a verdict for the plaintiff on the first count, damages 5l., saying that the charge intended to impute to the plaintiff that she was a swindler and a prostitute. Upon the second count, the verdict was for the defendant. And leave was reserved to the defendant to move to enter a verdict for him on the first count also, if the court should be of opinion that the words proved were not actionable per se, and were not spoken of the plaintiff in the way of her profession or business.

Montagu Chambers, in Michaelmas term, 1848, obtained a rule nisi accordingly. He cited *Savile* v. **[145]** *Jardine* (2 H. Blac. 531), and *Robertson* v. *Powell* (Selw. N. P. 10th edit. 1248, n. (8)), to shew that the words "swindler" and "prostitute" are not actionable words per se; and submitted that the circumstance of the plaintiff's intending or being about to carry on a trade or profession, would not suffice to take the case out of the ordinary rule.

Dowdeswell now shewed cause. The first count alleges, by way of inducement, that the plaintiff was about to receive pupils. The words proved to have been spoken were most offensive, and destructive of the undertaking contemplated, a reputation for morality being most essential to its success; though, after the dictum of Twisden, J., in *Wharton* v. *Brook* (1 Ventris, 21), cited by Lord Denman, C. J., in giving the judgment of the court in *Ayre* v. *Craven* (2 Ad. & E. 2, 4 N. & M. 220), it would be idle to contend that a charge of prostitution, in the absence of special damage, would entitle even a school-mistress to maintain an action. The charge, however, that the plaintiff is a person getting her living by imposture, involves an accusation that she is a rogue and vagabond, and so liable to pains and penalties. [V. Williams, J. That is no stronger than saying that the plaintiff is a cheat, which clearly is not actionable.]

The special damage, then, being the gist of the action, is admitted, not being traversed. It was so ruled expressly by Lord Abinger, C. B., in *Perring* v. *Harris* (2 M. & Rob. 5). In *Smith* v. *Thomas* (2 N. C. 372, 2 Scott, 546), Tindal, C. J., says: "Where the words are actionable in themselves, it is not the gist of the action, but a consequence only of the right of action. If the plaintiff proves his special damage, he **[146]** may recover it; if he fails in proving it, he may still resort to and recover his general damages. A traverse, therefore, of such an allegation, is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict." In *Wylie* v. *Birch* (4 Q. B. 566, 3 G. & D. 629), in case against the sheriff, the declaration alleged that a fi. fa., on a judgment recovered against P., issued, and was delivered to the defendant, who seized P.'s goods, and by sale thereof levied the sum indorsed on the writ, but did not render it to the plaintiff, and falsely returned that the goods remained in his hands for want of buyers: by means whereof the plaintiff lost the means of obtaining the money indorsed. The defendant pleaded three pleas, all alleging that the judgment was obtained on a warrant of attorney, and not on a cognovit actionem signed after declaration filed, nor in an adverse action. One of the pleas alleged that P. became a bankrupt, and a fiat issued against him before the sale; and that an assignee was appointed. Another plea alleged that the plaintiff had notice of the bankruptcy before the sale, and the defendant before the return; and that the defendant, in his return, after stating that the goods remained in his hands for want of buyers, added that the assignees had claimed the goods. Another of the pleas alleged that the warrant of attorney was given to the plaintiff by way of fraudulent preference. On special demurrer, assigning for cause that the pleas were argumentative traverses of the defendant's being guilty of the grievances alleged, and omitted to shew that the plaintiff had not sustained, and could not possibly sustain, damage,—it was held, that the pleas were all good, as shewing that the plaintiff had suffered no damage by the false return; that it was not necessary to aver expressly that no damage could possibly arise; and that they were not argumentative **[147]** pleas of not guilty, but negatived the suggestion of damage arising upon the defendant's admitted breach of duty. *Wright* v. *Newton* (3 Scott, 595), and *Sutherland* v. *Pratt* (11 M. & W. 296), also shew that there may be a plea to special damage. And in *Robinson* v. *Marchant* (7 Q. B. 918, 926), Lord Denman, C. J., says: "A plea to the damage only, is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained. Words spoken of a trader in the way of his trade, and imputing insolvency, are actionable in themselves. But it is argued, for the defendant, that the damage here complained of includes not only such as might accrue to the plaintiff alone, but the special damage which the firm is said to have sustained, and that the two cannot, for the present purpose, be distinguished. Whether this would have been a sufficient objection or not, on special demurrer to the declaration, it is not necessary to say. On a trial, the special damage might, and must, have been separated from the more general damage, and the jury, in their verdict, might have considered the last without the first." [Maule, J., referred to *The Cross-Keys Bridge Company* v. *Rawlings* (3 N. C. 71, 3 Scott, 400), where, to a declaration for carelessly impinging with a ship against the plaintiffs' bridge, and thereby doing damage, the defendants pleaded, that the plaintiffs improperly narrowed the channel by an obstruction, without this that the damage was occasioned by the carelessness of the defendants; and it was held, that, under this plea, the defendants were entitled to give evidence in disproof of carelessness, after they had failed to establish the obstruction imputed to the plaintiffs.] The special damage is not the wrongful act complained of, and therefore is not put in issue by the plea of not guilty.

[148] M. Chambers and Bramwell, in support of the rule. The point last urged was not made at the trial, and therefore it is not competent to the plaintiff to urge it now (*a*). The special damage is clearly traversed by not guilty. In *Norton* v. *Scholefield*

(*a*) See Archbold's Practice, 8th edit., vol. ii. p. 1323, and the cases there cited.

(9 M. & W. 665), in case for erecting a cess-pool near a well, and thereby contaminating the water of the well, it was held that the plea of not guilty put in issue both the fact of the making of the cess-pool, and that of the water being thereby contaminated. There was no plea of not guilty in *Perring* v. *Harris*: and the same remark applies to nearly all the cases cited. In *Smith* v. *Thomas*, the dictum was obiter; the plea was manifestly bad on general demurrer. In *Wylie* v. *Birch*, the plea did not simply deny the damage, but contained a statement of other affirmative matter: it was a plea in confession and avoidance.

COLTMAN, J. It is not necessary to decide whether a plea to the special damage would have been allowed in this case. The effect of the plea of not guilty may be, to admit that the pupils were lost, but to deny that they were lost in consequence of the words spoken: like the case of an action for driving over and breaking the plaintiff's leg,—the plea of not guilty does not deny that the leg was broken, but it puts in issue whether it was broken by the wrongful act of the defendant. So, here, it seems to me that the special damage alleged was sufficiently traversed by not guilty, and that Mr. Bramwell's argument must prevail.

MAULE, J. The substance of the charge in the declaration is, that the defendant has inflicted injury upon the plaintiff by the speaking of words not action-**[149]**-able per se. The plea of not guilty, in effect, says that the defendant did not injure the plaintiff in the manner alleged: it therefore puts in issue the infliction of the wrong in the mode described. It does not follow, that, where an injury is stated to have occurred from the doing by the defendant of an act which is not in itself actionable, the defendant may not be at liberty to deny that the injury resulted from that act, by a plea less extensive than not guilty: as, in the case of a collision between two vessels, in one of which the plaintiff is a passenger, the plea of not guilty puts in issue whether the collision occurred through the negligence of the defendant, and also whether the plaintiff sustained the alleged injury by such means: but the defendant may admit the collision, and deny the damage; or he may deny the collision, and admit the damage. It does not follow that because by a certain form of pleading the defendant might have put in issue less, the plea of not guilty should not still be allowed to put in issue every thing which is not by the new rules prohibited from being put in issue. I think not guilty puts in issue the special damage, where that is substantially the thing complained of.

CRESSWELL, J. I am of the same opinion. I think it is impossible to distinguish this case from *Norton* v. *Scholefield*, and the ordinary cases of consequential damage.

V. WILLIAMS, J. I am of the same opinion. In *Perring* v. *Harris*, there was no denial of the wrongful act complained of, but merely a plea denying that the plaintiff was entitled to be assessed. The case is not an authority for the position for which it is cited.

Rule absolute.

[150] WRIGHT *v.* COLLS. June 25, 1849.

[S. C. 19 L. J. C. P. 60.]

By agreement between A. and B.,—reciting that B. had, as he was advised and believed,—legally and effectually put an end to a certain lease granted to C., and dated the 18th of July, 1839, of a certain farm, &c., by entry thereon under a power therein contained, by reason of the bankruptcy of C.; and that B. had agreed to grant a lease of the farm, &c., to A., for twenty-one years from the 29th of September, 1844, at the same rents, &c., as the same had been held by C.,—it was agreed that B. should grant and A. accept a lease, at a certain rent, payable quarterly,—the said lease to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or so soon after as the defendant should be in a situation to grant the same; that such lease should contain the same covenants, &c., as the lease to C.; and that A. should pay to B., on possession being delivered to him, 500l. as a premium for the lease so to be granted.—A. was let into possession, and occupied the farm for about two years, paying the rent; and he also, within that time, paid B. 250l. in part of the 500l. premium; but, the fiat against C. having been superseded, B. was unable to grant the lease to A.—A. thereupon brought an action for the breach of contract, alleging in his declaration, that he had always been ready and willing to accept a lease, that the 29th of September, 1844, and a reasonable time for B. to grant the lease, had elapsed, and that B. was in a situation to grant a lease. A. also sought to recover back the 250l. as money had and received, upon a failure of consideration:—Held, that the recital in the agreement, and proof of declarations made by B. that C.'s lease was void and good for nothing, were primâ facie evidence, as against B., that he had power to grant the lease: but that, it appearing also by the recitals in the agreement, that the lease to C. was supposed to be void by reason of C.'s bankruptcy, such primâ facie case was rebutted by proof of the supersedeas of the fiat against C.; and, consequently, that B. was entitled to the verdict upon an issue as to his ability to grant the lease.—Held, also, that the production of the supersedeas was sufficient proof of the issuing of the fiat against C., and of the fact of its having been superseded. But, held, that A. was entitled to recover back the 250l., as money paid upon a consideration which had failed.

This was an action of assumpsit. The first count of the declaration stated, that, before the 29th of September, 1844, to wit, on the 26th of July, 1844, by a certain agreement in writing then made between the defendant of the one part, and the plaintiff of the other part,—after reciting that the defendant did, on a certain day then past, to wit, on the 25th of July then instant, as he was advised and believed, legally and **[151]** effectually put an end to a certain lease granted by one James Esdaile to one Samuel Hammond the younger, and bearing date the 18th of July, 1839, of a certain farm called Hunt's farm, by entry thereon under the power to him for that purpose contained in the said lease, by reason of the bankruptcy of the said Samuel Hammond the younger; and after further reciting that he, the defendant, had agreed to grant a lease of the said farm to the plaintiff, for twenty-one years from the 29th of September, 1844, at the same rents, and under the same terms as the same farm was then lately held by the said Samuel Hammond the younger, save and except of such part thereof as consisted of a certain cottage and premises in the said lease mentioned to be in the occupation of one Edward Hook, upon the following terms and conditions,—it was mutually agreed by and between the plaintiff and the defendant, that the defendant should grant, and the plaintiff should accept, a lease of all the said farm and land (except the cottage and premises in the said lease stated to be in the occupation of the said Edward Hook, and also except the timber, game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond the younger are excepted), at the yearly rent of 316l. 8s., clear of all deductions, excepting land-tax, and payable quarterly; the said lease so agreed to be granted and accepted as aforesaid, to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or so soon after as the defendant should be in a situation to grant the same: that it was thereby further agreed by and between the plaintiff and the defendant, that the said yearly rent should commence from the commencement of the term, or on possession being given, which should first happen, and should be paid quarterly; that the plaintiff should pay such further **[152]** rents as were provided for and reserved by the said lease to the said Samuel Hammond the younger; and that the said lease so to be granted and accepted as aforesaid, should contain the same or the like covenants, provisoes, conditions, and agreements as were contained in the said lease to the said Samuel Hammond the younger, and such further covenants and agreements as were usual, according to the custom of the country: that it was thereby further agreed by and between the plaintiff and the defendant, that the plaintiff should pay down to the defendant, on possession being delivered to him of the said farm thereby agreed to be demised to him, except the said cottage as aforesaid, the sum of 500l. as a bonus or premium for the said lease so to be granted and accepted as aforesaid, and also should pay all the costs, charges, and expenses of the said agreement, and a counterpart thereof, and should execute and deliver a counterpart of the said lease so to be granted and accepted as aforesaid, to the defendant,—the same agreement and lease and counterparts to be prepared by the solicitor of the defendant: and that it was further agreed by and between the plaintiff and the defendant, that the plaintiff should not require, call for, or see, or investigate, the title of the defendant: Mutual promises: Averment, that, after the making of the said promise of the defendant, and before the said 29th of September, 1844, to wit, on the 8th of August, 1844, possession of the said farm, &c. (except the said cottage as aforesaid), was delivered to the plaintiff under the said agreement; and that, on such possession being delivered to him as aforesaid, he, the plaintiff, relying on the said promise of the defendant, paid to the defendant, and the defendant then received of the plaintiff, a large sum of money, to wit, the sum of 250l., in part payment and satisfaction of the said sum of 500l. so agreed to be [153] paid by the plaintiff to the defendant, as a bonus or premium for the said lease as aforesaid; and that, although he, the plaintiff, had always from the time of the making of the said agreement, continually, been ready and willing to accept the said lease so agreed to be granted and accepted as aforesaid, and to execute and deliver a counterpart thereof to the defendant, according to the terms of the said agreement; and although the said 29th of September, 1844, and a reasonable time for the defendant to grant the said lease so agreed to be granted as aforesaid, had elapsed before the commencement of the suit; and although the defendant, on the said last-mentioned day, and from thence continually hitherto, was in a situation to grant, and could legally make and execute, such lease as last aforesaid, and during all the time aforesaid, had notice of the said several premises thereinbefore mentioned; yet that the defendant, disregarding his said promise, did not nor would, on the said 29th of September, 1844, or at any other time, though often requested so to do, grant to the plaintiff the said lease so agreed to be granted and accepted as aforesaid, but had wholly neglected and refused so to do; and that thereby the plaintiff not only had lost and been deprived of the benefits and advantages of the said lease so agreed to be granted and accepted as aforesaid, and of divers large gains and profits, to wit, to the amount of 500l., which would have accrued to him from the granting of the same, but had also lost and been deprived of the use of the said sum of money so paid by him to the defendant as aforesaid, in part payment and satisfaction of the said sum of 500l. so agreed to be paid as a bonus or premium for the said lease as aforesaid.

There was also a count for money had and received.

The defendant pleaded,—first, non assumpsit to both counts,—secondly, to the first count, that the [154] plaintiff was not ready and willing to accept the lease,—thirdly, to the first count, that the plaintiff had not paid or offered to pay any part of the residue of the 500l.,—fourthly, to the first count, that the plaintiff had not, until the bringing of the action, been in a situation to grant, and could not legally grant, the lease,—fifthly, to the first count, that a reasonable time for granting the lease had not elapsed.

The cause was tried before Coleridge, J., at the Chelmsford spring assizes, 1848. The facts that appeared in evidence were as follows:—On the 18th of July, 1839, one James Esdaile granted to one Samuel Hammond the younger, a farm at Upminster, in the county of Essex, for twenty-one years: this lease contained a covenant on the part of Hammond not to assign without consent in writing; and a power of re-entry was reserved to Esdaile in case of Hammond's bankruptcy or insolvency. After the grant of this lease, Esdaile conveyed his interest in the farm to Colls. In 1844, a fiat issued against Hammond, under which he was adjudged a bankrupt; whereupon Colls re-entered, under the power reserved in the lease of the 18th of July, 1839, and, on the 26th of July, 1844, entered into an agreement to grant a lease of the farm to Wright. The agreement was as follows:—

"Agreement made the 26th of July, 1844, between Christmas Williams Colls of the one part, and James Alfred Wright, of Brentwood, Essex, gentleman, of the other part: Whereas the said C. W. Colls did, on the 25th of this instant July, as he is advised and believes, legally and effectually put an end to the lease granted by James Esdaile, Esq., to Samuel Hammond the younger, and bearing date the 18th of July, 1839, of Hunt's Farm, in Upminster, Essex, by entry thereon under the power to him for that purpose contained in [155] the said lease, by reason of the bankruptcy of the said Samuel Hammond the younger, and he hath agreed to grant a lease thereof to the said J. A. Wright, for twenty-one years from the 29th of September, 1844, at the same rents and under the same terms as the same farm was lately held by the said Samuel Hammond, save and except such part thereof as consists of the cottage and premises in the said lease mentioned to be in the occupation of the said Edward Hook,—on the following terms and conditions: It is therefore hereby mutually agreed by and between the said C. W. Colls and J. A. Wright, that the said C. W. Colls shall grant, and the said J. A. Wright shall accept, a lease of all the said farm and land (except the cottage and premises in the said lease stated to be in the occupation of

Edward Hook, and with such exception of timber, and of game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond are excepted), at the yearly rent of 316l. 8s., clear of all deductions except land-tax, and payable quarterly. The lease to commence on the 29th of September next, if the said C. W. Colls can then legally make and execute a lease thereof, or as soon after as the said C. W. Colls shall be in a situation to grant a lease. The said yearly rent to commence from the commencement of the term, or on possession being given, which shall first happen, and to be paid quarterly. The said J. A. Wright also to pay such further rents as are provided for and reserved by the said lease to the said Samuel Hammond. The said lease to contain the same or the like covenants, provisoes, conditions, and agreements as are contained in the said lease to the said Samuel Hammond, and such further covenants and agreements as are usual, according to the custom of the country. The said J. A. Wright to pay down to the said C. W. Colls, on possession being delivered to him of the said farm hereby agreed to be demised to him **[156]** (except the said cottage as aforesaid), the sum of 500l., as a bonus or premium for the said lease; and also to pay all the costs, charges, and expenses of this agreement, and a counterpart thereof, and of the said lease, and of a counterpart thereof, and to execute and deliver a counterpart of such lease to the said C. W. Colls: the same agreement and lease and counterparts to be prepared by the solicitor of the said C. W. Colls. The said J. A. Wright is not to require, or to call for, or to see or investigate, the title of the said C. W. Colls. The said J. A. Wright to take the growing crops at a valuation, to be made by two arbitrators, one to be named by each party, with power for those two arbitrators to name an umpire; the award of any two of them to be binding. And, in case either party shall refuse or neglect, for ten days, to name an arbitrator, after the other party has named an arbitrator, then the arbitrator so named shall have power to name another arbitrator, and he and such arbitrator so named by him, shall have liberty to name an umpire, if they cannot agree; and the award of any two of them to be binding. But, if the said C. W. Colls should not have legal right to sell the said crops, he is not to be bound so to do. Witness, the hands of the said parties," &c.

Under this agreement, the plaintiff was let into possession of the farm, which he occupied for two years, during which he duly paid the rent reserved, and also paid 250l. of the 500l. bonus. Hammond having presented a petition to the court of review, in January, 1845, obtained a supersedeas of the fiat against him; and in 1846 commenced an ejectment to recover possession of the farm.

One Woodward, who was called as a witness on the part of the plaintiff, proved that the defendant had **[157]** repeatedly declared to him that Hammond's lease was void, and good for nothing.

It also appeared, that, in September, 1844, a draft lease had been submitted by the defendant to the plaintiff's solicitor, and returned by him approved.

The only evidence of the issuing of a fiat against Hammond was, the production of a supersedeas, which the learned judge ruled to be sufficient for that purpose.

As to the first issue, the learned judge merely left it to the jury to find what damages the plaintiff had sustained by the defendant's breach of contract. Upon the second issue, he directed the jury to find for the plaintiff, which they did: upon the third issue, he directed them to find for the defendant; they, however, found that issue for the plaintiff: upon the fourth issue, he directed a verdict for the plaintiff,—reserving leave to the defendant to move to enter the verdict on that issue for the defendant, if the court should think him so entitled: upon the fifth issue, he gave the jury no direction, and that issue they found for the plaintiff: and, as to the count for money had and received, the learned judge told the jury that the plaintiff was entitled to recover the 250l. which he had paid on account of the 500l. premium.

The jury thereupon assessed the damages on the first count at 50l., and on the second at 250l.

Shee, Serjt., in Easter term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the assessment of damages upon the two counts was inconsistent: and also to arrest the judgment, on the ground that there was no averment in the declaration that the plaintiff tendered, or was ready and willing to pay, the 250l., residue of the 500l.

[158] Lush and Hawkins, in Hilary vacation, 1849, shewed cause. The payment of the 500l. was not a condition precedent: that sum was to be paid on possession being given of the farm; but the lease was not to be granted until the defendant could legally execute it. In *Pordage* v. *Cole* (1 Wms. Saund. 319 l.), it was held, that, if it be agreed between A. and B., that B. shall pay A. a sum of money for his lands, &c., on a particular day, these words amount to a covenant by A. to convey the lands; for, agreed is the word of both; but it is an independent covenant, and A. may bring an action for the money before any conveyance by him of the land. This case falls precisely within the first rule in the notes to that case (ibid. 320 b., n. (4)), where it is said: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for, it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance of that which is the consideration of the money or the act (*c*). This seems to be the ground of the judgment in this case of *Pordage* v. *Cole*, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed." [Maule, J. *Pordage* v. *Cole* would apply, if this were an action for the non-payment of the money. **[159]** Where the two acts are to be done concurrently, or the act to be done by the plaintiff is to be done before the other, the plaintiff must aver that he was ready and willing to do it.] If the covenants are distinct and independent, neither need aver performance on his part.

The finding upon the third plea aids the defect, if there be any, in the declaration. The jury have negatived that plea. [Cresswell, J. Every part of it?] Yes. [Cresswell, J. Then they find that the plaintiff has paid the whole 500l. Maule, J. The verdict upon the issue on de injuriâ to that plea, only finds that enough of the plea is disproved to make the traverse insufficient.] It negatives the excuse. [Maule, J. No; it affirms that some one of the necessary component parts of the excuse, is not true.] This is somewhat analogous to the case of *Brooke* v. *Brooke* (1 Sid. 184), where, in trespass for taking a hook, the defendant pleaded that he had a way to a certain wood, over the land of the plaintiff, that he was passing along it, and the plaintiff endeavoured to cut his harness, and to wound him with the said hook, and that therefore he took the hook out of the hands of the plaintiff, and delivered it to a constable, &c. Issue was taken upon the right of way, and a verdict was found for the plaintiff. It was afterwards moved, in arrest of judgment, that the plaintiff had not shewn in his declaration that the hook was in his possession: and it was agreed by the court, that, if the defendant had pleaded not guilty only, the judgment would have been arrested, because the plaintiff in his declaration had not alleged that the hook was his, nor shewn that it was in his possession. But the court were of opinion that the defendant had by his special plea made the declaration good; for, he pleaded that he took the hook out of the possession of the plain-**[160]**-tiff; wherefore the plaintiff might well maintain the action, upon his possession, without any property. [Maule, J. That proceeded upon the admission in the plea, which admitted the taking, and described the mode of taking consistently with the declaration.] Upon a motion in arrest of judgment, the court is bound to look at the whole record, and at the finding. Here, the jury must be taken to have found, upon the whole record, that it was not true, as alleged in the third plea, that the plaintiff was not ready and willing to pay the residue of the 500l. [Maule, J., I think the plaintiff had no right to call for the lease, until he had paid, or was ready to pay the remaining 250l.] If the declaration be good, as it is submitted it is, without the averment of readiness and willingness, and the payment of the whole 500l. was not a condition precedent, the plea is immaterial and bad, and the court will not grant a new trial.

Upon the fourth plea, the verdict was properly found for the plaintiff. There was no evidence to shew that the defendant was unable to grant the lease. On the contrary, there was evidence whence the jury might fairly infer the contrary; there was the recital in the agreement, and the defendant's declarations to Woodward that Hammond's lease was void and good for nothing; and a draft lease had actually been prepared, and submitted to the plaintiff's attorney, and by him returned approved.

(*c*) Citing Dyer, 76 a., in margin; *Thorpe* v. *Thorpe*, 1 Salk. 171, 1 Ld. Raym. 665, 1 Lutw. 250, 12 Mod. 461; per Hale, C. J., *Peter* v. *Opie*, 1 Vent. 177, 2 Saund. 350; *Callonel* v. *Briggs*, 1 Salk. 113; *Terry* v. *Duntze*, 2 H. Blac. 389; *Campbell* v. *Jones*, 6 T. R. 572.

The way in which it was attempted to shew the defendant's inability to grant the lease to the plaintiff was, by shewing that the fiat against Hammond had been superseded; and the only evidence of that was, the production of the supersedeas. No fiat was put in. Nor was Hammond's lease produced, so that it might be seen whether or not the circumstance of a fiat having issued against him, operated a forfeiture. It was proved, indeed, that, in Hilary term, 1846, a de-**[161]**-claration in ejectment was served by Hammond: but it did not appear that the action was prosecuted.

As to the alleged inconsistency of the finding of damages on the first and second counts,—that merely arises from the jury having erroneously severed the damages: the whole damages should have been given on the first count. [Maule, J. And a verdict found for the defendant on the second count?] Yes.

Shee, Serjt., and Bramwell, in support of the rule. The agreement was one entire agreement, all the stipulations on the one side being the consideration for what was to be done on the other side: *Hunt* v. *Silk* (5 East, 449). The direction of the learned judge, therefore, was clearly wrong: there having been no entire failure of consideration, the plaintiff was not entitled to recover the 250l.

The fourth plea ought unquestionably to have been found for the defendant. There was abundant evidence to shew that he never was in a situation to grant a lease—that the title was in a state of disquietude. The declarations alleged to have been made by the defendant to Woodward, are to be explained by the circumstance of Hammond's bankruptcy. *Gervis* v. *The Grand Western Canal Company* (5 M. & Sel. 76), and *Ledbetter* v. *Salt* (4 Bingh. 623, 1 M. & P. 597), are distinct authorities to shew that the supersedeas was sufficient evidence that a fiat had issued against Hammond, and that it had been superseded. [Maule, J. In *Gervis* v. *The Grand Western Canal Company*, the court treat a commission and a supersedeas as a proceeding of a competent tribunal, that is evidence against all the world,—a proceeding in rem, like an adjudication in a prize court.] Or in an ecclesiastical court (*d*).

[162] The fifth issue should have been found for the defendant. [Coltman, J. The allegation in that plea must mean, a reasonable time from the period at which the defendant should be in a condition to grant a lease.] Precisely so.

As to the damages,—the two findings are clearly inconsistent and incongruous. The plaintiff's right to damages on the first issue, is founded upon the assumption that the defendant has failed to do that which he was bound by the contract to do, viz. to grant a lease. That involves the question raised by the fourth issue—whether the defendant was in a situation legally to grant a lease. The finding on the first issue proceeds on the ground that the defendant could have granted a lease: and the finding of damages on the second count proceeds on the ground that the defendant did not and could not grant a lease. The 250l. could only be recoverable if the consideration wholly failed.

The first count is bad in arrest of judgment, for the reason already stated.

Cur. adv. vult.

Coltman, J., now delivered the judgment of the court,—after stating the agreement and the pleadings,—as follows:—

On shewing cause against the rule, it was not denied that the third issue ought to have been found for the defendant, the plaintiff having only paid 250l., in part of 500l. mentioned in the agreement. But it was contended that there was no ground for granting a new trial on that account, the plea being, as was insisted, an immaterial plea,—the payment of the sum of 500l. not being, it was said, a condition precedent.

With respect to the fourth issue, it was contended that the verdict was properly found for the plaintiff. The burthen of proof lay on the plaintiff, who had alleged in his declaration that the defendant could have **[163]** granted a lease: but he contended that the recital at the commencement of the agreement was primâ facie evidence against the defendant, that he had power to grant it; and there was evidence given of declarations made by the defendant to one Woodward, that Hammond's lease was void and good for nothing. It may be true that this evidence, though slight, was such as the jury might have acted upon, if there had been nothing to explain it. But it appears, by the recitals of the agreement, that the lease to Hammond was supposed to be void on the score of Hammond's being a bankrupt; and the declarations made

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(*d*) Or, in the Exchequer, upon a seizure of goods forfeited. Mann. Exch., 2nd edit., 142.

to Woodward, had reference, no doubt, to the same supposed bankruptcy; and, therefore, when it was shown, as was done in this case, that the fiat against Hammond had been superseded, that fact explained the primâ facie case set up by the plaintiff, and led strongly to the conclusion that the defendant had not any power to make a lease. The verdict on this issue, therefore, seems to us to be wrong; and on that score the defendant will be entitled to have the verdict on the fourth issue entered for him, pursuant to the leave reserved. It is, therefore, unnecessary to decide whether the verdict on the third issue is or is not immaterial.

The remaining question is, whether there is evidence to support the count for money had and received. The agreement in this case was so far acted upon that the plaintiff was admitted into possession, and occupied the land for two years, and paid 250l., in part of the 500l.; and, it having turned out in the end that no lease could or would be granted to him, he claims to have the 250l. returned to him, as being paid on a consideration which has failed,—that consideration being, as the plaintiff alleges, the promised grant to him of a lease for twenty-one years. The defendant, on the other hand, contended that the consideration for paying the sum of 500l. was **[164]** not solely the granting of the lease, but that the whole of the matters agreed to be done on the one side, was the consideration for the whole of the matters to be done on the other side. It may be admitted that such is in general the case,—that the whole of the stipulations on the one side are the consideration for the whole of the stipulations on the other: but such is not necessarily the case; nor is it the case, we think, in this agreement, which is of a special nature; and it is expressly stated in it that the sum in question is a bonus or premium for the lease, and the granting of the lease is the particular consideration for which the bonus was to be given.

It was understood between the parties that there might be some difficulty or delay in granting a valid lease; and therefore the parties contemplated the commencement of a tenancy before the lease was granted; and the yearly rent of 316l. 8s. was to commence, in that event, from the time when possession was delivered; and the sum of 500l. was then to be paid. But it cannot be supposed to have been the intention of the parties that the defendant should keep the sum of 500l., if he never made the lease. The object of the tenant in making such an agreement is, that he may have a security that he shall keep the land for the specified term, so that he may safely lay out money in improvements at the commencement of his term, of which he may reap the benefit before his term is expired. He may reasonably be supposed to have been willing to pay an annual rent for the possession of the land, but not to be willing to pay the bonus or premium, unless he gets the security of the term; and therefore it is, that, in express terms, he states that the money is to be paid as a bonus for the lease, not as a consideration for making the agreement. The lease, then, not having been granted, the consideration must, after such a lapse of time, be considered to have failed, and the count for money had and received is maintainable.

[165] Under this state of circumstances, the defendant is entitled to have the verdict entered for him on the fourth issue; and the verdict for the plaintiff on the other issues will stand.

Rule accordingly.

BEARD v. EGERTON AND OTHERS. June 25, 1849.

[S. C. 19 L. J. C. P. 36; 13 Jur. 1004.]

In the construction of a specification, the whole instrument must be taken together, and a fair and reasonable interpretation given to the words used in it.—A specification of a patent for "a new and improved method of obtaining the spontaneous re-production of all the images received on the focus of the camera obscura," in describing the process, stated it to be divided into five operations:—"The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating (iodine), upon which the action of the light traces the design: the second operation is, the applying that sensitive layer or coating to the silver surface: the third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images: the fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the camera obscura: the fifth and last operation is, that of removing the sensitive layer or coating, which would continue to be affected and undergo different changes from the action of light,—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura." It then proceeded to give a description of the first operation,—preparing the silver surface of the plate; the concluding part of which directed that nitric acid dissolved in water should be applied three different times, the plate being each time sprinkled with pounce and lightly rubbed with cotton: adding—"When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface after being exposed to heat: the first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time: this will allow of a number of plates being kept prepared up to the last slight operation: it is, however, considered indispensable, that, just before the moment of using the plates in the camera, or the reproducing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated: finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface, or its edges." In a subsequent part of the specification, having described the second operation, viz. the application of the iodine, the inventor observed: "After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura: whenever it is possible, the one operation should immediately follow the other:"—Held, that, taking the whole specification together, the direction as to the third application of acid, was not to be understood to be a direction to apply the acid after the second operation, viz. the coating the plate with iodine,—which, it was proved, would render the whole process abortive,—but to apply it as part of the first operation; and that the specification gave sufficient information to an operator of reasonable skill.

Case, for infringement of a patent. The declaration stated, that, before and at the time of the making the letters-patent, and of the committing of the grievances by the defendants as thereinafter mentioned, Miles Berry was the true and first inventor of the working or making of a certain manner of new manufacture within this realm, to wit, a certain invention of a new or improved method of obtaining the spontaneous re-production of all the images received on the focus of the camera obscura, and which said invention others, at [166] the time of the making of the said letters-patent, did not use: that thereupon, Her present Majesty, Victoria, theretofore, and before the commencement of this suit, to wit, on the 14th of August, in the third year of her reign, by her letters-patent, bearing date at Westminster, the day and year last aforesaid, under the Great Seal of Great Britain and Ireland, for herself, her heirs and successors, did give and grant unto the said Miles Berry, his executors, administrators, and assigns, her especial licence, full power, sole privilege, and authority that he, the said Miles Berry, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said Miles Berry, his executors, administrators, or assigns, should at any time agree with, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within that part of her united kingdom of Great Britain and Ireland called England, her dominion of Wales, and town of Berwick-[167]-upon-Tweed, also in all her colonies and plantations abroad, in such manner as to him the said Miles Berry, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet; and that he the said Miles Berry, his executors, administrators, and assigns, should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein and in that declaration thereinafter mentioned,—to have, hold, exercise, and enjoy the said licence, powers, privileges, and advantages thereinbefore granted, or mentioned to be granted, unto the said Miles Berry, his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date of the said letters-patent, and immediately ensuing, and fully to be completed and ended, according to the statute in such case made and provided; and to the end that he the said Miles Berry, his executors, administrators, and assigns, and every of them, might have and enjoy the full benefit and the sole use and exercise of the said invention, according to her gracious intention thereinbefore declared, Her said Majesty did, by the said letters-patent, for herself, her heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other her subjects whatsoever, of what estate, quality, degree, name, or condition they should be, within that said part of her united kingdom of Great Britain and Ireland called England, her dominion of Wales, and town of Berwick-upon-Tweed, and also in all her colonies and plantations abroad aforesaid, that neither they nor any of them, at any time during the continuance of the said term of fourteen years thereby granted, either directly or indirectly, should make, use, or put in practice the said **[168]** invention, or any part of the same, so attained unto by the said Miles Berry as aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor should make, or cause to be made, any addition thereunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, devisor or devisors thereof, without the licence, consent, or agreement of the said Miles Berry, his executors, administrators, or assigns, in writing, made under his or their hands and seals, first had and obtained, in that behalf, upon such pains and penalties as could or might be justly inflicted on such offenders, for their contempt of that her royal command; and further to be answerable to the said Miles Berry, his executors, administrators, and assigns, according to law, for his and their damages thereby occasioned: that the said letters-patent were, amongst other things, upon this express condition, that, if the said Miles Berry should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Her said Majesty's high court of Chancery within six calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, anything thereinbefore contained to the contrary thereof in any wise notwithstanding,—as by the record of the said letters-patent, then remaining inrolled of record in Her said Majesty's high court of Chancery, reference being thereto had, would more fully and at large appear: that the said Miles Berry did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, by an instrument in writing, to wit, a specification, under his hand and seal, particu-**[169]**-larly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, and did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, to wit, on the 14th of February, in the said third year of the reign of Her said Majesty, and A.D. 1840, cause the said instrument in writing to be inrolled in Her said Majesty's high court of Chancery,—as by the record of the said specification, then remaining inrolled of record, reference being thereunto had, fully appeared: that afterwards, and before the committing by the defendants of the several grievances thereinafter mentioned, and before the commencement of the suit, to wit, on the 23rd of June, 1841, by a certain indenture then made between the said Miles Berry of the one part, and the plaintiff of the other part,—profert,—the said Miles Berry, for the considerations therein mentioned, did grant, assign, transfer, and set over (amongst other things) unto the plaintiff, his executors, administrators, and assigns, the said letters-patent, and all benefit thereof, and also the exclusive exercise, right, and enjoyment of and to the said invention in the said letters-patent, and thereby granted to the plaintiff, and all and singular the liberties, privileges, profits, emoluments, and advantages whatsoever appertaining or belonging thereunto, or in anywise to be had or made thereupon; and all the right, title, interest, term and terms of years unexpired, property, claim, interest, and demand whatsoever, at law or in equity, of him, the said Miles Berry, of and in, to, out of, and upon the said letters-patent,—to have, hold, exercise, and enjoy, amongst other things, the said letters-patent, and the privileges, authorities, profits, and advantages thereto belonging, unto the plaintiff, his executors, administrators, and assigns, for his and their use and benefit, for and during all the residue of the said term of years then **[170]** unexpired in the said letters-patent, and for all other the term and interest (if any) of him the said Miles Berry therein,—as by the said indenture more fully and at large appeared; whereby the plaintiff then became and was, and thence continually had been, entitled to the said privileges, authorities, benefit, profits, and advantages of the said letters-patent: Yet the defendants, well knowing the several premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and after the inrolment of the said specification, and the making of the said indenture, as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, unlawfully, and unjustly, without the leave or licence, and against the will of the plaintiff, did make, use, exercise and vend the said invention, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the letters-patent, and of the privileges to which the plaintiff was and is entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the inrolment of the said specification and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commence-**[171]**-ment of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, unlawfully, and unjustly, without the leave or licence, and against the will of the plaintiff, did put in practice the said invention, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the inrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, wilfully, and unjustly, without the leave or licence and against the will of the plaintiff, did make, use, and put in practice a part of the said invention, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the inrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, wilfully, and **[172]** unjustly, without the leave or licence, and against the will of the plaintiff, did imitate the said invention, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the inrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of this suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, wilfully, and unjustly, without the leave or licence, and against the will of the plaintiff, did make certain additions to, and subtractions from, the said invention, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, and did thereby pretend themselves to be the inventors and devisors thereof, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: And that, by means of the committing of the said several grievances by the defendants as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and letters-patent, and in respect whereof he had been and was entitled to such privileges as aforesaid, and had been and was otherwise damnified: To the damage, &c.

The defendants pleaded,—first, not guilty.

Secondly, that our Lady the Queen did not give and grant unto the said Miles Berry, his executors, ad-**[173]**-ministrators, and assigns, the licence, power, privilege, and authority, profits, benefits, commodities, and advantages in the declaration in that behalf mentioned, by the said letters-patent therein mentioned, in manner and form as in the said declaration was alleged,—concluding to the country.

Thirdly, that the said letters-patent in the declaration mentioned, were obtained and procured from our Lady the Queen, by the fraud, covin, deceit, and misrepresentation of the said Miles Berry and others in collusion with him, wherefore the same were and are void in law,—verification.

Fourthly, that the said Miles Berry was not the true and first inventor of the said new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura, within the meaning of the statute in such case made and provided, in manner and form as in the declaration was alleged,—concluding to the country.

[The fifth, sixth, seventh, and tenth pleas were demurred to, and the plaintiff obtained judgment thereon; vide ante, vol. iii. p. 97.]

Eighthly, that the said invention was not the making or working of any manner of new manufacture for which letters-patent could be granted, according to the true intent and meaning of the statute in such case made and provided,—concluding to the country.

Ninthly, that the said invention was not, at the time of the making of the said letters-patent in the declaration mentioned, a new invention, as to the public use and exercise thereof within this realm, in manner and form as the plaintiff had above alleged,—concluding to the country.

Eleventhly, that the title and description of the said invention was and is expressed in the said letters-patent **[174]** in manner and form as in the tenth plea mentioned (*a*); and that the said title and description was and is in its claim, description and definition of the said invention, inconsistent and at variance with, and too large for, the said supposed invention as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff (*b*), in the declaration mentioned, and was not a true and proper description thereof; wherefore the said letters-patent were and are void,—verification.

Twelfthly, that the said Miles Berry did not, by any instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above alleged,—concluding to the country.

Thirteenthly, that the said Miles Berry did not grant, assign, transfer, or set over to the plaintiff, his executors, administrators, and assigns, the said letters-patent, and all benefit thereof, and the exclusive right, exercise, and enjoyment of and to the said invention, and all and singular the liberties, privileges, profits, emoluments, and advantages whatsoever appertaining or belonging thereto, or to be had or made thereupon, in manner and form as the plaintiff had above alleged,—concluding to the country.

Fourteenthly, leave and licence.

Fifteenthly, that the said alleged invention in the declaration mentioned, and in the said letters-patent **[175]** and instrument in writing in the declaration mentioned and described, was and is of no use, benefit, or advantage to the public whatsoever,—verification.

The plaintiff joined issue upon the first, second, fourth, eighth, ninth, twelfth, and thirteenth pleas; and replied to the third, that the said letters-patent were not obtained or procured from our Lady the Queen by fraud, covin, deceit, or misrepresentation,—

(*a*) The tenth plea was as follows:—"That the title and description of the said invention in the declaration mentioned, was and is expressed in the said letters-patent in the words following, and in no other manner, that is to say, 'A new or improved method of obtaining the spontaneous re-production of all the images received in the focus of the camera obscura,' wherefore the said letters-patent were and are void in law,"—verification.

(*b*) Of Miles Berry.

concluding to the country: to the eleventh, that the said title and description was not nor is, in its claim, description, or definition of the said invention, inconsistent, at variance with, or too large for the said invention as described and ascertained by the instrument in writing in the last-mentioned plea mentioned and referred to, and was a true and proper description thereof,—concluding to the country: to the fourteenth, de injuriâ: and to the last plea, that the said invention in the declaration mentioned, and in the said letters-patent and instrument in writing in the declaration mentioned and described was, at the time of making and granting the said letters-patent, and afterwards, and still is, of use, benefit and advantage to the public,—concluding to the country.

The defendants joined issue on the replications to the third, eleventh, fourteenth, and fifteenth pleas.

The cause was tried before Wilde, C. J., at the sittings in London after Trinity term, 1847.

Evidence was given by the plaintiff in support of the first, second, third, fourth, eighth, ninth, thirteenth, fourteenth, and fifteenth issues. To prove the twelfth, the specification was put in. The patent was therein described to be for "A new or improved method of obtaining the spontaneous re-production of all the images received on the focus of the camera obscura."

The infringement was admitted.

[176] After the usual preamble, the specification contained the following preliminary observations:—

"This invention or discovery relates to photogenic drawing, or the spontaneous re-production of images, pictures, or representations of nature, by the action of light, that is, by the process or method now well known under the name of 'Daguerreotype' I believe it to be the invention or discovery of Messrs. Louis Jacques Maude Daguerre and Joseph Isidore Niepce, junior, both of the kingdom of France, from whom the French government have purchased the invention, for the benefit of that country.

"This invention or discovery was fully communicated to me by a certain foreigner, residing in France, on or about the 15th day of July, in the year 1839, with instructions, immediately to petition Her Majesty to grant her royal letters-patent for the exclusive use of the same within these kingdoms; and, in consequence thereof, I did apply for such letters-patent; and Her Majesty's Solicitor General, after hearing all parties who opposed the same, was pleased, on or about the 2nd day of August, now last past, to issue his report to the crown in favour of the patent being granted, and it consequently passed the great seal in the usual course, being sealed on the day above named, which is some days prior to the date of the exposition of the said invention or discovery to the French government, at Paris, by Messrs. Daguerre and Niepce, according to the terms of their agreement. And I will now proceed to describe this invention or discovery, as communicated to me.

"Description of the process.—The reproduction of the images received at the focus of the camera obscura, is effected on plates, or surfaces of silver, which may be plated on copper; the copper serving principally to support the surface or sheet of silver,—the combina-**[177]**-tion of these two metals contributing towards the perfection of the effect. The silver employed should be without alloy, or as pure as possible. The sheet of copper should be sufficiently thick to preserve the perfect smoothness and flatness of the plate, so that the images may not be distorted by the warping thereof; but the copper should not be thicker than what would be required to attain that end, on account of the weight of the metal. The thickness of the two metals united, need not exceed that of a stout card.

"The process is divided into five operations:—The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating, upon which the action of the light traces the design. The second operation is, the applying that sensitive layer or coating to the silver surface. The third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images. The fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the camera obscura. The fifth and last operation, is that of removing the sensitive layer or coating, which would continue to be affected and undergo different changes from the action of light;—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura.

"Description of the first operation—preparing the silver surface of the plate.—For this operation, are required, a small phial of olive oil, some cotton, very finely carded, a small quantity of pounce or pumice powder, ground extremely fine, and tied up in a small bag of muslin, sufficiently thin in texture to allow the powder to pass easily through when the bag is shaken.—A phial of nitric acid, diluted with pure water, in [178] about the proportion of one part of acid to sixteen parts of distilled water.—A wire frame or stand, on which the plates can be placed, so as to be heated by means of a lamp. Lastly, a spirit or other lamp to heat the plates. The size of the plates or surfaces are limited by the dimensions of the apparatus.

"The plates must first be well cleaned and polished. To effect this, begin by sprinkling the silver surface with pounce, by shaking the bag, without touching the plate, and then with cotton, impregnated with a little olive oil, rub it gently on, lightly moving the hand round in circles from the centre. The plates, during this operation, should be placed flat on a sheet of paper, which must be changed when necessary. The pounce must be sprinkled several times, and the cotton changed several times, during the operation of rubbing.

"The pestle and mortar used for pulverising the pounce or pumice powder, should not be formed of either cast iron or copper, but made of porphyry. The pounce should be ground afterwards on a glass plate, with a glass muller, pure water being used in the operation. The pounce should be used only when perfectly dry.

"It will readily be conceived how important it is that the pounce or pumice powder should be sufficiently finely pulverised, so as not to cause streaks; for it is, in a great measure, upon the fine polish of the surface of the plate that depends the beauty of the image, picture, or tracing produced thereon.

"When the plate is perfectly polished, it must then be cleaned. This is effected by dusting or sprinkling the powder over the surface, and rubbing it with dry cotton the movements of the hand being made in circles, and backwards and forwards, and up and down crossing each movement, in order to operate equally on [179] all parts of the surface. This is the best mode of rubbing to gain the desired result.

"Next, a small knot or tuft is made with carded cotton, which is to be moistened with a little acid diluted in water, as above stated. To do this, the knot of cotton may be placed on the mouth of the bottle containing the diluted acid, and pressed thereon; the phial being then inverted, and then placed again upright, so that the centre of the tuft of cotton may be moistened with acid without deeply impregnating it. Very little acid is required, and care must be taken not to wet the fingers with it. With this tuft, so charged with acid, the surface must be rubbed, care being taken to carry the acid uniformly over all parts of the surface of the plate; the cotton should be changed several times, and the rubbing of the surface be made by moving the hand round and round, and crossing as before, so as to extend, equally, the acid; which, nevertheless, ought to do no more than cover slightly the surface of the plate. It will sometimes happen that the acid applied on the surface of the plate will be found to accumulate into small globules,—these must be destroyed by changing the cotton, and by rubbing the plate gently, so as to spread the acid evenly; for, on any place where the acid has been allowed to rest a time, or has not been laid evenly, it would form spots or stains.

"It will be seen that the acid is evenly spread upon the surface of the plate, by its appearing covered with a uniform tint, or what may be termed a thin veil or change of surface. The plate is finally to be sprinkled with pounce or pumice powder, and cleaned by slightly rubbing it with a fresh piece of carded cotton. Instead of ordinary pounce, calcined Venetian tripoli may be used.

"The plate, thus prepared, is then to be submitted [180] to a considerable degree of heat. To do this, it is placed on a wire frame, the silver surface being uppermost. Under the plate is placed a lighted lamp, which is to be moved about, so that the flame shall act equally upon all parts. When the plate has been submitted to this operation for about five minutes (or until the heat has acted equally upon all parts of the plate), it will be perceived that the surface of the silver has obtained a whitish tint or coating, and then the action of the heat must cease.

"This effect may be obtained by other means; for instance, the heat of lighted charcoal may be used, which may be preferable, as the operation will be sooner finished. In this case, the wire frame is unnecessary, for, the plate may be laid on the stove, or held with tongs, the silver surface always being upwards, and it may be moved backwards and forwards on the furnace, so as to heat it equally throughout, until the silver surface becomes covered with a whitish tint, as above stated. The plate is next to be cooled rapidly by placing it on a cold body or substance, such as a marble slab, or stone, or metal surface. When cooled, it must be polished again. This may be quickly done, since it is only necessary to remove the white tint which has been formed on the silver surface. To effect this, the plate is to be sprinkled with pumice powder, rubbed in a dry state with a portion of cotton. This should be done on the surface of the plate several times, taking care to change the cotton often.

"When the silver is well polished it is to be rubbed, as above stated, with acid dissolved in water, and sprinkled with a little dry pounce powder, and rubbed lightly with a knot of cotton. The acid is then to be laid upon the plate, say three different times, care being taken to sprinkle, each time, the plate with powder, and to rub it dry, and very lightly, with clean cotton. **[181]** Care should be taken not to breathe upon the plate, or to touch it with the parts of the cotton touched by the fingers, as the perspiration would produce spots or stains; and dampness of the breath, or of the saliva, would produce the same defects in the drawings.

"When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface, after being exposed to heat. The first part of the operation may be done at any time. This will allow of a number of plates being kept prepared up to the last slight operation. It is, however, considered indispensable, just before the moment of using the plates in the camera, or the re-producing the design, to put, at least once more, some acid on the plate, and to rub it lightly with pounce, as before stated.

"Finally,—the plate must be cleaned, with cotton, from all pounce dust which may be on the surface or its edges.

"Second operation.—For this operation, the following implements are required:—The box, represented in figs. 3 and 4; the thin board or frame, shewn in fig. 5; four small metallic bands, of the same metals as the plates, seen also in fig. 5; a small handle, and a box of small nails or tacks; and a phial of iodine.

"After having fixed the plate upon the thin board or frame, (the silver surface uppermost,) by means of the metallic bands, and the small nails which are forced into the board by the handle, some iodine is then to be put into the cup or dish *d*, placed in the bottom of the box, figs. 3 and 4. It is necessary to divide the iodine into pieces, in order to render the exhalation more extensively and equally diffused; otherwise, on the middle of the plate would be formed circles, or a kind of iris, or appearance of a rainbow, in prismatic colours, which would prevent the plate from receiving an uniform impression.

[182] "The thin board, with the plate, is then placed, with the silver surface undermost, upon small brackets or supports, at the four angles of the box; its cover *g*, is then closed. In this position, the plate must be left until the surface of the silver be covered with a fine golden tinge, which is caused by the evaporization of the iodine condensing on the surface of the silver. If the plate were allowed to remain too long, this golden yellow colour would turn purple, or violet colour, which must be avoided, because, in this state, the coating is not so sensitive to the effect of light. On the contrary, if this coating is too pale, or not sufficiently yellow, the image taken from nature would be very deficiently or faintly re-produced: therefore, a coating of a golden yellow is particularly desired, because it is the most favourable to the production of the effect.

"The time necessary for this operation cannot be stated; because it depends on several circumstances; one is, the temperature of the room wherein the operation is conducted; another, the state of the apparatus, which, for this process, should be left to itself, and not be affected by the addition of any other heat than that of the room.

"It is very important, in this operation, that the temperature inside the box be equal to that outside; if such were not the case, on the plate being passed from a cold to a warmer atmosphere, it would become covered with condensed moisture from the atmosphere, which would do great injury to the effect. This operation should be left entirely to the spontaneous evaporation of the iodine. Also, the more this box or apparatus is used, the less time is required to effect the object, because the interior sides of the box become penetrated with vapour of iodine; and as it is the nature of this vapour always to evaporate, it will arise **[183]** from all the internal parts of the box, and, therefore, will spread more evenly and more quickly on the surface of the plate, which is very important; therefore, it is proper to leave a little iodine in the cup on the bottom of the box, and also to keep the box free from damp. It is, therefore, evident that the apparatus will operate better after being used several times.

"From the causes above stated, it is not possible to fix, precisely, the time necessary for obtaining the coating of a golden yellow tint, as the same may vary from five to thirty minutes, but rarely longer, unless the weather be very cold. It is necessary to look at and examine the state of the plate from time to time, to ascertain whether it has attained the golden yellow tint required; but it is important that the light should not be allowed to fall or strike directly upon its silver surface. It may happen that the plate be more coloured or tinted at one end than at the other; in that case, in order to equalize the tint, care must be taken, in replacing the plate, to turn it endways, or side for side.

"In order to accomplish these repeated examinations, without injuring the sensitive ground or coating, this process should be conducted in a darkened room, into which light is admitted sideways, not from the roof. The box should be placed in a dark room, where the light enters but feebly, as through the door left a-jar. Whenever the plate is to be inspected, the operator is to raise the lid of the box, when the board may be taken by its edges with the two hands, and turned up rapidly, very little light being required to shew the true colour of the coating; and if the plate has not obtained the golden yellow tinge, it must be immediately replaced in the box, and there kept until it attains the proper gold colour; if, on the contrary, the colour is deeper, then the coating will not be of any use, and **[184]** the plate is to be repolished and cleaned,—the first operations being recommenced.

"From a written description, this operation may seem difficult and tedious; but, with a little practice, an intelligent operator would be enabled to judge, accurately, of the time required to obtain the desired golden yellow tint; and also to inspect, rapidly, the plate, so as not to give the light sufficient time for acting upon the coating.

"When the surface of the plate has attained the proper colour, the board, with the plate, must be introduced into the frame, represented at figs. 6, 7, and 8, which frame is adapted to the camera obscura. In this transference, care must be taken to prevent the light striking on the surface of the plate; and for this purpose, the camera obscura may be lighted with a wax taper, the light of which has much less effect upon the coated surface; even this light ought not to be allowed to strike too long on the plate, as it will cause marks or traces on the same, if allowed to continue a length of time.

"After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura. Whenever it is possible, the one operation should immediately follow the other; the longest interval between the two should not exceed an hour; beyond this time, the action of the iodine and silver surface will lose their requisite photogenic properties. But, previous to passing to the third operation, I would add the following remarks or observations:—

"First observation.—Before using the iodine box, the interior should be well cleaned, and the box itself turned upside down, in order to empty it of all the particles of iodine which may have escaped from the **[185]** cup; care must be taken not to touch the iodine with the fingers.

"During the operation of coating the surface with iodine, the cup should be covered with a wire or other gauze, stretched on a frame; this gauze has the effect of regularly distributing the evaporation or vapour of the iodine upon the surface of the plate, and at the same time to hinder, whenever the lid of the box is closed, the compression of air, thereby occasioned, from causing the particles of iodine to be scattered or flying about within the box, which particles might strike the plate and cause spots or blotches thereon; for this reason, the lid of the box should always be closed quietly. The same observation applies in case particles of dust should rise inside the box, which, being charged with the vapour of iodine, might injure the plate by coming in contact with its surface.

"Second observation.—The iodine box or apparatus, above described, may be varied according to circumstances, or be substituted by the following contrivance:—A thin deal board, similar to the one used for fixing the plates upon, is first to be saturated with the vapour of the iodine; this may be done in a box similar to the one above described, or even in a box only two inches high. This board, when once properly saturated, may be placed in a small box, two inches high, of the proper length and width, and provided with three grooves or ledges, one to receive the metallic plate or silver surface, and the two others to receive the saturated board, which may be placed nearer to or further from the metallic surface. When placed in the first groove or ledge, it may be at a quarter of an inch distance from the plate; in the second, it may be at a distance of half an inch or more. This second groove, or further position, need only be used in case the operation of coating the surface should proceed too fast, in **[186]** consequence of increase of temperature, or in case the plate should have been withdrawn before it has reached its proper degree of golden colour.

"This mode or process of coating the surface has the advantage of enabling the operator to coat the plate with iodine with great rapidity, that is to say, generally in a very few minutes. If the operation should proceed too fast, the board, saturated with iodine, may be placed in the upper groove, and the metallic plate underneath: this position causes the operation to proceed slower. It is necessary that this iodine box should be securely closed, to hinder any current of air reaching the surface; and, moreover, in this latter case, the box should only open on one of its sides.

"The board, saturated with iodine, may be made to serve to coat several plates during a whole day, or even several days, without the necessity of replacing it in the iodine saturating box. I will now proceed to describe the third operation.

"Third operation—the camera obscura.—As before stated, the operation should proceed as quickly as possible from the second to the third operation, or not leaving more than one hour between both, as, beyond this time, the combination between the iodine and the silver has no longer the same property.

"The apparatus necessary for this operation is the camera obscura (see figs. 9 and 10), adopted and fitted to receive the prepared plates and their boards.

"This third operation is that in which, by means of light acting through the lens of the camera obscura, nature reflects or impresses (to use figurative language) an image of herself of all objects enlightened by the sun, on the surface of the photographic or prepared plates.

"It is easy to conceive, that, this operation being produced only by the agency or effect of light, the action is the more rapid according as the objects are **[187]** more brilliantly lighted up, or illuminated, or in their nature are more intensely white, or present bright lines or surfaces.

"After having placed the camera obscura opposite to, or in front of, the objects of which it is desired to fix or retain the image, or obtain a representation, it is essential, first, to adjust the focus of the camera obscura, so that the objects may be represented perfectly clear and distinct. This is easily done, by moving forward or backward the frame of a plate of ground-glass in the camera, which glass receives the images of the objects from the lens. When this frame is brought to the proper position, this moveable part of the camera obscura is fixed by means of screws, applied for that purpose. The ground-glass is then removed from the instrument, care being taken not to move the camera obscura; and, in the place of the ground-glass, is substituted the apparatus, carrying the prepared metallic plate or surface (see figs. 6, 7, and 8), which apparatus exactly fits the place of the ground-glass plate or its frame. During the time the apparatus, with the prepared surface, is being fastened by small brass buttons or other fastenings, the camera obscura is closed. The obscuring shutters or doors *b*, *b*, of the apparatus, are then opened by means of the two semicircles *a*, *a*. The plate is then in a proper position to receive and retain the impression of the image of the objects chosen,—nothing more need be done, but to open the aperture of the camera obscura, and to consult a watch to reckon the minutes the prepared surface shall be under the action of the light.

"This operation is of a very delicate nature, and should be carefully attended to, because nothing is visible; and it is quite impossible to state the time necessary for the re-production of the image, as it depends entirely on the intensity of light received by **[188]** or from the objects, the image of which it is intended to re-produce: the time may vary from three to thirty minutes.

"It must likewise be remarked, that the seasons, as well as the hours of the day, have great influence on the rapidity of the operation. The most favourable hours are, from seven in the morning till three in the afternoon. The process of re-production, which may require from three to four minutes in the months of June and July, will require from five to six in the months of May and August, from seven to eight in April and September, and so on in proportion as the seasons advance. This is only a general and approximate statement, for objects strongly lighted, as it often happens that twenty minutes are necessary for the operation in the most favourable months, that is, when the objects are partially in shadow or darkness.

"It will be seen, from what has been stated, that it is impossible to name exactly the time necessary for obtaining images or tracings from nature (or photographic designs); but, by a little practice, it may be easily ascertained. Practice is the only sure guide; and, with this advantage, an operator will readily ascertain the required time correctly. Latitude of the situation is of course to be considered:—for example, it is conceived, that, in the south of France, and, generally, in all the countries where the light is very intense, as in Spain or Italy, the plates will receive the impression much more rapidly. It is, however, very important not to allow more time to pass than what is necessary for the re-production, because the clear parts would no longer be, or remain, white or clear,—they would be darkened by the prolonged action of the light allowed to strike upon the iodine on the surface. If, on the contrary, the time allowed is not sufficient, [189] then the proof or image would be vague, and without proper details.

"Supposing the operator has failed in one proof, it being imperfect on account of its having been withdrawn too soon, or left to remain too long, another may be begun immediately. If a plate has been previously prepared, the operator is then more certain of obtaining the proper effect, the second operation being corrected by the first.

"It is desirable and useful, in order to acquire a proper practice, to make some experiments of this kind. The plate or surface having been submitted to the action of the light the required time, I will proceed to describe the—

"Fourth operation—the mercurial process.—The operator must hasten to submit the surface of the plate to the fourth operation as soon as it is withdrawn from the camera obscura. Not more than one hour ought to be allowed to expire between the third and fourth operations; and it is much more certain to obtain good proofs or tracings of nature, when the fourth operation takes place immediately after the third.

"For the fourth operation, the following articles are required;—First, a phial containing a quantity of mercury, or quicksilver. Second, a spirit or other lamp. Third, the apparatus represented in figs. 11 and 12. Fourth, a glass funnel, with a long neck. By means of the funnel, the mercury is poured into the cup *c*, situated in the bottom of the apparatus (shewn in the figures), and in a sufficient quantity to cover the ball or globe of the thermometer *f*. From this time, no day-light must be admitted, and the room must be darkened, and the light of a candle or taper only be used to enable the operator to inspect the progress of the operation.

"The board, on which the plate is fixed, must be [190] withdrawn from the apparatus, already mentioned, as adopted in the camera; which apparatus preserves it from the contact of light. The thin board, with the plate, is then introduced into the grooves or ledges of the blackened board *b*, fig. 11. This black board is then replaced in the box or apparatus, where it is maintained at an inclination of forty-five degrees. The prepared metal surface *h*, being placed undermost, so that it may be seen through the side glass *g*: the cover *a*, of the box must be put down gently, to prevent any particles of mercury flying about, in consequence of the compression of the air.

"When the whole is thus prepared, the spirit lamp is lighted and placed under the cup containing the mercury, and allowed to remain until the thermometer (the ball of which is immersed in the quicksilver bath, the tube extending outside the box), indicates a temperature of sixty degrees centigrade: the lamp then must be removed. If the thermometer has rapidly risen, it continues to rise even when the lamp is removed, but it should not be allowed to rise above seventy-five degrees centigrade.

"The impression of the image of nature now actually exists on the plate, but it is not visible; it is only after several minutes of time has elapsed, that faint tracings of the objects begin to appear, as may be readily ascertained by inspecting the operation, or looking through the glass, assisted by the light of a candle or taper,—which must not be allowed to strike too long on the plate, because it would leave marks on the same.

The plate should be left in the box until the thermometer has fallen to forty-five degrees; then the plate is to be taken out, and this operation is finished.

"When the objects or articles (the re-production of the images of which it is intended to be produced) have been brightly illuminated, and the light has acted **[191]** a little too long in the camera obscura, this fourth operation will be finished, even before the thermometer has gone down to fifty-five degrees; this effect may be perceived by looking through the glass *g*.

"It is necessary, after each operation, to wipe or clean well the interior of the apparatus, in order to remove the slightest coating or layer of mercury which generally covers or adheres to it. The black board or frame *b*, must, likewise, be carefully wiped, that it may not retain any particles of quicksilver. When the apparatus is to be packed up for carrying it from place to place, the mercury which is in the cup must be poured into the phial; this is done by inclining the box, so as to let the mercury escape through the small cock *e*, at the side of the apparatus.

"The picture or plate may now be inspected by means of a weak light, in order to ascertain whether the operation has succeeded or not. It may be taken from off the thin board, by removing the metallic bands or straps, which bands should be cleaned carefully, by means of pounce and a little water, from any iodine or mercury they may have received: this should be done after each plate has been operated upon.

"It will be readily conceived that this cleaning is necessary, since not only these small bands are covered with a coating of iodine, but they have also received a portion of the tracing from nature.

"The plate is then to be placed in a box provided with a cover and grooves, until it can undergo the fifth and last operation. This operation need not be effected immediately, for, the plate or sketch may be kept in this state for several months, without undergoing any alteration, provided, however, it be not frequently inspected or exposed in the open day-light. I will now proceed to the last operation, viz., the—

"Fifth operation—fixing the tracing, delineation, or **[192]** picture.—The object of the fifth operation is, to remove from the surface or plate the coating of iodine, which, otherwise, on its being exposed too long to the action of light, would continue to be decomposed, and would thereby destroy the picture or tracing.

"For this operation, the following articles are required:—First, water, saturated with sea salt, or a weak solution of hyposulphite of pure soda. Second, the apparatus represented in figs. 13 and 14. Third, two troughs of tinned metal. Fourth, a vessel or jug full of distilled water.

"In order to remove the coating of iodine, the operator must take the common salt, and put it into a bottle with a large mouth, the bottle being filled with pure water. To accelerate the dissolving of the salt, the bottle may be shaken from time to time. When the water is completely saturated with salt, it is to be filtered through blotting paper, that no extraneous matters may remain in it, and that it may be perfectly clean.

"Water, saturated with salt, may be prepared in sufficient quantity before-hand, and kept in corked bottles; by this means, the necessity and inconvenience of preparing it every time is avoided.

"Into one of the troughs, the salt water is to be poured, until it is about an inch in depth; the other trough is to be filled with pure water. These two fluids are warmed or heated in temperature, though not to the boiling point.

"In place of the solution of salt, may be substituted a solution of hyposulphite of pure soda: this latter is even preferable, because it completely removes the iodine, which is not always the case when salt is used, especially if the designs or tracings have been obtained some time, and laid aside between the fourth and fifth operations. The mode of operating, however, is the same for the two solutions, although the solution of **[193]** hyposulphite does not require to be warmed, and a less quantity of it is required than of the salt and water, since it is sufficient that the plate should be covered with the same when laid on the bottom of the trough.

"The plate is first to be immersed in the pure water contained in one of the troughs. It must only be dipped in, and drawn out immediately; it is sufficient that the surface of the plate be covered with water, and then, without allowing it to dry, it is to be plunged immediately into the salt water.

"If the plate is not dipped in pure water before immersing it in salt water, or in the solution of hyposulphite, these solutions would make marks or spots on the surface of the plate. To facilitate the action of the salt water, or of the hyposulphite which absorbs the iodine, the plate should be moved about in the liquid, thus producing a gentle washing of the surface.

"When the yellow colour or tint of the iodine is entirely removed from the surface of the plate, it is to be removed, and carefully taken by the edges, so as not to touch or injure the drawing, and then dipped immediately in the first trough of pure water.

"The apparatus, shewn in figs. 13 and 14, is then brought into use, and must be perfectly clean, and a vessel filled with distilled water, which should be hot, but not boiling. The plate, on being withdrawn from the trough of water, is to be placed immediately on the inclined plane *e*, and, without allowing it time there to dry, the operator is then to pour upon the surface, bearing the drawing, the hot distilled water, beginning at the top of the plate, and pouring the water over it in such manner that it shall flow over the surface and carry away with it all the solution of sea salt, or of hyposulphite, which has been already considerably weakened by the immersion of the plate in the first trough. If hyposulphite solution has been used, the **[194]** distilled water to be poured over the surface, need not to be so hot as for the common salt solution.

"Not less than a quart of hot distilled water is required for thus washing the surface of a plate measuring eight or nine inches long by six or seven inches wide. It will sometimes occur, that, after having poured warm water on the surface, some drops or globules of water will remain on the plate. In this case, they must be removed before they have time to dry, as they might contain some particles of sea salt, or iodine, and injure the drawings ; they are readily removed by strongly blowing on the plate.

"It will be understood how important it is that the water used for this washing, should be perfectly pure, for, part of it will dry on the surface of the plate, notwithstanding the rapidity with which it may have passed over it; and, if it contains extraneous matters, then numerous and indelible spots would be formed on the drawing or tracing.

"In order to ascertain that the water is suited for this washing, a drop may be let fall on a burnished plate, and if, when evaporated by heat it leaves no stain or mark behind, it may be employed without fear. Distilled water is always sufficiently pure for this operation, without testing.

"When this washing is completed, the picture, drawing, or tracing is finished. The only thing now to be done is, to preserve its surface from being touched, also from dust, and from vapours which tarnish silver. The mercury which traces the images, or, in other words, by the action of which the images are rendered visible, is partly decomposed,—it adheres to the silver,—it resists the washing by the water poured upon it by its adhesion,—but it will not bear any rubbing or touching.

"To preserve the drawings, they must be covered **[195]** with glass, securely placed a little above the surface ;—both the edges of the glass and plate secured by pasted paper, or other means ; and they are then unalterable, even by the light of the sun.

"It may happen, that, in travelling, the operator may not be able, conveniently, to thus secure the plates ; but they may be preserved by inclosing them in a box ; and, for greater safety, small bands of paper may be pasted over the junction of the box and its cover.

"It may be necessary to state that the silver surfaces may be used several times, in succession, provided the silver be not polished or ground through to the copper. And it is very important to remove, after each time of using, the mercury traced on, or adhering to, the surface, which is to be done, as before described, by means of pounce or pumice powder and oil, and by changing the cotton often : otherwise, the mercury would finally adhere to the silver, and the proofs obtained on that combination would always be imperfect, because they would be deficient both in vigour and clearness.

"Explanations of the drawings (see Plate I.) of the apparatus used in these processes or operations of Daguerreotype.—Fig. 1 represents a plan view of a wire frame ; fig. 2 is a side view of the same. This frame serves to receive the plates when they are to be heated by the spirit lamp.

"Fig. 5 is a plan view of the thin board or tablet, on which is fixed the plate for the subsequent operations. The plate is fixed on it by means of four thin metal bands, plated with silver,—they should be of the same thickness as the plate. These bands are fixed on the board by small nails, forced or driven into it through holes by means of a handle.

"The surface of these bands, being nearly level with that of the plate, retain it by small projections or pieces soldered on them. These metallic bands have two **[196]** offices to perform,—one, to secure the plate, and the other to facilitate the equalization of the coat of iodine, which might otherwise be more intense on the edges or borders of the plate than on its centre.

"Fig. 3 is a vertical section of the iodine box, or apparatus wherein the coating of iodine is obtained upon the silver surface. Fig. 4 is a plan view of the same. *c* is an interior cover, closing the lower part of the box; it serves, when the apparatus is not in operation, to concentrate the evaporation of the iodine, which condenses on the wooden surface of this part of the box; *d* is the cup or dish for containing the iodine; *e* is the thin board, to which is fixed the plate (as represented in fig. 5), the silver surface being downwards; it is thus placed in order to obtain the coating of iodine, as the vapour therefrom rises upwards. The board rests on brackets (*f*), placed at the four angles of the box, the cover *c* being previously removed; *g* is the lid or cover of the box, which should be kept shut, excepting when the plate is taken out for examination; *h h* are small rods at the four corners of the inclined lining (*k*) of the box, to support the cover, *c*; *j* represents a disc or sieve of wire, or other gauze, which is to be placed over the cup, in order to equalise the dispersion of the evaporation of the iodine; it serves also to prevent, in case the box should be closed too rapidly, the compressed air from driving out of the cup particles of iodine, which might adhere to the plate, and cause spots on the drawing; *k* is the wooden lining, formed with inclined sides, in the shape of a square funnel; this shape assists to diffuse equally the vapours of iodine, which spread as they rise.

"It is requisite to have a magazine box, or case, and its cover, in which may be inclosed the plates or surfaces, before and after the drawings have been taken. The plates are introduced into and secured by small **[198]** grooves on the insides, so that they cannot rub against one another, they being at the same time preserved from dust. By pasting strips of paper on the junctions of the cover and box, they may be preserved from all injurious vapours; but this is requisite only for plates or drawings completely finished, or in case the box should not close well.

"Figs. 6, 7, 8, represent different views of the frame which receives the thin board carrying the plate or silver surface, and serves to preserve it from the effect of light as soon as it has received the coating of iodine in the box, shewn in fig. 3. Fig. 8 a front view, shewing the covers or doors to shade the silver surface. Fig. 6 is a section shewing the doors in the position they will be in when the plate is exposed to the action of the light in the camera. *a a* are semi-circles or pieces for opening the doors (*b b*), whenever this frame, with the plate, is placed in the camera obscura; *c* is the thin board on which the plate is fixed; *d d* are buttons on both sides of the frame, to fasten the board on the doors; *e* shews the thickness of the frame; *f* is the plate or surface intended to receive the picture.

"Fig. 6 represents the frame with the doors open, as they are at the time when a tracing is taken in the camera obscura.

"The camera obscura process.—Fig. 10 is a vertical section, taken through a camera obscura, adapted for the process of Daguerreotype or photogenic delineation, furnished with a frame for carrying the plate of ground-glass *a*. The distance this glass plate is to be from the object glass or lens is, the same as the distance at which the surface intended to receive the image is placed, with the frame and shading doors, as shewn in *c*, fig. 9, which figure is a horizontal section of the camera obscura. *b* is a mirror for observing the effect of objects and selecting points of view: this mirror serves to enable the **[199]** operator to choose the scenery, the image of which is to be reproduced; it should be inclined about forty-five degrees to the horizon, by means of the rod *l*. In order to bring the objects precisely in the focus, the ground-glass should be completely exposed, and the object looked at as reflected on the ground-glass. The image of the object is easily brought into the proper focus, by moving forward or backward the sliding box *d*, taking hold of it at the bottom with both hands by the projections *e*, fig. 9, and forcing it to or from the operator.

"When the focus is properly adjusted, the thumb-screw *h* is turned, to fix the parts in this position. The mirror is kept close by means of two hooks at *f*, which

FIG. 1

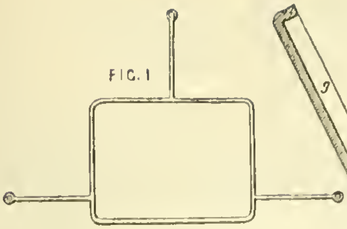


FIG. 3

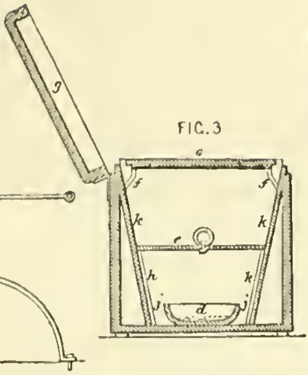


FIG. 6

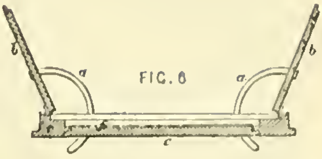


FIG. 2

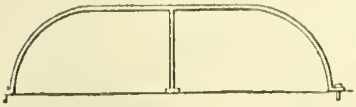


FIG. 7

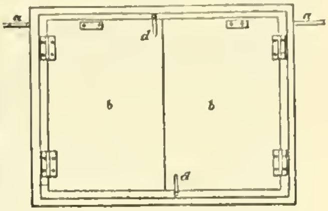


FIG. 5

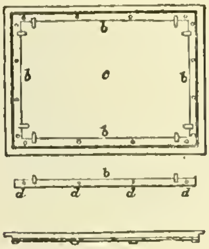


FIG. 4

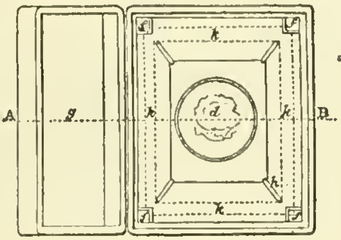


FIG. 8

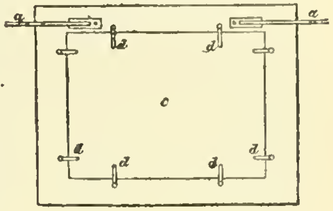


FIG. 9

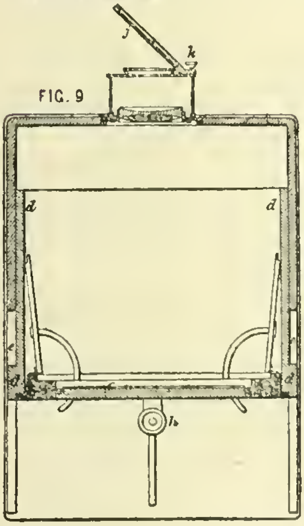


FIG. 13

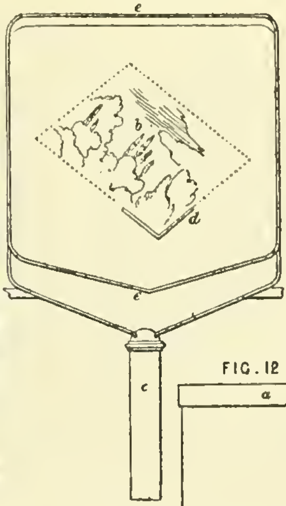


FIG. 14

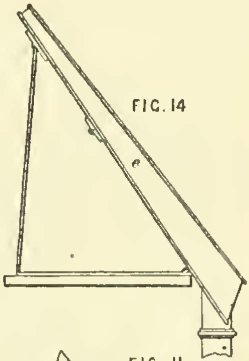


FIG. 12

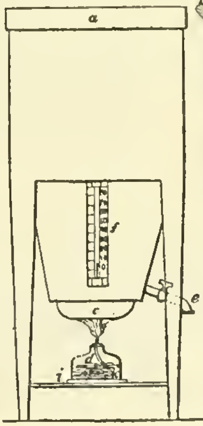


FIG. 11

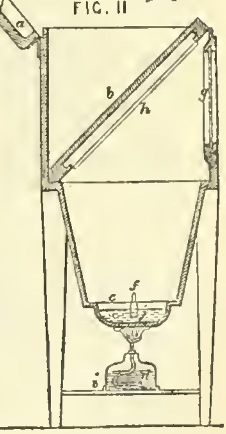
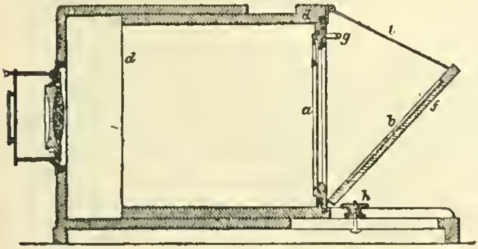


FIG. 10



take into small eyes at *g*; the frame and ground-glass plate is withdrawn, and in its place is substituted the frame carrying the prepared plate or surface, which is so represented in fig. 9, with the shading doors *b* open in the camera obscura. These doors should be internally lined with black velvet, as well as the sliding box *d*, to avoid all reflection of light.

"The object glass is achromatic and periscopic (the concave part must be outside of the camera obscura): its diameter is about three and a half inches, and its focus about thirteen inches. A diaphragm is placed before the object glass, at a distance of about three and a half inches, and its aperture may be closed by means of a plate on a pivot.

"This camera obscura reverses the objects from right to left, which is not of much consequence in a great number of cases; but, if it is desired to have an image, drawing, or tracing, in the natural position of the object, a flat looking glass or mirror is to be placed on the outside beyond the aperture of the diaphragm, as at *j*, fig. 9, it being fixed by means of a screw at *k*. But, as this arrangement of reflection occasions a loss of light, and injures the photogenic process, about one third **[200]** more time must be allowed to obtain a tracing or drawing.

"The mercurial process.—Fig. 11 is a vertical section of the apparatus, and fig. 12 a front elevation, shewing the thermometer. *a* is the cover of the apparatus; *b* the black board with grooves to receive the board *h*, carrying the silver surface or metallic plate; *c* the cup containing the mercury or quicksilver; *d* is the spirit lamp; *e* is a small cock, through which the mercury may be withdrawn, the apparatus being inclined on one side for that purpose; *f* is the thermometer; *g* is a glass window, through which the progress on the silver surface may be inspected; *h* is the board carrying the metallic plate, which has received the image or design; *i* is a stand or support for the spirit lamp, which is held by the ring *k*, so that the flame may play on the centre of the cup. All the interior parts of this apparatus ought to be blackened and varnished.

"The washing apparatus.—Fig. 13 is a front representation of the washing apparatus, made of tin, varnished. To wash the designs on the plates, they are placed on the stand or angular ledge *d*, see fig. 13. *e* is a ledge to conduct the water to the receptacle *c*. Fig. 14 is a side elevation of this washing apparatus."

A witness called on the part of the plaintiff, to prove that the directions contained in the specification would enable a person of competent skill to perform the operations therein described, stating that the application of acid after the plate had been coated with iodine, would, in his opinion, render the experiment abortive, it was objected, on the part of the defendants, that the specification was bad.

On the part of the plaintiff, it was insisted that no person could be misled by this isolated statement; and that, taking the whole specification together, and giving **[201]** it a fair and reasonable construction, it was sufficiently explicit.

The learned judge, however, was disposed to think the objection fatal. It was thereupon arranged that a verdict should be taken for the defendants on the twelfth issue, and for the plaintiff on all the others, with 40s. damages; leave being reserved to the plaintiff to move to enter the verdict on the twelfth issue in his favour, if the court should think the specification sufficient; and leave being also reserved to the defendants to urge, upon the argument of the plaintiff's rule, several other objections to the specification (*a*). And it was further agreed, that the lord chief justice should be **[202]** taken to have ruled whatever the court should think he ought to have ruled, and that the plaintiff should be considered to have tendered a bill of exceptions, if necessary.

(*a*) The main objections taken by the defendants at the trial, were as follows:—

1. That the expression "spontaneous" used in the title of the patent was erroneous,—the images not being spontaneously re-produced; because, after the silver plate has been treated with iodine, and exposed to light, no picture is visible, nor does it become so until the plate has been subjected to the mercurial process.

2. The second objection was to the use of the words "new or improved," in the title, and that the specification did not distinguish between what was new and what was improved.

3. The third objection was to the words in the title, "all the images received in the focus of the camera obscura," whereas only stationary objects can be taken by the

Sir F. Thesiger, accordingly, in Michaelmas term, 1847, pursuant to the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiff on the twelfth issue. He referred to *Bloxam* v. *Elsee* (1 C. & P. 558), *Hullett* v. *Hague* (2 B. & Ad. 370), *Derosne* v. *Fairie* (1 Webster's Patent Cases, 154, 158), *Russell* v. *Cowley* (1 C. M. & R. 864, 1 Webster's Patent Cases, 459, 463), *Neilson* v. *Harford* (8 M. & W. 806, 1 Webster's Patent Cases, 328, 331), and *M'Alpine* v. *Magnall* (ante, vol. iii. p. 496).

W. H. Watson, W. R. Grove, and J. Brown, in Hilary term last, shewed cause. The specification describes the five several operations that are necessary to produce the effect desired: the first is, the polishing the surface of the silver plate that is to receive the object to be delineated; the second, the application of a layer of iodine; the third, the submitting the prepared plate to the action of light in the camera obscura; the fourth, consists in the bringing out the image, which is effected by the application of mercury; and the fifth relates to the removal of the iodine from the plate, by means of salt. Any application of acid to the plate after it has received the iodine, would render it incapable of receiving the figure intended; or, if applied after the plate has undergone the third operation, would at once remove both iodine and figure. This was proved by one of the plaintiff's own witnesses; and this, it is submitted, is a fatal defect in the specification. The law upon this subject is well laid down by Buller, J., in **[203]** *The King* v. *Arkwright* (1 Webster's Patent Cases, 66), where, in leaving the case to the jury, that learned judge said: "It is clearly settled at law, that a man, to entitle himself to the benefit of a monopoly, must disclose his secret, and specify his invention in such a way that others may be taught by it to do the thing for which the patent is granted; for, the end and meaning of the specification is, to teach the public, after the term for which the patent is granted, what the art is; and it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. This I take to be clear law, as far as it respects the specification; for, the patent is the reward which, under the act of parliament, is held out for a discovery; and, therefore, unless the discovery be true and fair, the patent is void. If the specification, in any part of it, be materially false or defective, the patent is against law, and cannot be supported. It has been truly said by the counsel, that, if the specification be such that mechanical men of common understanding can comprehend it, to make a machine by it, it is sufficient; but then it must be such that the mechanics may be able to make the machine, by following the directions of the specification, without any new inventions or additions of their own." In *Turner* v. *Winter* (1 T. R. 602), Ashhurst, J., says: "I think, that, as every patent is calculated to give a monopoly to the patentee, it is so far against the principles of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention after the expiration of the time for which the patent is granted. It is, therefore, incumbent on the patentee to give a specification of the invention, in the clearest and most unequivocal terms of which the subject is capable. And, if it appear that there is any unnecessary **[204]** ambiguity affectedly introduced into the specification, or any thing which tends to mislead the public, in that case, the patent is void." Again, in *Bloxam* v. *Elsee* (6 B. & C. 169), Abbott, C. J., says: "If any material part of the representation was not true, the consideration has

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patented process, and those only by daylight, and the camera obscura receives images by artificial light.

4. The fourth objection was, that the specification did not distinguish between new and old.

5. The fifth objection was, that the specification contained the following direction, —"It is, however, indispensable, that, just before the moment of using the plate in the camera, or the re-producing the design, to put some acid (nitric) on the plate, and rub it lightly with pounce;" whereas, the use of nitric acid and pounce after iodizing the plate, would render the production of any image quite impossible, as the acid and rubbing after the plate had been in the camera, would take the iodine and image off the plate altogether.

6. The sixth objection was, that the specification was insufficient to work by, and threw experiments upon the public.

7. The seventh was, that some of the processes were not new: ex. gr. the first and third,—the cleaning and polishing of the plate,—and the camera obscura.

failed in part, and the grant is consequently void; and a defendant in an action for infringing the patent, has a right to say that it is so." And in *Bainbridge* v. *Wigley* (Parl. Pat. Rep. 1829, Appendix, p. 197, Hindmarch on Patents, 183), where a patent was taken out for improvements on the flageolet and English flute, in the specification of which it was stated, that, by the improvements, the instrument produced new notes not before produced on the old instrument; and it appeared in evidence, that, although the invention was a great improvement, yet only one new note was produced; Lord Ellenborough held that this was fatal to the patent, the consideration on which it was granted not being truly stated. Since the statute 5 & 6 W. 4, c. 83, s. 1, which enables a patentee to enter a disclaimer as to part of his specification, there is still less reason for construing such instruments with undue liberality. So, in *Neilson* v. *Harford* (8 M. & W. 806, 1 Webster's Patent Cases, 331), it was held, that, if a specification contain an untrue statement in a material circumstance, of such a nature, that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification is therefore bad, and the patent invalidated; although the jury, on the trial of an action for the infringement of the patent, find that a competent workman, acquainted with the subject, would not be misled by the error, but would correct it in practice. In *Morgan* v. *Seaward*, Alderson, B., addressing the jury, says (1 Webster's Patent Cases, 173): "It is the duty of a party who takes out a patent, to **[205]** specify what his invention really is; and, although it is the bounden duty of a jury to protect him in the fair exercise of his patent right, it is of great importance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect. Unless he be required to do that, monopolies would be given for fourteen years to persons who would not on their part do what in justice and in law they ought to do, state fairly to the public what their invention is, in order that other persons may know what is the prohibited ground, and in order that the public may be made acquainted with the means by which the invention is to be carried into effect." In *The King* v. *Wheeler* (2 B. & Ald. 345) a patent was taken out for "a new or improved method of drying and preparing malt:" in the specification, it was stated that the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether wet or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat, which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished: and it was held, that the specification was not sufficiently precise, and the patent consequently void. Abbott, C. J., in pronouncing the judgment of the court, there says: "a specification which casts upon the public the expense and labour of experiment and trial, is undoubtedly bad. If it be said that all these matters will be well or easily known to a person of competent skill (and to such only the patentee may be allowed to address himself), then the inventor will not in reality have given **[206]** any useful or valuable information to the public: so that, in either way of viewing the case, there is either no certain and clear process described, or the process described is such as might be practised without the assistance of the patentee."

The specification is vague and uncertain. In describing the first process, it is said that the prepared plate is to be submitted to "a considerable degree of heat." Again, in describing the second operation, it is said, that "the time necessary for this operation cannot be seated, because it depends on several circumstances." [Cresswell, J. Taking it all together, it amounts to this—"you must keep the plate in the iodine box until it assumes a golden yellow tint." Maule, J. If so much nicety of description were required, it would be impossible to draw a specification at all. It is enough if it be so explicit as to enable a man of ordinarily competent skill, and willing to learn, to perform the operation.] The time for the performance of the third operation is also extremely vague. The whole is uncertain and obscure.

The specification omits to distinguish between what is old and what is new. In *Macfarlane* v. *Price* (1 Stark. N. P. C. 199, 1 Webster's Patent Cases, 74, n.), it was held, that, in the specification of a patent for an improved instrument, it is essential to point out precisely what is new and what is old; and that it is not sufficient to give a general description of the construction of the instrument, without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. Lord Ellenborough, in nonsuiting the plaintiff, said: "The patentee in his specification ought to inform the person who consults it, what is new, and what is old. He should say, my improvement consists in this, describing it by words, if he can, or, if not, by **[207]** reference to figures. But, here the improvement is neither described in words nor by figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. The specification states that the improved instrument is made in manner following: this is not true, since the description comprises that which is old, as well as that which is new. Then, it is said, that the patentee may put in aid the figures: but, how can it be collected from the whole of these, in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention: but it would exceed the wit of man to discover from what he is warned in a case like this." In *Morgan* v. *Seaward* (2 M. & W. 544), Parke, B., in delivering the judgment of the court, says: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law: and such a grant is void, not against the crown merely, but in a suit against a third person: *Travell* v. *Carteret* (3 Lev. 135); *Alcock* v. *Cooke* (5 Bingh. 340, 2 M. & P. 625). It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill* v. *Thompson* (8 Taunt. 375, 2 J. B. Moore, 424) and *Brunton* v. *Hawkes* (4 B. & Ald. 541), for, although the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether is, that the consideration for the grant is the novelty of all, and, the consideration failing, or, in other words, the crown being deceived in its grant, the patent is void, and no action is maintainable upon it." In *Saunders* v. *Aston* (3 B. & Ald. 881), a patent was **[208]** taken out for improvements in making buttons: the specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet or ring with teeth: neither the construction of the button, nor the application of a flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention; and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used: it was held, that the patent was not sustainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect. [Wilde, C. J., referred to *Haworth* v. *Hardcastle* (4 M. & Scott, 720).] The principle was again acted upon in *Hill* v. *Thompson* (8 Taunt. 375, 2 J. B. Moore, 424), *Felton* v. *Greaves* (3 C. & P. 611), and *Cook* v. *Pearce* (8 Q. B. 1044, 1054). Here, the specification contains five things, two of which, at least, are old.

Further, the invention specified, is not that which the title of the patent points at. The title is for "a new or improved method of obtaining the spontaneous re-production of all the images received in the focus of the camera obscura." Now, that is untrue in several respects. In the first place, it appeared that stationary objects only can be taken: and, in the next place, it is only by the light of the sun that the process in question **[209]** can be performed; whereas, it is well known that the camera obscura will re-produce images by artificial light. Nor is the image produced spontaneously, as alleged; its re-production depends upon a subsequent chemical operation; and, it appears that the plate requires to be submitted to the rays of light for about thirty minutes. The title, therefore, is clearly inaccurate.

Sir F. Thesiger, F. Robinson, and Webster, in support of the rule. Taking the whole of the specification together, and applying a fair and reasonable construction to each part of it, ample information is given to an operator of competent skill. The inaccurate use of words, for instance,—as in *Derosne* v. *Fairie*,—will not vitiate a specification, if the sense be sufficiently plain. In *Russell* v. *Cowley* (1 C. M. & R. 864, 1 Webster's Patent Cases, 459, 463), a patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation: a later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril: and it was held, that, taking the whole specification together, it must be inferred that the maundril was not to be used, and that the patent was good. Parke, B., there says: "In the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril." And in *M'Alpine* v. *Mangnall* (ante, vol. iii. p. 496), the same learned judge, delivering the judgment of the court of error, lays down the same rule of construction. "The patentees," he observes, "begin by describing their improvements to consist in a novel ar-**[210]**-rangement of mechanism for the purpose of stretching, drying, and finishing woven fabrics. They afterwards go on to explain their mode of conducting the operation, evidently referring to some known mode of stretching and drying cloth: and, towards the close, they remark that they are aware that many simple contrivances might be devised for effecting the object of their improvements, viz. giving vibratory motion to the salvages of the cloth, for the purposes above stated: but they go on to say—'as it is not practicable to describe every possible method in detail, we desire it to be understood that any mode even of moving one side or salvage of the cloth whilst the other remains stationary, we shall consider to be an evasive imitation of our invention, if for the purpose of drawing the threads into diagonal positions by mechanical means, instead of manual labour.' The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine that give the vibrating motion to the fabric in the course of drying." It was not possible for an operator possessed of a reasonable amount of skill and chemical knowledge, to be misled by the direction in this specification, as to the application of the acid for the third time to the plate. He would at once understand that to be a part of the first process, and to be intended to precede the submitting the plate to the action of the light in the camera obscura. To use the language of Parke, B., in *Neilson* v. *Harford* (8 M. & W. 824), the specification is such as, "if fairly followed out by a competent workman, without invention or addition, **[211]** would produce the machine (or, in this case, the result) for which the patent is taken out." The plaintiff is, therefore, clearly entitled to have the verdict entered for him on the twelfth issue.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

This was an action on the case by the assignee of a patent, for the infringement of a patent granted to Miles Berry, and by him assigned to the plaintiff, for "an invention of a new or improved method of obtaining the spontaneous re-production of all the images received in the focus of the camera obscura."

The defendant pleaded,—first, not guilty,—secondly, non concessit,—thirdly, that the patent was obtained by fraud,—fourthly, that Miles Berry was not the first inventor, —fifthly, sixthly, and seventhly, pleas that were demurred to,—eighthly, that the invention was not a new manufacture for which letters-patent could be granted, —ninthly, that it was not a new invention, as to the public use,—tenthly, a plea to which there was a demurrer,—eleventhly, that the title was, in its claim, description, and definition, inconsistent and at variance with, and too large for the invention, as described in the specification [to which the plaintiff replied, that the description was true and proper],—twelfthly, that Miles Berry did not by any instrument in writing, &c., particularly describe the nature of his invention, &c.,—thirteenthly, that Miles Berry did not assign to the plaintiff,—fourteenthly, leave and licence [replication, de injuriâ],—fifteenthly, that the invention was of no use to the public; to which the plaintiff replied, that it was of use, &c.

At the trial, before me, at the sittings in London, after Trinity term, 1847, evidence was given by the **[212]** plaintiff to maintain the first, second, third, fourth, eighth, ninth, thirteenth, fourteenth, and fifteenth issues. To prove the twelfth issue, the specification was put in; which, after stating that the invention was communicated to the patentee by a foreigner residing in France, proceeded to describe the process thus:—"The process is divided into five operations." [His lordship read the specification.]

A witness, called to prove that the specification would enable a person of competent skill to effect the re-production of images received in the focus of the camera obscura, stated that the application of acid after the plate had been coated with iodine, would render the experiment abortive; whereupon it was objected by the counsel for the defendant, that the specification was bad; that the third of the five operations described is, submitting in the camera obscura the prepared surface or plate to the action of the light, that it may receive the images,—the second operation being the coating the plate with iodine. But the specification says,—"It is, however, considered indispensable just before the moment of using the plates in the camera, or re-producing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated." And it was argued, that, as this was to be done just before the moment of using the plates in the camera, it must be done after the plates had been coated with iodine. The specification, therefore, described that as indispensable, which, according to the evidence, would render the whole experiment fruitless.

I inclined to the opinion that the objection was fatal: and it was arranged that the jury should find a verdict for the defendant on the issue on the twelfth plea,—the plaintiff having leave to move to enter the verdict in his favour, if the court should think the specification sufficient: but the defendants' counsel also had [213] liberty to raise, on the argument of such rule, other objections to the specification.

The other issues were found for the plaintiff, with 40s. damages.

In Michaelmas term, 1847, a rule nisi was granted according to the leave reserved; which was argued in last Hilary term. The counsel for the defendants, on that occasion, raised several other objections to the specification: but it is unnecessary to notice them now, as they were disposed of during the argument. But the court took time to consider the arguments on the more substantial question which had been raised on the trial of the cause: and we have now come to the conclusion that the objections then made to the specification cannot be sustained. In *Russell* v. *Cowley* (1 C. M. & R. 864), which was an action for the infringement of a patent granted for "certain improvements in manufacturing tubes for gas and other purposes," a question arose as to the sufficiency of the specification. The substance of the invention was, a method of manufacturing iron tubes without the use of a maundril: the specification did not, in terms, say that a maundril was not to be used; but the court held, that, taking the whole specification together, it was plain that any man of intelligence would understand that a maundril was not to be used; and that it was sufficient: and Parke, B., said: "In the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril." Again, in *Neilson* v. *Harford* (8 M. & W. 825), it was said, with reference to another specification,—"It is a just rule of construction, to judge of the meaning of a particular phrase, by taking the whole instrument to-[214]-gether." Again, in *M'Alpine* v. *Mangnall* (ante, vol. iii. p. 496), where it had been urged that the specification claimed too much, the court said—"The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine, that give the vibrating motion to the fabric while in the course of drying" (ib. 518). Applying the same principle of construction to the specification before us, we think it is free from any such mistake or obscurity as would mislead a person of fair intelligence. The specification states that the process is divided into five operations. "The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating, upon which the action of the light traces the design. The second operation is, the applying that sensitive layer or coating to the silver surface. The third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images. The fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the camera obscura. The fifth and last operation is, that of removing the sensitive layer or coating, which would continue to be affected, and undergo different changes from the action of light:—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura." It then gives a description of the first operation,—preparing the silver surface of the plate; the concluding part of which directs that nitric acid dissolved in water is to be applied

[215] three different times, care being taken to sprinkle each time the plate with powder, and rub it dry, and very lightly, with clean cotton: and this concludes the description of the first operation, viz. the preparing the silver surface of the plate, when it is intended for immediate use: and to this part of the specification no objection was, or could be, made. But then some further information is given respecting the preparation of the plate, in these words:—"When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface after being exposed to heat. The first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time: this will allow of a number of plates being kept prepared up to the last slight operation. It is, however, considered indispensable, that, just before the moment of using the plates in the camera, or the re-producing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated: finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface or its edges." Upon this part of the specification, it was contended that the direction to apply acid just before the moment of using the plates in the camera (which is the third operation), was a direction to use it after the second operation, viz. the coating the plate with iodine; and that using acid at that period would entirely spoil the whole process. But it must be remembered that the passage in question is part of the directions given for performing the first operation, viz. preparing the plate to receive the iodine. It is to be observed, when the plate is not intended to be used immediately, and where it has previously been partially, but not entirely, prepared for the iodine, this last application of acid is still to precede the second operation. The whole passage may be considered as in a paren-**[216]**-thesis; and the expression "just before the moment of using the plate in the camera" (*a*), is put in opposition to the time of partially preparing the plate; after which it is supposed to have been laid by for future use. That this is the real meaning of the passage, is further manifested by what follows in a subsequent part of the printed specification,—"After this second operation (viz. the application of iodine) is completed, the plate is to be passed to the third operation, or that of the camera obscura. Wherever it is possible, the one operation should immediately follow the other." It is plain, therefore, that the patentee did not intend any separate operation to intervene between the application of iodine and the introduction of the plate into the camera obscura. The last application of acid must, therefore, have been intended to precede the second operation.

This, we think, is the fair construction of the language of the specification. And, although there may, at first sight, be some appearance of obscurity in it, we think that it is cleared away by a consideration of the whole; and that it is sufficiently plain to be understood by an operator of fair intelligence. If that be so, it follows that the rule to enter a verdict in favour of the plaintiff, should be made absolute.

Rule absolute.

[217] GROOM AND ANOTHER, Assignees of Thomas Turner, a Bankrupt, *v.* WATSON. June 25, 1848.

Since the statute 6 & 7 Vict. c. 85, the bankrupt is an admissible witness to prove the petitioning-creditor's debt.

Notice having been given in this case to dispute the petitioning-creditor's debt, the bankrupt was called at the trial, before Cresswell, J., at the sittings in London, in Trinity term, 1848, to prove it; when it was objected, on the part of the defendant, that the bankrupt was not a competent witness for that purpose, notwithstanding the 6 & 7 Vict. c. 85. *Udall* v. *Walton* (14 M. & W. 254) was relied on for the plaintiffs, to shew that the bankrupt was an admissible witness.

The learned judge admitted him, and a verdict was found for the plaintiffs, damages 60l.

Whitehurst, in the same term, obtained a rule nisi for a new trial, on the ground that the evidence of the bankrupt had been improperly received.

June. 5.—Byles, Serjt., and Bovill, in Trinity term last, shewed cause. It may be conceded, that, before the passing of Lord Denman's act, the bankrupt was not an

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(*a*) The expression in the French specification, was, "au moment."

admissible witness to prove any of the requisites to support the commission. This was expressly so decided in *Chapman* v. *Gardner* (2 H. Blac. 279), and also in two earlier cases of *Cross* v. *Fox* (ib. 279 (*a*)) and *Flower* v. *Herbert* (ib. 279 (*a*)). In *Morgan* v. *Pryor* (*d*),—where the bankrupt was called to prove the hand-writing of the commissioners, in order [218] to identify the proceedings taken under the commission against him,—Bayley, J., says: "I am of opinion that the bankrupt was a competent witness to prove that for which he was called, although incompetent to prove any fact necessary to support the commission. It has been said that it is too late now to inquire into the principle upon which a bankrupt has been held incompetent for that purpose. I think it is also too late to extend the rule beyond the letter of former decisions. It appears to me that the rule was founded upon the principle of interest in the bankrupt. Before the 49 G. 3, c. 121, was passed, the assignees of a bankrupt were bound to produce witnesses to prove the trading, the petitioning-creditor's debt, and the act of bankruptcy; and, if they were unable to do that, it formed a ground upon which the lord chancellor might possibly supersede the commission. That would render the certificate inoperative; and therefore the bankrupt was considered interested in the support of the commission. But, merely failing to prove the hand-writing of the commissioners, is not a ground upon which the lord chancellor would think of superseding a commission. The principle upon which the former decisions proceeded does not, then, apply to this case; and the bankrupt was properly received as a witness." And Holroyd, J., says: "It has been held, that, in actions by assignees, although the bankrupt may be a witness for other purposes, yet he cannot prove the act of bankruptcy, trading, or petitioning-creditor's debt, because those circumstances are necessary, not only to the action, but to the commission itself. The case in 2 H. Bl. shews that the bankrupt was considered interested in proving each of those facts, lest proceedings should be had to supersede the commission; and, for that reason, he was considered as incompetent." [Maule, J. The recent statute removes the objection to the bankrupt's **[219]** admissibility, on the ground of interest.] It is not easy to ascertain the exact principle upon which his exclusion rested: but at all events it is now removed. [Wilde, C. J. He was formerly excluded, as well on the ground of crime, as on the ground of interest.] Lord Denman's act removes both objections. That act recites, that "The inquiry after truth, in courts of justice, is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony:" it then proceeds to enact, "that no person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury [inquiry], or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." [Maule, J. Crime or interest were not the only grounds of exclusion of witnesses: put the case of husband and **[220]** wife (*a*). The bankrupt may have been held incompetent, on the ground of policy,—that a person who was about to sue out a commission, should not rely upon the bankrupt's evidence to sustain it.] The only authority for the position that public policy was the ground of rejection, is a note in Starkie's Law of Evidence (3rd edit. vol. ii. p. 191, citing Christian's Bankrupt Law, 444). In *Udal* v. *Walton* (14 M. & W. 254) the bankrupt was called to prove notice to execution creditors, of a prior act of bankruptcy; and also to prove the petitioning-creditor's debt. It was objected that he was incompetent; but his evidence was

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(*d*) 2 B. & C. 14, 3 D. & R. 215 (per nom. *Morgan* v. *Price*), 3 Stark. N. P. C. 58.

(*a*) See *Jourdaine* v. *Lefevre*, 1 Esp. N. P. C. 66.

received. Upon a motion for a new trial, Pollock, C. B., says: "I have no doubt that the evidence of the bankrupt was properly received. His testimony was tendered, not to support the commission, but to prove the petitioning-creditor's debt. The question, therefore, as to his competency to support the commission, does not arise; he clearly is competent to prove collateral facts; and, in truth, this point was given up on the argument." And Alderson, B., says: "I do not see why he was not competent to prove even the act of bankruptcy." The statute, it is to be observed, is a remedial one. [Wilde, C. J. I do not think it remedies more evils than it creates.]

Whitehurst, in support of the rule. Before the passing of Lord Denman's act, a bankrupt was clearly an incompetent witness, either to support or to impeach the commission or fiat. That shews conclusively that interest could not have been the sole ground of exclusion. He was a competent witness for other purposes, whether for or against his assignees, provided he released the surplus. If interest had been the ground, his exclusion would equally have extended to collateral **[221]** matters. And crime certainly was not the ground. The suggestion in the note in 2 Starkie on Evidence, p. 191 (*d*), is the correct one, viz. that the exclusion of the bankrupt rests on grounds of public policy: and to this ground of exclusion Lord Denman's act has no application. That statute does not apply, where the objection is to particular questions, and not to the general competency of the witness. [Wilde, C. J. Bankrupts have been called to prove fraudulent preference.] There seems to be some inaccuracy in the report of the case of *Udal* v. *Walton:* at all events, it is not an authority to the extent contended for in the present case.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

A rule nisi was granted in this case, to set aside the verdict for the plaintiff for 60l., upon the ground that the bankrupt had improperly been admitted as a witness to prove the petitioning-creditor's debt, the defendant having given notice of his intention to dispute it. And the only question for the consideration of the court is, whether the bankrupt was a competent witness to prove such debt: and that depends upon the construction of the 6 & 7 Vict. c. 85. The authorities were too numerous to admit of any question, as to the non-admissibility of the bankrupt as a witness to support or to negative either the trading, act of bankruptcy, or petitioning-creditor's debt, before the passing of the statute referred to. The question, therefore, depends entirely upon the construction of that statute; which recites that the inquiry after truth is often obstructed by incapacities created by the present law, and that it was desirable that full information as to the facts in issue should be laid before the persons appointed to **[222]** decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. It was therefore enacted that no person should thereafter be excluded, by reason of incapacity from crime or interest, from giving evidence upon the trial of any issue joined, but that every person so offered should be admitted to give evidence on oath, notwithstanding such person should have an interest in the matter in question, or in the event of the trial in which he should be offered as a witness, and notwithstanding such person should have been previously convicted of any crime,—subject to certain exceptions not material to the present case.

It has long been considered, and held as a settled rule, that the bankrupt was an incompetent witness upon the question of the validity of the commission or fiat in bankruptcy; and that although the question might be tried in an action or suit in the event of which the bankrupt had no interest: and it is, therefore, necessary to consider, for the purpose of deciding whether the statute in question has made the bankrupt a competent witness, upon what ground he was deemed to be incompetent before the statute,—the effect of that statute being, to render admissible persons who before its passing were inadmissible by reason of crime or interest.

In some cases, objection has been made to the bankrupt's being examined as to the act of bankruptcy, upon the ground that an act of bankruptcy was an offence or crime which might subject the party to forfeiture, and to which, therefore, he was not liable to be examined: and it would seem that a demurrer to a bill of discovery filed by the assignee under a commission of bankruptcy, against the bankrupt, seeking a discovery of the trading and act of bankruptcy, was, upon that ground, allowed so far as it related to the act of bankruptcy, but over-**[223]** ruled in regard to the discovery sought of the trading: *Chambers* v. *Thompson* (4 Bro. C. C. 433).

The objection upon the ground that it may subject a witness to a charge of crime, or to a forfeiture, is, however, no objection to the admissibility of a witness, and is an objection that can be taken only by the witness himself, for his own protection,—except in certain cases of conviction, not material to be adverted to. But the admissibility of the bankrupt upon any occasion as a witness in support, or against the validity, of the commission or fiat, has been put upon the ground of interest; and the exclusion has been carried, it is said, to an anomalous extent, inasmuch as a bankrupt is held to be inadmissible to disprove the bankruptcy, even after he had obtained a certificate, and thereby become discharged from his debts, and where, therefore, he would appear to have the strongest interest to support the bankruptcy: and the reason assigned has been, that a bankrupt stands in such a peculiar position that there are no means of deciding whether, in any given case, he has a greater interest to support or to defeat the bankruptcy; and, as the interest of various persons other than the litigating parties might be involved in the question of the validity of the bankruptcy, and by a supersedeas or establishment of the bankruptcy by means of the bankrupt's testimony, public policy has been said to require the exclusion altogether of his testimony upon the subject. This ground of exclusion is plainly referable to the presumption of a bankrupt's interest in the question, and that such interest had a tendency to bias his testimony, contrary to the truth of the facts upon which he might be examined.

Public policy has never been referred to as the ground of exclusion, except in reference to the bias **[224]** from interest, to which his testimony might be supposed to be subject, and from the impossibility of ascertaining whether that interest would be advanced or prejudiced by the testimony which the party tendering his evidence might anticipate he would give, and by reason of the possibility that the interest and rights of parties not before the court on the particular trial, might be affected consequentially by the testimony,—that is, by the bankruptcy being superseded or affirmed.

The exclusion of the bankrupt, therefore, being referable to the possible bias to which his testimony might be subject from his interest, it appears to be the object and intention of the statute referred to, that interest should no longer be a ground for excluding testimony in a judicial proceeding; and that, for the future, the existence of interest on the part of a person tendered as a witness, should have no other effect than upon the credit to be given to his testimony by the authority charged with the duty of determining upon its truth.

The text books, from the earliest period, contain little more than the statement that a bankrupt is an incompetent witness upon the question of bankruptcy or no bankruptcy; and a reference in detail to the numerous cases in which the doctrine has been acted upon (the result of which authorities we have before stated, and which does not seem to be open to any doubt), appears to be unnecessary.

We therefore think the evidence of the bankrupt in support of the petitioning creditor's debt, was properly admitted, under the authority of the statute before mentioned, and that the rule must be discharged.

Rule discharged.

[225] DUNCAN v. TOPHAM. June 25, 1849.

[S. C. 18 L. J. C. P. 310. Questioned, *British and American Telegraph Company* v. *Colson*, 1871, L. R. 6 Ex. 115. Approved, *Harris's case*, 1872, L. R. 7 Ch. 596. Adopted, *Evans* v. *Nicholson*, 1875, 32 L. T. 779. Approved, *Taylor* v. *Jones*, 1875, 1 C. P. D. 90. Applied, *Household Fire Insurance Company* v. *Grant*, 1879, 4 Ex. D. 220. Referred to, *Grundy* v. *Townsend*, 1888, 36 W. R. 532.]

A contract to be performed "directly," means, to be performed, not "within a reasonable time," but "speedily," or, at least, "as soon as practicable."—On the 18th of February, the plaintiff wrote to the defendant, offering to supply him with linseed cake at 10l. 15s. per ton: on the 19th, the defendant replied, "I can take five tons at 10l. 10s., but it must be put on board directly:" and on the 22nd, the plaintiff again wrote, "I shall ship you five tons best cakes to-morrow:"—Held, that this correspondence did not prove a contract on the part of the defendant to accept cake "to be delivered within a reasonable time."—A contract is complete upon the posting by one party, of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such letter never reaches its destination.

Assumpsit. The first count of the declaration stated, that, on, &c., the defendant bargained for and bought of the plaintiff, and the plaintiff, at the defendant's request (*a*), then sold to the defendant, five tons of linseed cake, at and for the price or sum of 10l. 10s. for each and every ton thereof, to be delivered by the plaintiff to the defendant within a reasonable time in that behalf, and to be paid for, by the defendant to the plaintiff, on the delivery thereof: Mutual promises: Averment, that the plaintiff was, at all reasonable times after the making of the said contract, ready and willing to deliver the said linseed cake, and afterwards, to wit, on, &c., requested the defendant to accept the same, and to pay him the price thereof: Breach, that the defendant did not nor would, when he was so requested, or at any time, accept the said linseed cake, or any part thereof, or pay the plaintiff for the same, &c., but wholly neglected and refused so to do; whereby the plaintiff had incurred and been put to great expense in and about the carriage and conveyance of the said linseed cake, &c.

There was also a count for goods sold and delivered, and a count upon an account stated.

[226] The defendant pleaded,—first, non assumpsit,—secondly, to the first count, that the plaintiff was not ready and willing to deliver the said linseed cake, in manner and form as in the declaration alleged.

Upon these pleas the plaintiff joined issue.

The cause was tried before Cresswell, J., at the summer assizes at York, 1848. The facts were as follows:—The plaintiff was an oil-cake merchant at Hull; the defendant was a farmer at Westkeal, near Coningsby, in the county of Lincoln. On the 18th of February, 1848, the plaintiff wrote to the defendant, offering to supply him with linseed cake at 10l. 15s. per ton. The defendant on the 19th answered,—"I can take five tons of cake at 10l. 10s.; but it must be put on board directly, as it takes some time to get to Coningsby." On the 22nd the plaintiff posted a letter at Hull, directed to the defendant, accepting his offer, in these terms:—"I shall ship you five tons best fresh made cakes to-morrow, at 10l. 10s." This last-mentioned letter inclosed an invoice. On the 26th, the five tons of cake were put on board a boat called the "William," belonging to one Ratcliffe, and bound for Lincoln, where it would have to be transhipped for Coningsby. The "William" did not leave Hull until the 28th of February; and, when the cake reached Coningsby, on the 17th of March, the defendant declined to receive it: and, on the 19th, he wrote to the plaintiff, saying, that, as he had received no answer to his letter of the 19th of February, he had bought other cake in the neighbourhood.

There was contradictory evidence as to whether or not the cake could have been sent earlier. Two witnesses called on the part of the plaintiff, stated that Martin's boat, which started about the time of the contract, and which went direct from Hull to Coningsby, was full, and consequently could not take the cake; **[227]** and that Dry's boat, which also started about the same time, was likewise full. On the other hand, Martin, who was called as a witness for the defendant, stated, that his boat was lying at Hull from the 21st of February until the 2nd of March, when she sailed, not being full; that no application had been made to him to carry the cake in question; and that, in the ordinary course, goods sent by him would have reached Coningsby sooner than goods that went by Ratcliffe's boat on the 28th of February. The defendant also proved that he had actually bought other linseed cake on the 6th of March, for which he paid at the rate of 10l. 15s. per ton.

It was insisted on the part of the defendant, that there was a material variance between the contract alleged in the first count, and that proved,—inasmuch as the contract declared on, was a contract for goods to be transmitted within a reasonable time, whereas the evidence shewed a contract to be performed directly.

The plaintiff's counsel declining to amend, the learned judge told the jury, that the meaning of the contract was, that the goods should be sent as early as was practicable, and that, if, upon the evidence on both sides, they were of opinion that there had been a delivery or an offer to deliver the cake within a reasonable time, their verdict must be for the plaintiff. And he further told them, that, if the plaintiff's

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(*a*) Unnecessary. Vide ante, vol. vi. p. 295, 5 M. & G. 267, n.

letter of the 22nd of February, accepting the contract, was put into the post-office at Hull, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete.

The jury returned a verdict for the plaintiff, damages 52l. 10s.

Martin, in Michaelmas term, 1848, moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence. He submitted that **[228]** the plaintiff had incorrectly declared on, and the learned judge had incorrectly interpreted, the contract; for, that a contract to send goods "directly" did not mean that they should be sent "within a reasonable time," but "immediately" or "speedily." [Maule, J. By the earliest opportunity.] Provided it be immediately. [Wilde, C. J. As soon as practicable, might be in a month.] Or a year. The learned judge was also mistaken, in telling the jury that the contract was complete on the posting of the plaintiff's letter on the 22nd of February, notwithstanding it might never have come to the defendant's hands. There is no authority for that position. [Maule, J. I think it was the mode of proof in *Harvey* v. *Johnston* (ante, vol. vii. p. 295, 6 D. & L. 120). Wilde, C. J. There is also a case of *Dunlop* v. *Higgins* (1 House of Lords Cases, 381), in the House of Lords, where the same point was decided (*c*).]

The court took time to consider, and, on a subsequent day intimated that the rule might go on the ground of the variance, but not as for a verdict against evidence, the learned judge who tried the cause expressing himself not dissatisfied with the conclusion the jury came to.

Knowles and Hugh Hill now shewed cause. The contract is properly set out in the declaration. It is true the defendant's letter of the 19th of February annexes as a condition of the contract that the cake shall be delivered directly. But the term is ambiguous, and must be construed with reference to the surrounding circumstances: and, where there are no special circumstances, such as the contract having reference to **[229]** a commodity of a perishable nature, or the like, it must be understood to mean within a reasonable time. Thus, in *Moor* v. *The Mayor and Jurats of Hastings* (2 Stra. 1070, Cas. temp. Hardw. 353, 362), it was held that a fine certain may be alleged as a reasonable fine. So, in *Bayley* v. *Tucker* (2 N. R. 458), where the declaration stated that the defendant promised the plaintiff (bail of A.), in consideration of certain reasonable reward, to render A. within due time, according to the practice of the court,—it was held, per Chambre, J., that evidence that a specific sum was agreed upon, was no variance. Again, in *Laing* v. *Fidgeon* (6 Taunt. 108, 4 Campb. 169), a contract to furnish saddles at from 24s. to 26s., was held to be well declared upon as a contract to furnish them at a reasonable price. And in *Wickes* v. *Gordon* (2 B. & Ald. 335), the contract laid in the declaration being, to deliver stock on the 27th of February, the contract proved was, to deliver stock on the settling day, which, at the time, was fixed for, and understood by the parties to mean, the 27th February: and it was held,—overruling *Payne* v. *Hayes* (Bull. N. P. 145),—that the proof supported the declaration. [Maule, J., referred to *Ellis* v. *Thompson* (3 M. & W. 445).]

Martin and Tomlinson, in support of the rule. This is a contract for the sale of goods above the value of 10l., and therefore within the 17th section of the 29 Car. 2, c. 3. The delivery on board the boat at Hull, was not an acceptance: *Hanson* v. *Armitage* (5 B. & Ald. 557, 1 D. & R. 128). The contract is contained in the two letters of the 19th and 22nd of February. The defendant offers to take five tons of cake, provided it be shipped directly; and the plaintiff accepts that offer by saying on the 22nd, "I **[230]** shall ship you five tons to-morrow." [Maule, J. In effect, the plaintiff says,—"I accept your offer, and I mean to perform the contract by shipping the cake to-morrow." The word "directly" does not necessarily mean "immediately": it necessarily comprehends a certain space of time.] The contract, which was accepted on the 22nd, was, for cake to be delivered on the following day: and that has not been performed. "Directly" means "forthwith," or "as soon as possible" (*a*), which is very different from the construction contended for on the part

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(*c*) On the authority of *Adams* v. *Linsell*, 1 B. & Ald. 681, and *Stocken* v. *Collin*, 7 M. & W. 515.

(*a*) Quære as to the admissibility of the latter construction in the particular case. The defendant did not contemplate the possibility of the cake's being shipped after the season for using it had passed.

of the plaintiff. The plaintiff has, by his letter of the 22nd, put the true construction upon the terms of the defendant's offer. At all events, the plaintiff was bound to ship the cake by the first available opportunity: and there was an opportunity of doing so on the 23rd of February, of which he omitted to avail himself.

COLTMAN, J. (Wilde, C. J., was absent). I am of opinion that there must be a new trial in this case. It appears to me that the declaration does not correctly describe the contract. The order given by the defendant was a conditional order, to send him five tons of cake, provided it could be shipped directly. That clearly means something different from a contract to be performed within a reasonable time.

MAULE, J. I am of the same opinion. I think this is a variance, and a variance which might and ought to have been amended at the trial. A "reasonable time" certainly means some more protracted space than "directly," which is the term used in the defendant's proposal.

[231] CRESSWELL, J. I agree with the rest of the court in thinking that the rule should be made absolute. It appears to me that "reasonable time" is a much more comprehensive expression than "directly." It is true, as appears from *Thompson* v. *Gibson* (8 M. & W. 281, 9 Dowl. P. C. 717), that "directly" does not mean "instanter": and it may be subject to a similar limitation here. But the expression "within a reasonable time," in this declaration, certainly is larger than is warranted by the terms of the contract.

I do not think the plaintiff lost anything by refusing to amend; for, if he had amended, the verdict would have been against him.

Rule absolute for a new trial.

JUDITH GARRARD, Widow, *Demandant*, TUCK, Tenant. June 25, 1849.

[S. C. 18 L. J. C. P. 338. Discussed, *Melling* v. *Leak*, 1855, 16 C. B. 668. Approved, *Drummond* v. *Sant*, 1871, L. R. 6 Q. B. 767.]

In a writ and count in dower, the exact number of acres of land in respect of which dower is demanded is not material: in order, therefore, to sustain a plea alleging that the tenements mentioned in the count were subject to an outstanding term, it is sufficient for the tenant to shew that all the lands held by him in the parishes named in the count are subject to the term.—Where an inclosure act provides that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, and for such and the same estates, as the lands in respect of which such allotments shall be made, would have been subject to in case the act had not been made,—the allotments made under it are held subject to an outstanding term to which the original lands were subject.—Perfect identity of description and quantity is not, under such circumstances, necessary.—The surrender of a term assigned to attend the inheritance, is not to be presumed unless there has been a dealing with the estate in a way in which reasonable men would not have dealt with it unless the term had been put an end to.—The object of the statute 3 & 4 W. 4, c. 27, was to settle the rights of persons adversely litigating with each other; not to deal with cases of trustee and cestui que trust, where there is but one single interest, viz. that of the person beneficially entitled.—A cestui que trust who enters into possession of land, becomes, at law, tenant at will to the trustee: where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under the 2nd section of the 3 & 4 W. 4, c. 27, accrues only upon the determination of the tenancy at will resulting from such possession.—The 3rd section of the 3 & 4 W. 4, c. 27, does not apply to the case of a cestui que trust holding possession of land under the trustee.—The court below refused to set aside a writ of error issuing out of the petty-bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,—thinking that the court in which the writ was returnable alone had power to deal with it. [Sed vide post, p. 258.]—The court of Exchequer Chamber declined to set aside a writ of error issuing out of the petty-bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,—holding that the power so to deal with the writ was in the court below, or in a judge at chambers under s. 37; the court of error not being a "superior court of common law," within that statute.—The Exchequer Chamber, irrespectively of the statute 12 & 13 Vict. c. 109, has no jurisdiction to quash a writ of error,—except for a defect apparent on the face of it, or on the ground that the record is inconsistent with it.

This was an action by writ of dower unde nihil habet. The count stated that Judith Garrard, who was the wife of James Roberts Garrard, deceased, by A. S., her attorney, demanded against Charles Edward Tuck the third part of one messuage, one barn, one stable, one garden, one orchard, sixty acres of land, sixty acres **[232]** of meadow, sixty acres of pasture, sixty acres of arable land, sixty acres of woodland, and sixty acres of land covered with water, with the appurtenances, in the parish of Surlingham, in the county of Norfolk, and the third part of two acres of land, two acres of meadow, two acres of pasture, two acres of arable land, and two acres of woodland, with the appurtenances, in the parish of Rockland, in the county aforesaid, and the third part of two acres of land, two acres of meadow, two acres of pasture, two acres of arable land, and two acres of woodland, with the appurtenances, in the parish of Bramerton, in the county aforesaid, as the dower of the said Judith Garrard, of the indowment of the said James Roberts Garrard, deceased, theretofore her husband, whereof she had nothing, &c.

The tenant pleaded,—first, dotem non, because he said that the said James Roberts Garrard, on the 18th of March, 1839,—being the time of suing forth the original writ of the said Judith Garrard in this action in this behalf, was not dead; concluding to the country (*a*).

Secondly, that the said Judith Garrard ought not to **[233]** have her dower of the tenements aforesaid, with the appurtenances, of the indowment of the said James Roberts Garrard, theretofore her husband, otherwise than of the reversion thereinafter mentioned, and of the rent incident thereto thereafter mentioned, because he said that the said tenements, with the appurtenances, were and are subject to a term of one thousand years, and that the said Judith Garrard was only entitled to be endowed of the reversion expectant on the determination of the said term, and of a peppercorn rent incident to the said reversion; and that this the tenant was ready to verify, wherefore he prayed judgment if the demandant ought to be indowed of the said tenements, with the appurtenances, as of the indowment of the said James Roberts Garrard, otherwise than of the said reversion and of the said rent incident thereto, &c.

The demandant joined issue on the first plea, and replied to the second, that she, by reason of anything by the tenant in that plea alleged, ought not to be barred from having her dower in the said tenements, with the appurtenances, of the indowment of the said James Roberts Garrard, formerly her husband, because she said that the said tenements, with the appurtenances, were not, either before or at the time of pleading the said last plea, subject to the said term of one thousand years; without this that the said tenements, with the appurtenances, were and are subject to the said term of one thousand years, and that she the said Judith Garrard is only entitled to be indowed to the reversion expectant on the determination of the said term and of the said peppercorn rent incident to the said reversion, in manner and form as in that plea alleged,—concluding to the country.

The cause was tried before Pollock, C. B., at the spring assizes at Norwich, in 1847. The facts are so fully stated in the judgment, that it is unnecessary to **[234]** repeat them here. At the close of the tenant's case, it was insisted on the part of the demandant,—first, that the term of one thousand years mentioned in the second plea, must be presumed to have been surrendered, on the authority of *Doe d. Putland* v. *Hilder* (2 B. & Ald. 782),—secondly, that the plea should have stated that the tenements were subject to the residue of a term of one thousand years,—thirdly, that

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(*a*) This conclusion appears to be bad in substance, as referring to trial by jury, a fact which ought to be tried by the court per testes. Com. Dig. Pleader (2 Y. 9). If the plea had been properly concluded, it could not well have been joined with the second plea,—in bar of execution,—any issue arising out of which must have been tried by the country.

the rights of entry and of action, in respect of that term, were taken away by the statute 3 & 4 W. 4, c. 27, ss. 2, 7,—fourthly, that, by the 8 & 9 Vict. c. 112, s. 1, the assignment of satisfied terms was unnecessary,—fifthly, that the term which the tenant had proved, was not a term in the land described in the count,—sixthly, that, assuming that the lands allotted under two acts for the inclosure of lands in the parishes of Surlingham and Rockland, respectively, 48 G. 3, and 49 G. 3 (which, with the awards made under them, had been put in by the tenant), had belonged to James Roberts Garrard, it was not shewn that the lands in respect of which the allotments were made, were the lands now in question, and therefore it did not follow that the term would subsist in the new allotments.

A verdict was found for the demandant, with leave reserved to the tenant to move that the verdict might be entered for him on the second issue, if the court should be of opinion that the second plea was made out,—and leave to the demandant to move to enter up judgment non obstante veredicto, if the tenant's motion to enter the verdict on the second issue should be successful.

Byles, Serjt., accordingly, in Easter term, 1847, on the part of the tenant, obtained a rule to shew cause **[235]** why the verdict found for the demandant on the second issue should not be set aside, and instead thereof a verdict be entered for the defendant; or for a new trial, upon affidavits. As to the presumption of a surrender of the term, he referred to the cases collected in Sugden's Vendors and Purchasers (*a*), and to *Doe d. Blacknell* v. *Plowman* (2 B. & Ad. 573), as virtually overruling *Doe d. Putland* v. *Hilder*. As to the objection that the term proved was not a term in the lands in the count, he submitted that the defect, if any, arose from the defective way in which the demandant had herself described the lands; and that if the description was too general, the judgment ought to be arrested,—citing Com. Dig. Pleader (2 Y. 2). And, as to the last objection urged at the trial, he referred to the various provisions of the local inclosure acts, and to the 14th section of the general inclosure act, 41 G. 3, c. 109, as shewing that the new allotments followed the title of the lands in respect of which they were made.

O'Malley and Willes, in Trinity term, 1848, shewed cause. To entitle him to a verdict on the second issue, the tenant was bound to shew, in the terms of that issue, a term of years covering all the lands of which James Roberts Garrard was seised, out of which the demandant claimed to be indowed: Robinson's Entries, 237, 254, 257, 277, 279; Lilly's Entries, 187; Com. Dig. Pleader (2 Y. 7); Roscoe on Real Actions, 179, 219, 329, 332; *Rogers* v. *Custance* (1 Q. B. 77, 4 P. & D. 574); *Cousins* v. *Paddon* (2 C. M. & R. 547, 5 Tyrwh. 535); *Tuck* v. *Tuck* (5 M. & W. 109, 7 Dowl. P. C. 373); *Moore* v. *Butlin* (7 Ad. & E. 595, 2 N. & P. 436). **[236]** This difficulty, it will be urged, the tenant would have avoided, if he had been permitted to plead, as he had proposed,—first, ne unques seisie que dower,—secondly, that the husband was alive at the time of suing forth the original writ,—thirdly, the term of one thousand years. It is obvious, however, that these pleas could not have been pleaded together, inasmuch as they would have required different modes of trial,—the second, per testes, and the others by a jury (vide supra, 232 (*a*)): Com. Dig. Pleader (2 Y. 9); 2 Wms. Saund. 44 c.; Booth on Real Actions, 168; Roscoe on Real Actions, 219, 220; *Abbot of Strata Marcella's case* (9 Co. Rep. 30 b.); *Lindsey* v. *Lindsey* (1 Salk. 291, per nom. *Booth* v. *The Marquess of Lindsey*, 2 Ld. Raym. 1293); *Davies, Dem., Lowndes, Ten.* (7 M. & G. 762, 8 Scott, N. R. 539).

The effect of the general inclosure act of 41 G. 3, c. 109, is to exclude all persons who omit duly to prefer their claims: *Doe d. Watson* v. *Jefferson* (2 Bingh. 118, 9 J. B. Moore, 260); and here, no claim was made in respect of the term of one thousand years created by the deed of 1739: and, although there are provisions in the local acts produced at the trial, that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, and for such and the same estates, as the lands in respect whereof such allotments shall be made, would have been subject to in case the acts had not been passed; yet these provisions do not embrace an attendant term. [Maule, J. The policy of all inclosure acts, as well public as private, is, that the land acquired under the award of the commissioners, shall differ from that in respect of which the allotment is made, in its physical qualities only. Wilde, C. J. Is it not

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(*a*) 10th edit., vol. iii. pp. 21-69. And see Dart's Compendium of Law and Practice of Vendors and Purchasers, 160 (*c*).

a fallacy to say that the trustees of the term did not claim? A claim by the cestui que trust is a claim by the trustees.]

[237] The jury were warranted in presuming a surrender of the term, from the lapse of time, and from the fact of two deeds having since been executed by the parties, in which the term is not alluded to, viz. the mortgage of 1812, and the conveyance by James Roberts Garrard to the trustees for sale, in the same year: *Doe d. Putland* v. *Hilder* (2 B. & Ald. 782); *Doe d. Burdett* v. *Wrighte* (2 B. & Ald. 710); *Bartlett* v. *Downes* (3 B. & C. 616, 5 D. & R. 526); *Townsend* v. *Champernown* (1 Y. & J. 538); *Doe d. Hammond* v. *Cooke* (6 Bingh. 174, 3 M. & P. 411). *Doe d. Putland* v. *Hilder* has repeatedly been cited without disapprobation.

Twenty years having elapsed since the right of entry first accrued to the trustee of the term, the term is gone, by the operation of the statute of limitations of 3 & 4 W. 4, c. 27, ss. 2, 3, 7. In *Doe d. Jacobs* v. *Phillips* (10 Q. B. 130, 16 Law Journ., N. S., Q. B. 268, 11 Jurist, 692) the facts were these:—In 1767, the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H., to attend the inheritance: in 1844, the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H.: the owner of the legal interest in the term had never been in possession: no demand of possession had been made before action brought:—and it was held that the action was not maintainable; for, if a tenancy at will existed, as between the trustee and cetteux que trust, it had not been determined by demand of possession, and, if no tenancy existed so as to render a demand of possession necessary, then the action might have been brought twenty years before, and was, consequently, barred by the 2nd and 3rd sections of the statute.

[238] Further, the term is extinguished and gone, by virtue of the 8 & 9 Vict. c. 112, s. 1, by reason of its being no longer necessary. [This point was abandoned.]

Byles, Serjt., and Unthank, in support of the rule. It is at the least extremely doubtful whether the statute 3 & 4 W. 4, c. 27, applies at all as between trustee and cestui que trust (*a*): and, if it does, the question cannot be raised by a stranger. It has long been settled, that the possession of the cestui que trust is the possession of the trustee. If any legal relation is supposed to exist between them, it is that of tenant at will: Littleton, §§ 462, 463; Com. Dig. Estate (H. 1); Sugden's Vendors and Purchasers (11th edit. p. 610); *Vallance* v. *Savage* (7 Bingh. 595, 5 M. & P. 576). In the last-mentioned case, Tindal, C. J., says: "The evidence was, that John Vallance, the plaintiff, was a trustee, and that James Vallance was his cestui que trust, and had let the premises in question to Sarah Pell, from whom he received the rent. It was therefore the simple case of trustee and cestui que trust. The legal interest is in the trustee; actions must be brought by him; the cestui que trust has no interest in law: if he enters, his possession is considered the possession of the trustee; and any disposition made by him, and adopted by the trustee, is considered as the disposition of the trustee, the cestui que trust only possessing the property in the right of the trustee." The statute 3 & 4 W. 4, c. 27, was passed to regulate all estates, in law as well as in equity. The second section enacts, that, after the day therein mentioned, "no person shall make an entry or distress, or bring an action, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to **[239]** bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Under the old statute of limitations, 21 Jac. 1, c. 16, the question of adverse possession was a most material one: and there is no appreciable distinction between the words of the first section of that statute, and those of the second section of the 3 & 4 W. 4, c. 27. The seventh section enacts, "that, when any person shall be in possession, or in receipt of the profits, of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have deter-

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(*a*) See Dart's Compendium of Law and Practice of Vendors and Purchasers, 191.

mined." But, at the end of the clause, there is this express proviso, "that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee." In *Nepean* v. *Doe d. Knight* (2 M. & W. 894),—where it was held that the doctrine of non-adverse possession is done away with by the 3 & 4 W. 4, c. 27, ss. 2, 3, except in the cases provided for by s. 15,—it was admitted that the possession was adverse, and the case exactly within the 3rd section. In *Doe d. Corbyn* v. *Bramston* (3 Ad. & E. 63, S. C. per nom. *Doe d. Corby* v. *Branson*, 4 N. & M. 664), a feme sole, seised in fee, married, and she and her husband ceased to be in possession **[240]** or enjoyment of the land, and went to reside at a distance from it: they both died at times which were not shewn to be within forty years from their ceasing to occupy: the wife's heir-at-law brought ejectment against the party in possession, within twenty years of the husband's death, and within five years of the passing of the statute 3 & 4 W. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: and it was held, that the heir-at-law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. Lord Denman, in delivering the judgment of the court, there says: "The fact being clear, that, within the terms of 3 & 4 W. 4, c. 27, s. 3, the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents, above forty years before the action brought, the action is clearly barred by s. 17 of the same statute. Some argument was raised on the question whether the possession was adverse or not; but the terms of that clause are unequivocal, and one of its objects was, to avoid the necessity of inquiring into facts of so antient a date." Patteson, J., observing upon this statute, in *Doe d. Jones* v. *Williams* (5 Ad. & E. 291, 6 N. & M. 816), says: "From the language of the 15th section, it plainly appears that something or other was, after the act passed, to be considered as adverse possession, which was not so before the act passed; for, in that section, it seems to be considered that the possession, which, up to the passing of the act, was not adverse as the law then stood, would, by the operation of the act, become so on the very day after the act passed; and that by relation; otherwise the provision as to the five years, was not needed to protect the right of the party against whom such ad-**[241]**-verse possession might be set up. What is 'adverse possession at the time of the act passing,' in the sense of that section, depends therefore upon the law as it stood up to that time. One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge* v. *Bere* (5 B. & Ald. 604), such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and, in a late case (*b*), Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee; and therefore I think that the 15th section applies to the present case. How far, under the 3rd section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all (*c*). If the 3rd section was intended to comprehend the case of a mortgagee, it is very ill penned; and the 40th section, if meant to apply to actions of ejectment, is still worse penned." Lord Denman, in delivering the judgment of the court in *Culley* v. *Doe d. Taylerson* (11 Ad. & E. 1008, 3 P. & D. 539), says: "The effect of this (the 2nd) section (of the 3 & 4 W. 4, c. 27) is, to put an end to all questions and discussions whether the possession of lands, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the **[242]** ejectment, is barred by this section." [Maule, J. In all these cases, the party came within the description of a person dispossessed.] In *Doe d. Jacobs* v. *Phillips*, the plaintiffs were trustees for two infants: the estate was gavelkind: both trustees and cetteux que trust had been kept out

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(*b*) Perhaps *Doe d. Roby* v. *Maisey*, 8 B. & C. 767, 3 M. & R. 107.

(*c*) The 7 W. 4 & 1 Vict. c. 28, regulates the time at which entry may be made, or action brought, by a mortgagee of land within the definition of the 3 & 4 W. 4, c. 27, s. 1, giving twenty years from the last payment of any part of the principal or interest, although the right of entry may have first accrued more than twenty years before.

of possession more than twenty years, by the uncles and aunts of the latter (*a*). [Maule, J. If not barred in twenty years, they never would be. Coltman, J. The uncles and aunts were co-parceners: the case, therefore, came within the 12th section (*b*)¹.] No doubt. The remarks upon this statute by Tindal, C. J., in *James* v. *Salter* (3 N. C. 514, 4 Scott, 168), and those contained in the notes to *Nepean* v. *Doe d. Knight*, in Smith's Leading Cases (3rd edit. vol. ii. p. 396, et seq.), are much to the purpose.

Whether or not a surrender of a term ought to be presumed, is ordinarily a question for the jury: *Doe* v. *Scott* (11 East, 478); *Jenkins* v. *Harvey* (1 C. M. & R. 877); Best on Presumptions (pages 165, 166). The circumstance of the existence of the term not being noticed in the will of Thomas Bowles, in 1762, and of James Roberts, in 1793, or in the mortgage to Thomas Bignold, in 1812, or the conveyance to trustees for sale, in the same year, affords no valid ground for presuming that the term created by Sarah **[243]** Thurston, in 1739, had ceased to exist. It could not be expected that the term would be mentioned in the wills: and, in practice, it is not usual, in the case of a mortgage, to get in an outstanding term, especially if it be an old one: Sugden's Vendors and Purchasers (11th edit., p. 1134). Of the seven cases upon the subject, to which Sir E. Sugden refers (*b*)², in three of them there were outstanding terms, of which no notice was taken. No doubt, it is more prudent in all cases to get in the term; but it is not so universally the practice to do so, as to warrant an inference being drawn from the non-observance of that precaution. It was not until the decision in *Mole* v. *Smith* (*c*), that it was considered that a purchaser was obliged to take an estate protected from dower by a term.

As to the identity of the lands,—the quantities and descriptions are as nearly identical as could, under the circumstances, be reasonably looked for, regard being had to the fact, that, under the two inclosure acts, sixteen new public, and thirty-two private roads had been set out; and that, under those acts, land were exchanged as well as newly allotted, and no distinction between allotments and exchanges was made in the awards of the commissioners.

It was not necessary for the defendant to shew a term covering a quantity of land equal to that mentioned in the count. The writ and count in dower resemble the writ and declaration in assumpsit, rather than in debt, where the writ used to be for a particular **[244]** sum. In a writ of right, the demandant claims specific land: in dower, the writ merely claims a reasonable endowment out of the lands which belonged to the husband; and, when she comes to count, the demandant may abridge her claim; or she may recover on the trial, although she may fail in proof as to part: *Williams* v. *Gwyn* (2 Wms. Saund. 44 a. and the notes); Littleton, § 39; Co. Litt. 34 b., 281. [Maule, J. The question is, whether it was not necessary for the tenant to plead the term as to so much, and ne unques seisie que dower as to the residue. Dower does not very much resemble either debt or assumpsit: in debt, the plaintiff claims a certain sum of money; in assumpsit, he claims compensation for the non-performance of a contract or promise. But, where land, or dower out of land, is claimed, it has reference to some particular and specific land.] There are three cases in Style to that effect,—*Thynn* v. *Thynn* (Style's Rep. 99), *Fairefax* v. *Fairefax* (ib. 238), and *Booth* v. *Lambert* (ib. 276). The tenant clearly proved the substance of the issue.

If necessary, the verdict on the second issue may be entered distributively, for the

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(*a*) See 8 Q. B. 158, and 11 Jurist, 692.

(*b*)¹ Which enacts, "that, when any one or more of several persons entitled to any land or rent, as co-parceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

(*b*)² *Goodtitle* v. *Morgan*, 1 T. R. 755, *Doe d. Putland* v. *Hilder*, 2 B. & Ald. 782, *Willoughby* v. *Willoughby*, 1 T. R. 763, *Keene* v. *Deardon*, 8 East, 248, *Maundrell* v. *Maundrell*, 10 Ves. 246, *The Marquess of Townshend* v. *The Bishop of Norwich*, MS., 27th Jan. 1820, *Cholmondeley* v. *Clinton*, 2 Jac. & W. 158.

(*c*) 1 Jac. 490. And see Dart's Compend. Vend. & P. 251.

tenant as to part, and, as to other part, for the demandant. For this the authorities are numerous: Co. Litt. 227 a.; Com. Dig. Pleader (S. 19); Bac. Abr. Verdict (M.), (Q.); *Bates* v. *Bates* (1 Lutw. 719); *Wheatley* v. *Best* (Cro. Eliz. 564, Noy, 65); *Pheasant* v. *Pheasant* (1 Ch. C. 181); *Tiffin* v. *Tiffin* (2 Freeman, 66); *Hooper* v. *Shepherd* (2 Stra. 1089); *Benington* v. *Benington* (Cro. Eliz. 157); *Spilsbury* v. *Micklethwaite* (1 Taunt. 146); *Timothy* v. *Simpson* (1 C. M. & R. 757); *Rogers* v. *Maw* (15 M. & W. 444).

Cur. adv. vult.

[245] WILDE C. J., now delivered the judgment of the court, after stating the pleadings.

On the trial of the cause, a verdict was found for the demandant, with leave to the tenant to have the verdict entered for him on the second issue, if the court should be of opinion that he had made out his plea. A rule nisi was accordingly granted, for entering the verdict for the tenant on the second issue.

It was insisted, on the argument, that, inasmuch as the number of acres specified in the count amounted to 500, the tenant was bound to shew a term of years covering 500 acres of land, in order to make out his plea. But we do not assent to this position. The writ of dower is brought for the third part of specific lands in the tenure of the tenant; and, though the writ, in conformity with the established forms of writs, demands a certain number of acres, yet we do not consider the exact number of acres to be material.

The effect of the pleadings in the case, we conceive to be this:—The tenant not having pleaded ne unques seisie que dower, has thereby admitted that the demandant's husband was seised of all the lands in respect of which dower is demanded; and the demandant has the right to apply her demand to any lands in the tenure of the tenant, which the demand, as framed, is capable of covering,—that is, under the circumstances of this case, to all the lands of the tenant in the parishes of Surlingham, Rockland, and Bramerton: consequently the tenant, who by his plea has undertaken to shew that the lands demanded are covered by the term of one thousand years, has, in effect, bound himself to shew that all his lands in those parishes are covered by the term.

The term relied upon by the tenant was originally granted, in 1739, by Sarah Thurston (then being seised in fee of thirty-two pieces of land, containing by esti-**[246]**-mation thirty-seven acres, and one other piece of land of uncertain quantity), to Thomas Seaman, for securing a sum of money,—by the description of all those thirty-three pieces, &c. (particularly describing them), and all other the messuages, &c., lands and hereditaments, of her the said Sarah Thurston, situate, lying, and being in Surlingham St. Mary, Surlingham St. Saviour, Rockland, and Bramerton. In 1746, Seaman assigned the mortgage to one Anthony Aufrere. In 1750, Sarah Thurston conveyed the mortgaged premises, in fee-simple, to one Thomas Bowles, by whom the mortgage was paid off; and thereupon Aufrere assigned the term to John Kerridge, in trust to attend the inheritance. Thomas Bowles, by will, dated the 27th of December, 1762, devised all his messuages, lands, tenements, and hereditaments, in Surlingham, or in any other town next or near adjoining, which he had purchased of Sarah Thurston, widow, and all other his messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in Surlingham aforesaid, to James Roberts and his heirs. James Roberts, by his will, dated the 17th of October, 1793, devised all his messuages, lands, tenements, and hereditaments in Surlingham, Rockland, Bramerton, Kimpnall, Fritter, and Topcroft, in the county of Norfolk, and all other his real estates whatsoever, to James Roberts Garrard (the husband of the demandant), and his heirs for ever, subject to an executory devise over on a contingency which never occurred. In January, 1812, James Roberts Garrard demised all his freehold or charter-hold messuages, lands, tenements, and hereditaments in Surlingham, Rockland, and Bramerton, and in Fritter, Topcroft, and Kimpnall, to Thomas Bignold, for a term of years, to secure a sum of money. In October, 1812, James Roberts Garrard conveyed to Farr and Fiske all his freehold or charter-hold messuages, lands, **[247]** tenements, and hereditaments in Surlingham, Rockland, and Bramerton, and any other town thereto next or near adjoining, in trust to sell, and pay debts. In May, 1813, Farr and Fiske, and James Roberts Garrard and Thomas Bignold, conveyed to Thomas Tuck (the tenant) so much as was freehold or charter-hold of and in all that messuage or dwelling-house in Surlingham, and various pieces of land particularly described, in Surlingham, Bramerton, and Rockland, amounting in the whole to near forty-eight acres: and, at the same time, one Edward Bickersteth (to whom a special administration had been granted of the goods of John Kerridge, so far only as concerned the rights and title of John Kerridge of and in the hereditaments comprised in the said term for one thousand years) assigned over the messuages, lands, &c., vested in Bickersteth, as administrator, for the residue of the term of one thousand years, to William Farrer, in trust for Thomas Tuck, and to attend the inheritance.

On the part of the demandant, it was contended, that, as a portion of the land conveyed by the demandant's husband to Tuck, was land allotted under certain acts which had been passed for inclosing lands in the parishes of Claxton and Rockland, and in the parishes of Strumshaw and Surlingham, that land was not subject to the term to which the lands in lieu of which it was allotted had been subject.

But we think there is no ground for doubt on this point, it being expressly provided by each of those acts that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, for such and the same estates, and no other, as the lands in respect whereof such allotments shall be made would have been subject to in case the act had not been made.

It was further objected, that the lands conveyed to Tuck did not correspond in quantity exactly with the [248] antient estimated quantities; nor could the land in respect of which the allotments were supposed to have been made, be precisely identified. It cannot be expected but that such should be the case, there having been two inclosure acts passed affecting the lands, under which many new roads had been set out, and allotments made. Neither the exact quantities, nor the antient descriptions, under such circumstances, are likely to correspond entirely. But it was proved, with reasonable certainty, in this case, that the whole of the land comprised in the term created by Sarah Thurston, came to James Roberts Garrard: and, in the absence of any ground for inferring that he had any other lands in Surlingham, Rockland, and Bramerton, besides those which he derived from Mrs. Thurston, there was, we think, reasonable ground on which a jury might and ought to infer the identity of the lands in the tenure of the tenant, with those comprised in the lease for one thousand years.

But it was further contended, on behalf of the demandant, that, as the existence of the term was never referred to in any of the deeds, from the time when it was assigned to Kerridge to attend the inheritance, in 1750, down to the year 1813, when the conveyance was made to Tuck, it ought to be presumed that it had been surrendered.

It is undoubtedly true, that surrenders of outstanding unsatisfied terms have been in several cases presumed, to prevent what was deemed to be a failure of justice,—as was done in *Doe d. Burdett* v. *Wrighte* (2 B. & Ald. 710), and *Doe d. Putland* v. *Hilder* (ibid. 782). But the doctrine laid down in those cases,—as was said by Lord Tenterden, in *Doe d. Blacknell* v. *Plowman* (ibid. 577),—has been much ques-[249]-tioned: and the current of the later authorities shews, that, where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it, unless the term had been put an end to. Now, what are the acts done since the assignment of this term? The first of these acts is the will of Bowles. There was no reason why, in making his will, he should refer to the term which was held in trust for him, and would be equally held in trust for his devisee. The same observation applies to the next act,—the will of James Roberts.

The next occasion was, in 1812, when the property was mortaged to Bignold, without any assignment to a trustee for Bignold. But it is to be observed that Bignold had full notice of the mortgage term; for, the mortgagor's title could not be made out without producing the conveyance to Bowles, on the face of which the mortgage to Aufrere appears as an incumbrance. The mortgagee would, of course, call for the assignment to Kerridge, and would be entitled to the custody of it for his security. The mortgage-deed conveys to the mortgagee the lands of the mortgagor wherein he, or any person in trust for him, hath any manner of estate; and there is a covenant for further assurance by all persons lawfully or equitably claiming any estate or interest therein. The security, under these circumstances, might well be deemed sufficient, without calling on the mortgagor to incur the unnecessary expense of searching after, and finding, the representative of Kerridge; and therefore we do not think that the absence of an assignment leads to the inference that a surrender had taken place.

The next act done was, in October, 1812, when the estate was conveyed to trustees for sale. But we see **[250]** no reason why an assignment of the term should be made to protect their estate, which they held for a temporary purpose only; and we find, that, as soon as that purpose could be carried into effect, a limited administration was obtained, and the term was assigned to the purchaser. We think, therefore, that, under the circumstances of this case, there is no ground for presuming a surrender.

It was further objected, that the term was extinguished, by force of the statute 3 & 4 W. 4, c. 27. The construction contended for leads to consequences so extensive and so alarming, that it ought not to be adopted, unless it is plain that such was the intention of the act. The consequence would be, in the majority of cases, to extinguish attendant terms, and shake the security of titles to an extent which it is impossible to estimate, and which it is difficult to suppose the framers of the act could have intended. The general object of the act seems to have been, to settle the right of persons adversely litigating with each other; not to deal with cases like that of trustee and cestui que trust, where, though there are two parties, there is but one single interest,—that of the person beneficially entitled.

It will be convenient, before adverting further to the statute, to consider in what relation the parties stood at the time the act passed. The mortgage term being satisfied out of the purchase-money of the inheritance, and the term assigned over expressly to attend the inheritance, the assignee thereby became trustee, and the purchaser cestui que trust, during the term; and, the cestui que trust entering into possession of the land, he was, at law, the tenant at will to the trustee: *Freeman* v. *Barnes* (1 Ventr. 80, 1 Siderf. 349, 458).

[251] Such being the relation of the parties, what is the operation of the act?

By section 2 it is enacted that no person shall make an entry, or bring an action, to recover any land, but within twenty years next after the time at which the right to make such entry, or bring such action, first accrued.

Now, pausing at this section,—at what time, as between lessor and lessee, is it to be understood that the right of entry accrues? The right of entry of a landlord on his tenant, must accrue on the expiration of the tenant's term, if he has a term: if he is a tenant at will, the right of entry, within the terms of this section of the act, would naturally be understood to accrue on the determination of the tenancy at will. It may be said, indeed, that, as, in case of a tenancy at will, the lessor may at any time determine his will by entering, a right of entry exists at all times, from the first commencement of the estate at will, and is not dependent on a previous determination of the estate at will. But we think that the term "right of entry," in the 2nd section, ought not to be so construed. The right which a lessor has in such a case is, a right to determine the tenancy at will; and it is only upon the determination of the tenancy at will, that there is such a vested right of entry as is in contemplation in the 2nd section of the act. This view appears to be confirmed by the provision in the 7th section, respecting tenancies at will,—which provides, in cases of ordinary tenancies at will, that the right to make an entry shall be decreed to have first accrued, either at the determination of the tenancy, or at the expiration of one year next after the commencement of such tenancy. The object of that section obviously is, to fix a definite period after the commencement of a tenancy at will, beyond which the **[252]** tenancy shall not be presumed to have had a continuance,—a provision which would have been wholly unnecessary, if a right of entry, within the meaning of the 2nd section, had at all times existed, from the very commencement of the estate at will.

But, passing from the 2nd to the 3rd section of the act, it is contended that the present case falls within that clause of the 3rd section which provides, that, where the person claiming such land, shall claim in respect of an estate or interest in possession, granted, by any instrument, to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, and no person entitled under such instrument shall have been in such possession or receipt; then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument. But we do not think that the case of a cestui que trust holding possession of land under the trustee, falls within this clause, which is meant to apply to cases were the person holding the land does not hold it under, or in privity with, the person in whom the right of entry is supposed to be. The cestui que trust in such a case holds possession under the trustee, and under the protection of the instrument by which the estate is conveyed to the trustee. It cannot, therefore, be said that it is a case in which "no person entitled under the instrument" has been in possession; for, the cestui que trust has virtually been in possession under the instrument.

If we proceed to the consideration of the provision contained in the 7th section, respecting trustees,—that provision appears to us to reflect light on the nature of their estate, and on the provisions of the 2nd and 3rd sections, as far as their estate is concerned.

[253] The object of that section appears to be (as above stated), to fix a definite period, at the end of which the right of entry of the lessor, as against his tenant at will, shall be deemed to have accrued; and it provides that no cestui que trust, shall be deemed to be a tenant at will within the meaning of that clause,—which is equivalent to saying that the right of entry of a trustee against his cestui que trust, shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. The intention appears to be, to put the estate of a trustee in a better state in this respect than that in which the estate of an ordinary lessor is, as against his tenant at will; whereas, his situation would be worse than that of an ordinary lessor, on the construction contended for on the part of the demandant in this case; for, the time of limitation, on the construction contended for, would run against the trustee from the first commencement of his estate; whereas, as against an ordinary lessor, the time would only run from the actual determination of the tenancy, or from the end of the first year of the tenancy.

On the part of the demandant, the case of *Doe d. Jacobs* v. *Phillips* (10 Q. B. 130, 16 Law Journ., N. S., Q. B. 268, 11 Jurist, 692), was relied on, as being at variance with the view we take of the statute. The facts of that case are not given in detail; so that it does not appear whether the cetteux que trust in that case had been in possession of the lands within twenty years, or, indeed, that they had ever been in possession. In the absence of more information than we possess regarding that case, **[254]** we do not look upon it as binding us: and, on the best consideration we can give to the subject, we think that the term in the present case has not been extinguished by force of the statute in question.

The result is, that, on the second issue, the verdict must be entered for the tenant.

Rule accordingly.

Nov. 9.—Judgment having on the 23rd of October, 1849, been entered for the tenant (*a*) on the second issue, the demandant brought a writ of error, on the ground that the matters contained in the second plea did not disclose a sufficient answer in law to her claim, and that on the ground, amongst others, that it did not shew whether the term therein mentioned, had been created previously to, or after, the marriage of the demandant with James Roberts Garrard; and that therefore she, the demandant, was entitled to judgment non obstante veredicto on that plea.

Byles, Serjt. (with whom was Unthank), now moved for a rule calling upon the demandant to shew cause why the writ of error should not be set aside, on the ground that it was issued against good faith,—upon an affidavit stating in substance, that the proceedings in this cause originated in the court of Chancery, where a bill had been filed by the demandant, Mrs. Garrard, against the tenant, C. E. Tuck, to recover her dower in the lands mentioned in the count; that the defences set up by the now tenant (the defendant in equity) were two,—first, that the demandant's husband did not appear to be dead,—secondly, that the lands were protected against the claim of dower by a term of one thousand years **[255]** created by one Sarah Thurston by deed dated the 6th of June, 1739; that the present action was brought pursuant to an order of Vice-Chancellor Knight Bruce made in that cause, in 1846; that, on the 4th of March, 1847, the tenant pleaded,—first, a denial of the death of the husband,—secondly, the statute of limitations,—thirdly, that Sarah Thurston, in 1739, being seised in fee, created a term of one thousand years, and tracing the term down to the

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(*a*) The proper judgment on this verdict would be, for the demandant, quod recuperet, with a cesset executio.

time of pleading; that part of the lands in respect of which dower was claimed, were not originally in the seisin of Sarah Thurston, or included in the term, but were allotments in respect of lands that were included in the term,—it being assumed, on all hands, that, if the term protected the lands of which Sarah Thurston was originally seised, it also protected the allotted lands; that the plea of the statute of limitations was afterwards withdrawn, pursuant to a judge's order made by consent; that, difficulties arising in framing the pleadings, and particularly with reference to the inclosure acts, it was ultimately agreed between the respective attorneys, assisted by counsel, that the pleas and replication should be in the short form in which they now appear upon the record,—upon an understanding that the real question to be tried on the second plea, was, whether or not the term created in 1739 had ceased; that the only ground of error relied on was, an objection to the form of the second plea so agreed to as aforesaid. [Wilde, C. J. We have no power to do what you ask.] The writ issues out of the petty-bag office, under the provisions of the 12 & 13 Vict. c. 109; it is directed to this court (*a*), and is returnable in the Exchequer Chamber. It is submitted that the court to which the writ is directed, is the proper court to deal with it. [Wilde, C. J. I very much doubt that. I had occasion to consider the sub-**[256]**-ject in the case of *Davies, Dem., Lowndes, Ten.* (7 M. & G. 762, 8 Scott, N. R. 557).] It seems clear that the court of error has no jurisdiction: and, in *Cane* v. *Masey* (*b*), the court of Queen's Bench quashed a writ of error on this ground. [Wilde, C. J. In *Tolson* v. *Kaye* (*c*), the court of error quashed the writ.] There, the court would give no judgment, the record being imperfect (*d*). In *Snook* v. *Mattock* (5 Ad. & E. 239, 6 N. & M. 783), on a feigned issue directed by the court of King's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial. The court having given judgment for the plaintiff, error was brought in the Exchequer Chamber, on the ground that the customs, as stated in the declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that error did not lie on a feigned issue. But the court of Queen's Bench afterwards expressed a doubt whether the court of error had power so to do. [Wilde, C. J. In *King* v. **[257]** *Simmonds* (14 Law Journ., N. S., Q. B. 248, 256, 7 Q. B. 289), Tindal, C. J., delivering the judgment of the court of error, quashing the writ of error, says: "The principle appears to be, that the court is to quash the writ, as useless, when they find that the record sent up is not one which, by the commission contained in the writ of error, they have the power to examine: and this applies as much to the case where the record sent up is not a judgment which has been entered at all,—and such is the present case,—as it does where the record is one which varies in the name of the parties, or in other particulars. This principle was acted upon in *Tolson* v. *Kaye*, in which the writ of error was quashed, where there was no final judgment upon the whole record returned, and so nothing for the writ to operate upon: and in *Snook* v. *Mattock* there was a similar judgment, where it appeared that the judgment was one on which no writ of error would lie. It is true, that the court of King's Bench has expressed a doubt as to the propriety of

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(*a*) It is directed to the chief justice, as the party having the custody of the record, to be removed or to be transcribed.

(*b*) 3 B. & C. 735, 5 D. & R. 624. And see *The Apothecaries Company* v. *Harrison*, 12 Ad. & E. 642, 4 P. & D. 292, in which it was held, that, where parties, on the trial of an action for several penalties, agree that a verdict shall be given for one only,—the defendant undertaking not to repeat the act complained of, and the plaintiff, that, unless he does so, execution shall not issue,—it is an implied term (nothing to the contrary being expressed) that the defendant shall not bring error: and, if he do so, the court (below) will quash the writ as issued against good faith.

(*c*) 6 M. & G. 536, 590, 7 Scott, N. R. 222, 268. In *Roberts* v. *Tucker*, Style, 191, 219, *Dawkes* v. *Payton*, ib. 218, *Shedlock* v. *La Pere*, ib. 265, *Porter* v. *Swetnam*, ib. 406, *Conye* v. *Lawes*, ib. 472, writs of error were abated or quashed by the court in which they were returnable, quia improvidè emanaverant.

(*d*) The court of Exchequer Chamber quashed the writ of error because they considered the record to be imperfect; and the final judgment which had been entered up, and which they held to be for that reason erroneous, was allowed to stand. Ante, vol. iii. p. 740.

the decision in that case; but that was probably on the ground that on the face of the record it did not appear that the issue was feigned."]

If the court is of opinion that the application should be made to the court of error, the defendant will adopt that course.

Per curiam. We think, that, when, in obedience to the writ, a transcript of the record has been sent to the court of error, our jurisdiction is at an end, and that the application to quash the writ of error should not be made here.

Rule on this point refused (*b*)[1].

[258] Nov. 13.—Unthank now made a similar application to the court of error, upon affidavits stating substantially the same facts as those before detailed.

The court granted a rule nisi, but not without expressing a doubt whether the court of error was the proper court for the purpose.

The case was argued on the 30th of November, 1849, by O'Malley and Willes for the demandant, and by Unthank for the tenant. The court, without expressing any opinion upon the merits of the motion, desired that the matter might be re-argued upon the question of jurisdiction: and on the 2nd of February, 1850, they called upon—

Unthank to support his rule (*a*)[1]. Formerly, all original writs issued out of the court of Chancery: 4 Inst. 80; Com. Dig. Chancery (C. 1). The jurisdiction for this purpose was abolished by the statute 5 & 6 W. 4, c. 82, ss. 10, 12, by which the duties of the cursitors were transferred to the petty-bag office (*b*)[2]. The practice of the petty-bag office is further regulated by the 12 & 13 Vict. c. 109, the 39th section of which enacts, "that, in every action, suit, and proceeding now pending, or which at any time hereafter shall be commenced or pending in the court of Chancery on the common-law side thereof, it shall be lawful for the superior courts of common law, and the judges thereof respectively, and they **[259]** are hereby respectively required, to hear and determine all such matters or applications arising in, or incident to, any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business, matters, and things, in, about, touching, or concerning any action, suit, or proceeding on the common-law side of the said court of Chancery, as by virtue of any orders or regulations for the time being in force by virtue of this act, may be transacted, done, or performed by such judge; subject, nevertheless, and according to the provisions of this act, and the laws, rules, and regulations for the time being in force for the regulation of the said court and the practice and proceedings thereof." Giving this clause a reasonable construction, it must be held to refer to the court having seisin of the cause. If the court of Common Pleas could entertain such a motion,—as it is submitted they might well have done,—à fortiori this court may. [Parke, B. I believe this statute was not adverted to when the application was made to the court below.] It was not. With the exception of a case before the Master of the Rolls, which is not reported, and where his honour is said to have held that he had no jurisdiction, the only decision upon this statute occurred in *Baddeley* v. *Denton* (19 Law Journ., N. S., Exch. 44), where Rolfe, B., held, that a writ of prohibition, issued out of the court of Chancery, is a proceeding within the meaning of the 39th section, and that a motion to set aside such writ, may be made in either of the superior courts at Westminster. [Wightman, J. Is this court "a superior court of common law?" At common law, error from the court of Common Pleas lay to the Queen's Bench. As a court of error sitting to review a decision of the court of **[260]** Common Pleas, we sit by virtue of the new jurisdiction created by Lord Abinger's act for the amendment of the law, 11 G. 4 & 1 W. 4, c. 70, s. 8.] The Exchequer Chamber is a court of common law: none but common law questions can arise in it; and it is amongst the courts so classed in Com. Dig. Courts (D. 5). [Platt, B. If you look at the 33rd section (*a*)[2], it seems

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(*b*)[1] A rule nisi was granted to amend a mistake in the record; which rule was afterwards made absolute.

(*a*)[1] Before Parke, B., Patteson, J., Coleridge, J., Rolfe, B., Wightman, J., and Platt, B.

(*b*)[2] Which is, however, part and parcel of the court of Chancery.

(*a*)[2] Which enacts, "that, in case any issue or issues in law, or issues both in fact and in law, shall be joined in any action, suit, or proceeding on the common-law side pretty evident that the statute, when speaking of the superior courts of common law, contemplates the courts of Queen's Bench, Common Pleas, and Exchequer only.] That section contemplates only a particular description of proceedings. [Parke, B. Would this have been a court under the statute of 7 Eliz. c. 9?] Possibly not. [Patteson, J. No doubt, the court of Chancery had jurisdiction, before the passing of the act now in question, to quash a writ of error.] That is conceded. [Parke, B. Why may not the court of Common Pleas, which clearly is a "superior court of common law," exercise that jurisdiction since the statute?] It is at the least extremely doubtful whether that court has any such jurisdiction. The writ of error issues out of the petty-bag office, and is returnable here. It is not even addressed to the court of Common Pleas, but to the lord chief justice, whose duty with respect to it is ministerial only. [Coleridge, J. Would a single mem-**[261]**-ber of this court have jurisdiction?] Yes, as a judge. [Willes. It has been decided that a judge, as a judge of the court of error, has no jurisdiction: it was so held in a case of *Higgs* v. *The St. Katharine's Dock Company.* Parke, B. Could you have made this application before the passing of the 11 G. 4 & 1 W. 4, c. 70,—supposing the 12 & 13 Vict. c. 109, had passed?] The court of Queen's Bench, as the then court of error, undoubtedly would have been a superior court of common law. This court may award a venire de novo, and may do many other things that are incident only to a superior court of common law. The section of the act treats of the proceedings by scire facias, which are transferred to the three courts of Queen's Bench, Common Pleas, and Exchequer, by name: but, when it comes to the 39th section, the legislature uses general words—"the superior courts of common law at Westminster." It is worthy of remark, that the statute 5 G. 1, c. 13, which authorises the amendment of variances or other defects in writs of error, gives the power to the court wherein the writ is made returnable. Independently of the statute, this court has jurisdiction, perhaps concurrently with the inferior court. The course ordinarily adopted by the courts below, where the writ of error has been brought against good faith, or in violation of an agreement entered into between the parties, has been, not to quash the writ of error, but to set aside the allowance of it (which is the act of the court below (*a*)), or to permit the other party to issue execution notwithstanding the writ of error. Such were the cases of *Camden* v. *Edie* (1 H. Blac. 21), *Best* v. *Gompertz* (2 Dowl. P. C. 395), *Brown* v. *Lord Granville* (2 Dowl. P. C. 796), *Wright* v. **[262]** *Nutt* (1 T. R. 388), and *Holmes* v. *Newlands* (2 Dowl. N. S. 716). In *Boreman* v. *Brown* (1 Dowl. N. S. 281), the court of Queen's Bench, on the authority of a case of *Jones* v. *De Lisle* (3 Bingh. 125, 10 J. B. Moore, 617), in the Common Pleas, held that they had no power even to set aside the allowance of a writ of error. On the other hand, there are three cases in which the courts below have taken upon themselves to quash writs of error which appeared to have been issued against good faith, viz. *Baddely* v. *Shafto* (8 Taunt. 434), *Cave* v. *Masey* (3 B. & C. 735, 5 D. & R. 624), and *The Apothecaries' Company* v. *Harrison* (12 Ad. & E. 642, 4 P. & D. 292). But there, in all probability, the applications were made before the writ of error was returnable. [Parke, B. I do not think you will find any satisfactory case, where the court of error has quashed the writ of error, on the ground that it has been issued against good faith. In the cases you cite, the same results would have occurred from permitting execution to issue notwithstanding the allowance of the writ of error. In *King* v. *Simmonds* (7 Q. B. 289, 14 Law Journ., N. S., Q. B., 248, 256), the Exchequer Chamber quashed the writ of error for a defect of jurisdiction apparent on the face of the proceedings: and in *Thorpe* v. *Plowden* (2 Exch. 387), the same court quashed a writ of error brought upon a judgment on a feigned issue under the 47th section of the tithe-commutation act, 6 & 7 W. 4, c. 71. My brother Patteson, in giving the judgment, says: "The legislature, intending to exclude a judgment of record in feigned issues under this act, has in effect excluded any writ of error. This being

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of the court of Chancery, then and in such case the record of such issue or issues shall be made up and filed in the office of the petty-bag, and a transcript of the said record shall or may thereupon be sent or taken into any one of the three courts of Queen's Bench, Common Pleas, or Exchequer; and such court shall, upon the transcript being brought into any such court, proceed to hear and determine the same in like manner as issues in law and fact from the common-law side of the said court of Chancery have heretofore been heard and determined in the court of Queen's Bench."

(*a*) De facto it is the act of the officer,—an act which he is bound to perform.

so, the case of *King* v. *Simmonds* is a direct authority to shew that the proper **[263]** course is, for this court to quash the writ of error."] The jurisdiction in question must exist somewhere; otherwise, the undertaking contained in warrants of attorney and submissions to arbitration, not to bring error, is superfluous and idle. In *Davies, Dem., Lowndes, Ten.* (6 M. & G. 529, 7 Scott, N. R. 215), where a writ of right, by journeys accounts, was brought after the death of a sole tenant, a motion having been unsuccessfully made to the Lord Chancellor to set aside the writ, on the ground, that, by the 3 & 4 W. 4, s. 27, c. 36, writs of right are wholly abolished, and that the original writ had abated by the death of the tenant,—application was made to the court of Common Pleas (7 M. & G. 762, 8 Scott, N. R. 539, 2 D. & L. 272) to set aside the writ of grand cape, and subsequent proceedings; and that court only abstained from doing so because their decision would have finally determined the demandant's right, without any appeal. Tindal, C. J., after stating that the objection might be raised by demurring to the count, observes,—"If this mode of deciding the question upon demurrer had not been open to the tenant, if he had not possessed the power of raising the question of whether the writ was valid or not before a superior court, except by previously incurring the expense of a new trial, we should have thought it our duty at once to have quashed the proceedings, and to declare the writ issued in this case by journeys accounts a nullity. But, as the tenant has the opportunity of bringing the question at once before the court upon the record, as a simple question of law, we think he can have no right to complain, if we decline to proceed summarily, and if we think it right to leave the question open for discussion before the highest tribunal." That shews, that, where the objection is not upon the record, the court in which the **[264]** writ of error is returnable will quash it. [Parke, B. The court of error may decline to proceed upon the writ; but I doubt whether they can quash it except for some defect upon the face of it.] In *Lloyd* v. *Skutt* (1 Dougl. 350), upon a motion in the court of King's Bench to set aside a writ of error removing a judgment of that court in a qui tam action for usury, on the 12 Ann. stat. 2, c. 16, it was objected,—first, that the writ was bad in form, because it described the action as between two private parties, and not as a qui tam action, in which the King was interested,—secondly, in substance, on the ground that this sort of penal action is not within the meaning of the statute of 27 Eliz. c. 8, which first gave the writ of error from the King's Bench to the Exchequer Chamber. But Lord Mansfield said: "We have considered this case, and have talked with all the other judges upon it; and we are all of opinion that the writ of error cannot be quashed here, but that the application ought to be made either to the court of Chancery, from whence it issues, or to the Exchequer Chamber, where it is returnable." In *Forster* v. *Laidler* (6 D. & R. 174), the court of Queen's Bench, upon the authority of that case, granted a rule to quash a writ of error from the borough court of Berwick-upon-Tweed. [Parke, B. That was for a defect apparent on the face of the writ, there being only twelve days between the teste and return, instead of fifteen.] The court did not assume to proceed upon that narrow ground: there was no plea of in nullo est erratum in that case. [Wightman, J., referred to *Snook* v. *Mattock* (5 Ad. & E. 239, 6 N. & M. 783,—cited, ante, p. 256).] That is like *King* v. *Simmonds* and *Thorpe* v. *Plowden*. [Parke, B. I do not think we have any such general jurisdiction over writs of error, as is suggested. Our power, as it seems **[265]** to me, is confined to cases where there is a defect on the face of the writ, or where the record does not correspond with it: we cannot interfere on the ground of the proceeding being contrary to good faith. The only question is, whether the recent statute gives us jurisdiction.] If the court has no power to quash the writ, at any rate they have power to mould this rule so as to meet the justice of the case. [Parke, B. (after consulting with the rest of the court). None of the authorities which have been cited suffice to convince us that we can interfere in this case. All they amount to is this, that the courts will exercise their power to prevent their own process from being used oppressively. The proper court in which to make this application, would be the court of Chancery, unless its jurisdiction is taken away by the 12 & 13 Vict. c. 109, and transferred to the superior courts of common law at Westminster. The question is, what is meant by these words? The statute may mean to give a concurrent jurisdiction to all the three superior courts of law, or it may mean the court which has the proceedings before it; if the latter be the true construction of the act, probably this court may have power to deal with the matter. We wish to hear Mr. Willes on this point.]

Willes (with whom was O'Malley), contrà. This court, though a superior court, and one which administers common law only, is not one of the "superior courts of common law" intended by the 12 & 13 Vict. c. 109. It is a court of a peculiar statutory creation. In Vin. Abr. Court (F.), pl. 3, it is said, that "when a new court is erected, it is necessary that the authority and jurisdiction of the court should be declared; for, such new court can have no other jurisdiction than is expressed in the erection; for, a new court cannot prescribe: 4 Inst. 200, 213." This court, therefore, can **[266]** only exercise such powers as are necessary for the purpose of carrying into effect the object for which it was created. [Wightman, J. Before the recent statute, the court of Chancery unquestionably might have set aside the writ: assuming the power of that court to be gone, where does it now reside?] In such one of the superior courts of common law as has possession of the record, or in a judge thereof. Throughout the act, down to s. 39, the courts of "Queen's Bench, Common Pleas, and Exchequer, and the judges thereof respectively," are mentioned nominatim: and when it comes to s. 39, the language is,—"it shall be lawful for the superior courts of common law, and the judges thereof respectively, and they are hereby respectively required, to hear and determine all such matters or applications arising in or incident to any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them." It is quite clear that the legislature did not in this clause mean to introduce any other superior court of common law, than those which had previously been mentioned. There is not a word that has a tendency to shew that it was intended to give jurisdiction to any two of those courts sitting together as a court of error. [Coleridge, J. The argument, then, does not seem to be very material; for, if you are right, any single judge (*a*)[1] sitting at chambers might do what we are now asked to do. Parke, B. You say the court of Chancery has no jurisdiction?] For this purpose, none. [Parke, B. The Master of the Rolls, and my brother Rolfe, seem both to have been of that opinion, in *Baddeley* v. *Denton* (19 Law Journ., N. S., Exch. 44).] It is unnecessary **[267]** to say whether that opinion is correct or not. [Platt, B. It is worthy of remark, that s. 39, when speaking of the "superior courts of common law," uses no word of reference.] The court may read in "such," in order to give effect to the obvious meaning of the legislature,—as was done in the statute 3 & 4 W. 4, c. 98, s. 7, the act exempting bills of exchange and promissory notes of limited date, from the operation of the usury laws (*a*)[2]. [Platt, B., addressing himself to Unthank, observed that the word "thereof" threw a considerable degree of difficulty in his way, seeing that the judges composing that court could not be said to be "judges of the court of error." Wightman, J. These proceedings may go on in vacation. Whatever courts have jurisdiction over them, the judges of those courts respectively have the same power.] The 48th section of the 12 & 13 Vict. c. 109,—which is a re-enactment of the 11 & 12 Vict. c. 94, s. 43, —enacts "that every of Her Majesty's courts of common law, and all other courts, judges, officers, and others, shall take cognisance of all and every the writs and proceedings so brought before them as aforesaid, and give effect thereto, in such manner as may be requisite." If the statute is not held to be limited to the three superior courts, as above suggested, this clause might be contended to give jurisdiction to every inferior judge in the kingdom. The language of the 25th and 32nd sections also confirms this interpretation of the 39th section.

Parke, B. The only question now remaining for our decision, arises on the construction of the 12 & 13 Vict. c. 109; for, we have already sufficiently intimated our opinion, that, irrespectively of that statute, this court has no jurisdiction to quash a writ of error, on the ground **[268]** of its having been issued in breach of good faith: its power in this respect is limited to cases where some defect is apparent on the face of the writ, or where the record brought up is inconsistent with it. The courts below seem, upon some occasions, to have assumed the power to quash the writ of error; but probably they ought to have done no more than vacate the allowance of the writ of error, or permit execution to issue notwithstanding such allowance. But, to quash the writ, on a ground such as that disclosed here, it seems to us that the court of Chancery, from which the writ issued, was the proper jurisdiction.

(*a*)[1] Quære, of the court of Common Pleas? See *The King* v. *Almon*, Wilmot's Notes, 243.

(*a*)[2] Vide *Vallance* v. *Siddel*, 6 Ad. & E. 932, 2 N. & P. 78.

The question, then, is, whether any jurisdiction is given to this court by the recent statute. That depends mainly upon the 39th section, which enacts, "that, in every action, suit, and proceeding now pending, or which at any time hereafter shall be commenced or pending in the said court of Chancery, on the common-law side thereof, it shall be lawful for the superior courts of common law, and the judges thereof respectively, and they are hereby respectively required, to hear and determine all such matters or applications arising in or incident to any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business, matters, and things, in, about, touching, or concerning any action, suit, or proceeding on the common-law side of the said court of Chancery, as by virtue of any orders or regulations for the time being in force by virtue of this act (*a*), may be transacted, done, or performed by such judge; subject, neverthe-**[269]**-less, and according to the provisions of this act, and the laws, rules, and regulations for the time being in force for the regulation of the said court, and the practice and proceedings thereof." If the jurisdiction of the court of Chancery is taken away by this act,—as the Master of the Rolls and Mr. Baron Rolfe seem to have thought,—the legislature must have intended to confer an equally facile and efficient jurisdiction elsewhere: and that affords a strong argument that the old jurisdiction of the court of Chancery must have been intended to be transferred to those superior courts of common law, which, by themselves, or by the respective judges thereof, are accessible in vacation as well as in term time,—to the exclusion of the Exchequer Chamber.

We read the 39th section as if the word of reference "such" had been found therein, as in some of the earlier clauses, and as applying to the three superior courts before mentioned, viz. the Queen's Bench, Common Pleas, and Exchequer. We think Mr. Baron Rolfe was right in exercising the jurisdiction as he did in *Baddeley* v. *Denton*. We cannot think, however, that the legislature intended to limit it to the court in which the proceedings originate. If that were so, it would altogether exclude relief in many cases. It is evident, therefore, that the legislature intended to confer the new jurisdiction upon the superior courts of ordinary judicature.

The conclusion at which we have unanimously arrived is, that the jurisdiction to quash the writ of error on the ground here presented to us, may be exercised by any one of the three superior courts of common law, but not by this court. If the argument urged by Mr. Unthank were to prevail, we might be called upon to set aside a writ of prohibition issuing out of the petty-bag office, directed to a county-court. **[270]** That seems to be an additional reason for holding that it is the Queen's Bench, Common Pleas, and Exchequer, and their respective judges, who are to exercise the powers which the court of Chancery might formerly have exercised, and possibly may still, in dealing with matters of this sort.

The result is, that the defendant in this case must address his application to a judge at chambers, who will, no doubt, give him the relief which, upon the affidavits, we think he is entitled to.

Rule discharged, without costs.

An application was subsequently made to Mr. Baron Parke at chambers, when his lordship made an order that the writ of error should be quashed.

An attempt was afterwards ineffectually made to get that order made a rule of the court of Common Pleas, for the purpose of obtaining costs.

The matter was ultimately compromised.

[271] KINNING *v.* BUCHANAN. June 25, 1849.

[S. C. 7 D. & L. 169.]

The judge of an inferior court of record who has made an order simpliciter for the payment of a debt by instalments, cannot, upon non-payment, issue his warrant for the imprisonment of the debtor, without giving him an opportunity of being heard as to the cause of such non-payment.—Where, therefore, in trespass by A. against B. for false imprisonment, B. pleaded that J. S. recovered a judgment against A.,

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(*a*) No rules or regulations have ever been framed under this act.

in the sheriffs' court, London,—that A. was summoned, and appeared before the judge of that court, who ordered the sum recovered to be paid by instalments,—that the first instalment was demanded and not paid,—that the judge duly, by warrant under his hand and seal, according to 8 & 9 Vict. c. 127, ordered the officer of the court to take A., and convey him to prison for 40 days,—and that B., as the attorney of J. S., delivered the warrant to the officer, who took A. Replication, that, by this order, it was not directed that A. should be committed, modo et formâ :—Held, that the warrant issued did not support the plea, which must be taken to aver the existence of a legal warrant. Held also, that the defendant, having acknowledged actual participation in the act of trespass, by pleading in confession and avoidance, could not protect himself, upon this issue, by shewing that he had acted merely as the attorney of J. S.

Trespass. The declaration stated, that the defendant, on the 27th of April, 1847, with force and arms, assaulted the plaintiff, and then seized, &c., and also then imprisoned the plaintiff, and kept and detained him in prison for a long time, to wit, thirty-nine days then following, contrary to law; and that thereby the plaintiff not only suffered great anguish and pain of mind, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation, and circumstances, and was necessarily subjected and put to divers expenses, amounting, to wit, to 40l., in and about endeavouring to obtain, and in obtaining, his liberation from the said imprisonment, &c.

The defendant pleaded,—first, not guilty; whereupon issue was joined.

Secondly, that, before the said time when, &c., to wit, on the 5th of October, 1846, William Townley levied his certain plaint against the now plaintiff, in the **[272]** court of our lady the Queen, before Thomas Challis, Esq., then being one of the sheriffs of the city of London, in his compter, situate in the parish of St. Giles-without-Cripplegate, in the ward of Cripplegate-without, in the same city, and within the jurisdiction of the same court, according to the custom of the said city, for a cause of action personal arising within the jurisdiction of the said court; that such proceedings were thereupon had, that, afterwards, to wit, on the 5th of December, 1846, at the said court then held before the said sheriff, at the Guildhall of the said city of London, and within the said city, and within the jurisdiction of the said court, the said William Townley, by the consideration and judgment of the said court, recovered against the now plaintiff, as well a certain debt of 19l. 19s. as also 3l. 12s. 6d. for his costs of suit, as by the record and proceedings thereof, still remaining in the said court, appears; that afterwards, and after the passing of an act of parliament passed in the ninth year of the reign of our lady the now Queen, intituled "An act for the better securing the payment of small debts," and before the said time when, &c., to wit, on the 5th of December, in the year last aforesaid, the (now) plaintiff then being indebted to the said William Townley in a sum not exceeding 20l., besides costs of suit, by force of the said judgment, to wit, the sum of 19l. 19s., the said William Townley made application, by petition and note in writing according to the form in schedule B. to the said act of parliament annexed, to the said court,—the same being an inferior court of record for the recovery of debts in and for the city of London, and then being held at the Guildhall aforesaid, in the said city, and within the jurisdiction of the said court, and the plaintiff then residing within the jurisdiction of the said court, to wit, within the city of London, and the said court then having a judge who was a barrister-at-law, that is to say, Edward Bullock, Esq., **[273]** barrister-at-law, then being the judge of the said court,—by which petition and note in writing the said William Townley requested the said court to summon the plaintiff to answer touching the debt due to the said William Townley by the judgment of the said court on his the said William Townley's behalf; that thereupon the said court, afterwards, to wit, on the 7th of December, 1846, upon the said application of the said William Townley, granted to the said William Townley a summons according to the form in schedule A. unto the said act of parliament annexed, by which summons the (now) plaintiff was required to appear at the sheriff's court, London,—being the said court,—to be holden at the Guildhall, of the city of London, in the said city, on Saturday, the 12th of December, 1846, at a quarter to ten of the clock in the forenoon of the same day, precisely, to answer such questions as might be put to him touching the not having paid to the said William Townley the sum of 23l. 11s. 6d., being the amount of the said debt and costs recovered by the said judgment; that the said William Townley then obtained the said summons from the said court; that the (now) plaintiff was, afterwards, and before the return of the said summons, to wit, on the said 7th of December, in the year last aforesaid, and within the jurisdiction of the said court, to wit, at London, duly served with the said summons, and summoned thereby; that thereupon, afterwards, and before the said time when, &c., to wit, on the 12th of December, in the year aforesaid, at the time and place appointed by the said summons,—such place being within the jurisdiction of the said court,—the (now) plaintiff appeared before the said court, the same court being then and there holden before the said Edward Bullock, then being the judge of the said court, and a barrister-at-law as aforesaid, in obedience to the said summons: that the said [274] William Townley also then and there appeared before the said court so holden as aforesaid; that the (now) plaintiff was then and there duly examined by and before the said court so holden as aforesaid, as required by the statute in such case made; and the said court so holden as aforesaid, upon hearing the (now) plaintiff and the said William Townley, and it appearing to the said court that the (now) plaintiff had the means of paying the said debt and costs by the instalments hereinafter mentioned, did, in pursuance of the statute in such case made, order that the (now) plaintiff should pay the said debt and costs to the said William Townley, in manner following, that is to say, the sum of 2l., part thereof, on the 12th of January then next, and the residue thereof by instalments of 2l. on the 12th of every subsequent month, until the debt and costs aforesaid should be fully paid, —of which order the (now) plaintiff then and there had notice, and was then and there duly served with a copy thereof, and the original order was at the same time shewn to him; that the (now) plaintiff did not pay the said instalments at such times as the said court ordered, but afterwards, and before the said time when, &c., to wit, on the 12th of January, 1847, the (now) plaintiff made default in the payment of the said instalment of 2l. which then became due and payable, although payment of the same was then demanded of him; that, afterwards, and before the said time when, &c., to wit, on the 4th of February, 1847, the said instalment then remaining wholly in arrear and unpaid, it was duly made to appear, and was proved, and did then and there duly appear, to the said court, so being holden as last aforesaid, that the plaintiff had had notice of the said order, and that he had been served with a copy thereof, and the original shewn to him, and that he had not paid the said instalment, and that the same had been duly demanded of him, and was [275] in arrear and unpaid; that thereupon, the said court, so holden as aforesaid, before the said Edward Bullock, so being such judge of the said court, and such barrister-at-law as aforesaid, before the said time when, &c., to wit, on the day and year last aforesaid, at London aforesaid, and within the jurisdiction of the said court, duly, and according to the form of the statute, ordered that the plaintiff should be committed for forty days to Her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein debtors under judgment and in execution of the superior courts of justice, might be, and were usually, confined within the city of London, being the city in which the plaintiff was then resident; that thereupon, the said Edward Bullock, so being, and as, such judge of the said court, and barrister-at-law, at the request of the defendant, then being the attorney of and for the said William Townley, and as such attorney, and acting upon the retainer and at the request of the said William Townley, duly, and according to the form of the statute in such case made, then and there made his warrant in writing under his hand and seal, directed to Lloyd Simpson, one of the serjeants-at-mace of the said court, and to Thomas Burdon, keeper of the said debtors' prison, or his deputy there, whereby, after reciting that the (now) plaintiff, therein described as Thomas Kinning, of, &c., on the 7th of December then last, being indebted to the said William Townley, of, &c., in a sum not exceeding 20l., besides costs of suit, that is to say, in the sum of 19l. 19s., besides 3l. 12s. 6d. costs of suit, by force of the judgment thereinafter mentioned, and then being at Fleet Lane, in the city aforesaid, and within the jurisdiction of the said court, had been duly summoned to appear on the 12th of December last at the said court, to answer such questions as might be put to him, touching the not having paid to the said William [276] Townley the sum of money recovered in a certain judgment of the said court, on the 5th of December, 1846 (meaning the aforesaid judgment), and the (now) plaintiff having appeared before the said judge at the time and place therein mentioned, and it thereupon then and there appearing to the said judge, by the admission of the (now) plaintiff, that the (now) plaintiff had the means of paying the said debt and costs aforesaid in manner thereinafter mentioned, the said judge did then and there order that the (now) plaintiff should pay the said debt and costs aforesaid to the said William Townley, in manner following, that is to say, the sum of 2l. on the 12th of January then next, and the residue thereof by instalments of 2l. on the 12th of every succeeding month, until the said debt and costs were fully paid, and that it had, on the day of making the said warrant, at the said court, been duly proved before the said judge that the plaintiff had not paid 2l., the amount of the first instalment, as directed by the said order, although the time for payment thereof had elapsed, and the same had been duly demanded of the (now) plaintiff, and the (now) plaintiff had been personally served with a copy of the said order, and the said original order was at the same time shewn to him, but that 2l., being the amount of the said first instalment, was still due and owing and unpaid to the said William Townley, contrary to the tenor and effect of the said order,—the said judge, therefore, by the said warrant, willed, required, and authorised the said Lloyd Simpson, immediately upon the receipt of the said warrant, or as soon after as might be, to take into his custody the body of the (now) plaintiff, and him safely to convey to Her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein the debtors under judgment and in execution of the superior courts of justice might be confined within the city of London, being the city in which the (now) plain-**[277]**-tiff had been resident, and there to deliver him to the said keeper of the said prison, who was thereby required and authorised to receive the (now) plaintiff into his custody, and him safely to keep and detain in the said prison, for the space of forty days from the time of his arrest under the said warrant, or until he should be discharged out of custody by leave of the said judge, and that, for so doing, the said warrant should be their sufficient warrant,—as by the said warrant appears; that the defendant so being, and as, such attorney, and on the retainer and at the request of the said William Townley, then delivered the said warrant to the said Lloyd Simpson, who then, and from thence until and at and after the said time when, &c., was one of the serjeants-at-mace of the said court, to be executed in due form of law, and then requested him to execute the said warrant in due form of law; and that, by virtue of the said warrant, and at the request of the defendant, so being such attorney, and acting on the said retainer, and at the said request of the said William Townley, the said Lloyd Simpson, so being and as such serjeant-at-mace, at the said time when, &c., at London aforesaid, and within the jurisdiction of the said court, took and arrested the (now) plaintiff by his body, and forthwith conveyed him to the said debtors' prison for London and Middlesex, and delivered him to the said keeper of the said prison, and the (now) plaintiff was detained in the said prison under and by virtue of the said warrant, for the space of thirty-nine days in the said declaration mentioned, the said sum of 2l., during all that time, and still, being wholly unpaid and unsatisfied, and on the occasion and for the purpose aforesaid the plaintiff was necessarily and unavoidably a little seized and laid hold of, and pulled and dragged about, which were the same supposed trespasses in the declaration mentioned; verification.

[278] The plaintiff joined issue on the first plea, and replied to the second, that the said Edward Bullock did not order that the (now) plaintiff should be committed for forty days to Her Majesty's debtors' prison for London and Middlesex, in the city of London, in manner and form as in the second plea alleged,—whereupon issue was joined.

The cause was tried before Coltman, J., at the sittings at Westminster, after Hilary term, 1848.

It was proved that Townley had recovered a judgment against the present plaintiff, in the sheriff's court, London, for 19l. 19s. and costs, and that the present defendant, as Townley's attorney, instituted the proceedings against the plaintiff upon that judgment, under the 8 & 9 Vict. c. 127.

In support of the second issue, the defendant put in a warrant of commitment signed by the judge of the sheriffs' court, in the terms recited in the second plea.

For the plaintiff, it was insisted that this warrant was bad upon the face of it, for the reasons given by this court in the case of *Ex parte Kinning* (ante, vol. iv. p. 507), and therefore that the plea was bad, for not alleging a good warrant of commitment; or that, if the plea was to be understood as alleging that the judge of the inferior court had made a valid order, it was not proved, and therefore the plaintiff was entitled to a verdict on the second issue.

On the part of the defendant, it was insisted that the issue taken on the second plea only made it necessary for him to shew, that, in point of fact, such an order was made as that described in the plea.

The learned judge having directed a verdict for the plaintiff on the first issue, and for the defendant on the second,

[279] Pashley, in Easter term, 1848, obtained a rule nisi for a new trial on the ground of misdirection, or for judgment non obstante veredicto on the second issue.

Byles, Serjt., and Peacock, in Easter term last, shewed cause. A second summons was not necessary before an order for the imprisonment of the debtor for non-payment of the debt pursuant to the first order; and, if necessary, the second plea sufficiently shews that a second summons did issue: and, further, assuming a second summons to have been necessary, and not to have issued, the order in question being a proceeding of a court of competent jurisdiction, acting inverso ordine, the party promoting it is protected.

1 The court can hardly be expected to deviate from the decision they unanimously came to in *Ex parte Kinning* (ante, vol. iv. p. 507), upon the same warrant of commitment: but it may be proper to call their attention to some statutory provisions which were not, upon that occasion, adverted to. The 1st section of the 8 & 9 Vict. c. 127, provides, that the debtor shall be examined touching the manner and time of contracting the debt, the means or prospect of payment he then had, the property, or means of payment, he still hath or may have, and the disposal he may have made of any property since contracting the debt; and it authorizes the court, or commissioner, to make an order on the debtor for payment of the debt by instalments, or otherwise: and, "in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, **[280]** or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or if he appears to have the means of paying the same by instalments, or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained, or order made,—then, in any of the said cases, it shall be lawful for such commissioner, or the judge of such court, to order such debtor to be committed for any time not exceeding forty days," &c. The 23rd section enacts "that all the enactments of the 7 & 8 Vict. c. 96, and of the several acts under which the said several courts [for the recovery of small debts] are now held or constituted, shall, within their several districts, be deemed to apply to every proceeding under this act, so far as the same are applicable, and not repugnant to the provisions of this act." Now, by the 62nd section of the statute so incorporated in that at present under consideration, it is enacted, "that, if it shall at any time appear, to the satisfaction of the judge of any such court, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness or unavoidable accident, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action, for such time as the judge shall think fit, and so from time to time, until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased." Reading these clauses together, it would seem,—the judge having already upon the first occasion inquired **[281]** into the debtor's means of payment,—that the application for indulgence should come from the debtor himself. [Cresswell, J. The terms of the section last cited seem to import that an execution has already issued.]

2. The next question is, whether enough does not appear on the face of the second plea, to shew that a second summons did in fact issue. In *Adams* v. *Freeman* (Sayer, 81, 2 Wils. 5), it is said by Lee, C. J., that "It was heretofore necessary for the plaintiff in an action in the inferior court, who would justify an imprisonment under a capias awarded by that court, to set out in his plea of justification all the proceedings

anterior to the awarding of the capias: but it was never necessary for the officer by whom the arrest was made, to do this. It has, however, for some years past been holden sufficient for the plaintiff in the action in the inferior court, to allege in such plea that a plaint was levied and process prayed in the inferior court, and that superinde taliter processum fuit, that a capias was awarded, without setting out all the proceedings between the levying of the plaint and the awarding of the capias." And in *Titley* v. *Foxall* (Willes, 688), Willes, C. J., says: "We held, in *Moravia* v. *Sloper* (Com. Rep. 574, Willes, 30), that taliter processum est would be sufficient, if it did not appear (as it did in that case), that there could not have been a precedent summons; and we founded our opinion on the case of *Patrick* v. *Johnson* (3 Levinz, 403), and on several other cases there cited. It was said, in that case, that it was resolved by the whole court, that taliter processum est was sufficient, though it had been formerly held otherwise, and that it had been so resolved by Hale, C. J., and the court of B. R., H. **[282]** 24 & 25 Car. 2." *Adams* v. *Freeman* (Sayer, 81, 2 Wils. 5), is to the same effect. [Wilde, C. J. If the issuing of a second summons is necessary, and is stated, and not proved, how does that affect the question whether or not there should be a new trial? Cresswell, J. If stated, and not traversed, it is admitted.]

3. Then, this being a proceeding of a court of competent jurisdiction, the party (and à fortiori the attorney, who merely does his duty) is protected. In the case of *The Marshalsea* (10 Co. Rep. 76 a., 2nd resolution), it was resolved, that, where a court has jurisdiction of the cause, and proceeds inverso ordine, or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but, when the court has not jurisdiction of the cause, the whole proceeding is coram non judice, and actions will lie against them, without any regard of the precept or process. *Gwinne* v. *Poole* (2 Lutw. 935) is to the same effect. In *Webb* v. *Batchelour* (1 Vent. 273), in trespass for taking cows, upon not guilty, a special verdict was found, that an act for repairing the highways appointed that such persons as keep carts and horses, &c. should send them at certain times to assist in the repairing of the ways, not having a reasonable excuse, and that warning was given to the parishioners of the parish whereof the plaintiff was parson, to send in their carts, and that, the plaintiff omitting to do it, a justice of peace made a warrant to the defendant to distrain him, according to the authority given by the act, &c. On the part of the plaintiff, it was contended "that the justice of the peace ought to have caused the plaintiff to appear before him, to have seen whether he had an ex-**[283]**-cuse, before he could have made his warrant; and that, though the officer that executes the process of a court of record be indemnified where the proceeding is erroneous, yet 'tis not so where the proceeding is not of record, as 10 Co., in the case of *The Marshalsea; Nichols* v. *Walker* (Cro. Car. 394), where a warrant was made by a justice of the peace, to distrain for a poor-rate; trespass was maintained against the officer that executed the warrant, because the plaintiff was not chargeable as an inhabitant of the parish for whose poor the rate was made." But the court said: "The officer that executes the warrant (though unduly made, for the cause alleged), is not answerable; for, he is not to judge, but to execute the matter, it being within the jurisdiction of the justice of the peace: and 'tis not like the case in 3 Cro. (Cro. Car. 394); for, there, the churchwardens and overseers of one parish distrained in another parish, which was out of the limits of their authority." In *Painter* v. *The Liverpool Oil-Gas Company* (3 Ad. & E. 433, 6 N. & M. 736), by a statute establishing a gas-light company, it was enacted, that, if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company, or their clerk, by warrant of any justice of peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due, by distress and sale of the goods of the party so neglecting or refusing to pay, &c. It was held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act; and **[284]** that such warrant afforded no justification to the company, in trover for seizing the plaintiff's goods under it, although it would have protected the clerk or officer. "A warrant," says Lord Denman, "is a justification to officers, because they are not to canvass the legality of the process they have to execute. Acts of parliament have been passed for their protection, founded on that principle; and it is a just one; for, it would be absurd

that an officer charged with the execution of a warrant, should have to pause and consider whether it was regularly issued or not. But here, the parties relying on the warrant are not officers; it is not even the clerk of the company who justifies, but the company themselves, who allege that their clerk, acting under their authority, and by their command, took the goods by virtue of the warrant. The case, therefore, is like those where the question has been, not whether an officer was justified, but the parties who set him in motion. The decision in *Webb* v. *Batchelour* limits itself to the principle that an officer is not liable for executing an irregular warrant; a doctrine also laid down by Powell, B., in *Gwinne* v. *Poole*. Those cases would have resembled the present, if the defendants had been parties intervening between the magistrate and the officer, and justifying themselves for employing the officer to act under the warrant." Here, the defendant, as attorney, had a duty to perform towards the party who employed him. Notwithstanding the strictures upon it in *Green* v. *Elgie* (5 Q. B. 99, 1 Dav. & Meriv. 199), the case of *Sedley* v. *Sutherland* (3 Esp. N. P. C. 202), is a distinct authority to shew that the attorney is entitled to the protection of the court, where he has not exceeded his duty. In *Cooper* v. *Harding* (7 Q. B. 928), it was held, that, if attorneys conduct-**[285]**-ing the business of a fiat in bankruptcy, take out a summons to attend before a commissioner under the 6 G. 4, c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party so summoned, and the warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it: and this although the attorneys, in applying for the warrant, used urgency, and, being told by the commissioner that they must take it at their peril, said they would do so. All that the defendant in this case did, was in accordance with what was done in *Cooper* v. *Harding*. In *Barker* v. *Braham* (3 Wils. 368, 2 Sir W. Blac. 866)—which will probably be relied on for the plaintiff,—the attorney was held liable, because he personally delivered the ca. sa. to the bailiff, with instructions to execute it immediately. [V. Williams, J. Your special plea admits that the defendant here took an active part in the trespass, and seeks to justify it. Cresswell, J. If the defendant did not order the plaintiff to be taken, it is an answer under not guilty: if he did, then he by his second plea justifies under a valid order. He must, therefore, to make out his justification, shew that the judge had power to make the order which he did make.] At most, that only makes the second plea an informal plea of not guilty. [Cresswell, J. You can hardly rely on this as a special plea of not guilty.] The plea shews that what was done was primâ facie lawful. [Cresswell, J. You admit that you ordered the plaintiff to be taken, and you shew that which does not amount to a valid order. Wilde, C. J. The question is, whether the delivery of the warrant **[286]** to the serjeant-at-mace amounted to an order to arrest the plaintiff, so as to make the attorney who did it liable to an action. It must be remembered that the warrant has been thought a valid one by two very learned judges (*a*). But it is pleaded in bar to the whole action,—by way of confession and avoidance.] In *Rowe* v. *Tutte* (Willes, 14), to trespass, assault, and false imprisonment, the three defendants pleaded a joint plea of justification under process, in which one of them said that he, as attorney for the party suing out the process, delivered the warrant to the other two defendants (to whom it was directed) to be executed in due form of law; and the two others, that they executed it; and it was held a good plea.

Pashley and Henniker, in support of the rule, submitted,—that there is a distinction between process of superior and inferior courts; in the former, omnia præsumuntur ritè esse acta; in the latter, the rule de non apparentibus et non existentibus eadem est ratio, applies. This principle is distinctly laid down in the judgment in *Gossett* v. *Howard* (10 Q. B. 411, 454): "Many of the writs issued by superior courts do, upon the face of them, recite the cause of their issuing, and shew their legality; writs of execution, for instance: others, however, do not, and, though unquestionably valid, are framed in a form which, if they had proceeded from magistrates, or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient, and rendered them altogether void." Nothing is to be presumed, in the proceedings

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(*a*) Patteson, J., and Erle, J., vide *Kinning, Ex parte*, 16 Law Journ., N. S., Q. B. 257.

of inferior courts: *Peacock* v. *Bell* (1 Wms. Saund. 73). It is impossible to establish any distinction between the sheriff's court in this case, and courts of quarter sessions. In **[287]** both, jurisdiction must appear on the face of the order. In *Dempster* v. *Purnell* (3 M. & G. 375, 4 Scott, N. R. 30), Tindal, C. J., in giving judgment, says, (3 M. & G. 385): "I take the rule to be well established by the cases of *Moravia* v. *Sloper* (Willes, 30) and *Titley* v. *Foxall* (ibid. 688), that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, every intendment will be made to support them: but, if it do not so appear, or, if the point whether or not the court has jurisdiction be left in doubt, no such intendment will be made." Here, the want of jurisdiction over the proceedings is the same as the want of jurisdiction over a cause in an inferior court. *The King* v. *Hulcott* (6 T. R. 583) first established the principle, that, where an order is in the nature of an execution, it must set out the proceedings in the same manner as a conviction: and that case has been recognised in many subsequent decisions,—*The King* v. *Marquess of Downshire* (4 Ad. & E. 698, 721, 6 N. & M. 92); *Day* v. *King* (5 Ad. & E. 359, 6 N. & M. 845); *The Queen* v. *Toke* (8 Ad. & E. 227, 3 N. & P. 323). [V. Williams, J. If a statute requires a summons, then an order must set it out, in the same manner as a conviction: but, if the summons be necessary by the common law, it is not requisite to set it out in the order. Cresswell, J. It may be, that, up to the point of shewing jurisdiction, an order must be as specific as a conviction. That distinction may reconcile many of the cases.] In orders made under the 4 G. 4, c. 34, relating to masters and servants, it has been held that all the evidence taken before the magistrates must be set out: *In re Gray* (1 New Sessions Cases, 354); *The Queen* v. *Tordoft* (5 Q. B. 933, 1 Dav. & Meriv. 693). The words of that statute are almost identical with those of the 8 & 9 Vict. c. 127.

[288] It is submitted that the warrant set out in the second plea was bad upon the face of it, and that its validity was well put in issue by the replication.

The following cases were also cited:—*Dresser* v. *Stansfield* (14 M. & W. 822); *Gisborne* v. *Hart* (5 M. & W. 50); *Williams* v. *Germaine* (7 B. & C. 468, 1 M. & R. 394, 403); *Dudlow* v. *Watchorn* (16 East, 39); *Sandon* v. *Proctor* (7 B. & C. 800); *Everard* v. *Paterson* (6 Taunt. 625 (645), 2 Marsh. 304); *Lucas* v. *Nockells* (10 Bingh. 157, 3 M. & Scott, 627); *Ransford* v. *Copeland* (6 Ad. & E. 482, 1 N. & P. 671, W. W. & D. 268); *The King* v. *Venables* (1 Stra. 630); *The King* v. *Hawkins* (cases of Settlement and Removal, 96); *The King* v. *Cleg* (1 Stra. 475); *The Queen* v. *Rose* (3 D. & L. 359); 1 Wms. Saund. 298, n. (1); *Startup* v. *Macdonald* (2 M. & G. 395, 2 Scott, N. R. 485; S. C. in error, 6 M. & G. 593, 7 Scott, N. R. 269); *Clement* v. *Lewis* (7 J. B. Moore, 200, 3 B. & B. 297); *Newton* v. *Harland* (1 M. & G. 644, 1 Scott, N. R. 474, 502, 3); *Codrington* v. *Lloyd* (8 Ad. & E. 449, 1 P. & D. 157); *Kinning, Ex parte* (16 Law Journ., N. S., Q. B. 257).

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court (*t*):

This was an action of trespass for false imprisonment. The defendant pleaded,—first, not guilty, and an issue was joined thereon which the jury found for the plaintiff, on evidence which confessedly justified the verdict.

The defendant also pleaded a special plea stating a judgment recovered against the plaintiff by one William **[289]** Townley, in an inferior court of record, viz. the sheriffs' court of the city of London, for a debt under 20l., and a subsequent application, under the statute 8 & 9 Vict. c. 127, to that court, for a summons against the now plaintiff, to answer touching the debt due by the judgment. The plea then alleged, that the court granted the summons, requiring the appearance of the now plaintiff at the court, that the summons was duly served, and that the now plaintiff accordingly appeared, and was examined before the judge of the court, who thereupon made an order that the now plaintiff should pay the debt and costs by certain specified instalments. The plea then averred, that the now plaintiff made default in the payment of the first instalment (although payment of it was demanded of him), and that afterwards it was duly made to appear, and was proved, and did duly appear to the said court, that the now plaintiff had been duly served with the order, and had not paid the instalment, though demanded; whereupon the said judge duly, and according

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(*t*) Wilde, C. J., Coltman, J., Cresswell, J., and V. Williams, J.

to the form of the said statute, ordered that the plaintiff should be committed for forty days to the debtors' prison for London and Middlesex; and thereupon the judge of the court, at the request of the defendant, then being the attorney of the plaintiff, Townley, and as such attorney, and acting upon his retainer and at his request, duly, and according to the form of the statute, made his warrant, directed to the serjeant-at-mace and the keeper of the said prison, by which,—after reciting the judgment, and the order for payment of the amount by instalments, and the default in payment thereof, &c., &c.,—the judge required the serjeant-at-mace to take the body of the now plaintiff, and convey him to the said prison, and there to deliver him to the keeper, and required the keeper to receive the now plaintiff, and keep him in prison for forty days, or until, &c.; and that the now defendant, so being the **[290]** attorney, and on the retainer, and at the request of the said William Townley, delivered the warrant to the serjeant-at-mace, and requested him to execute it in due form of law; and that, by virtue of such warrant, and at the said request of the defendant, the serjeant-at-mace took and arrested the now plaintiff, and conveyed him to the prison, and delivered him to the keeper; and that he was detained in prison under the warrant, &c.; which were the same supposed trespasses, &c.

To this plea, the plaintiff replied, that the said judge did not order that the said plaintiff should be committed, modo et formâ, concluding to the country.

On the trial, the defendant, in order to sustain this issue, produced an order of commitment made by the judge in the sheriffs' court, which corresponded with that described in the special plea, but which contained no statement of any previous summons of the plaintiff to shew cause why he should not be committed. And the jury, under the direction of the learned judge, found, on the evidence, for the defendant.

A rule was afterwards obtained, on behalf of the plaintiff, to shew cause why there should not be a new trial, for a misdirection, or judgment for him non obstante veredicto. The ground of the rule was, that the order was bad, for want of such previous summons, and that either the plea, in order to make it a good plea, must be understood to allege that the judge made a valid order,—in which case, the judge ought to have directed the jury to find for the plaintiff,—or the plea was no good bar, for want of an allegation of such previous summons,—in which case, the plaintiff was entitled to judgment non obstante veredicto.

On shewing cause, it was contended, on behalf of the defendant, that the traverse did not put in issue the validity of the order, but only the question whether in fact an order was made as described in the plea, and **[291]** therefore the verdict was rightly found for the defendant; and, further, that it was not essential to the plea that the order should be valid, inasmuch as the defendant appeared to have merely done his duty as the attorney of one of the litigant parties, in the execution of the order of a judge of competent jurisdiction; and that an attorney so acting is protected, whether the order be valid or not. It was also contended that the order was good on the face of it; for, that was not necessary that the issuing of a summons should be stated.

But we are of opinion that these arguments are not well founded. It is true, that, if an attorney does no more than set a court of competent jurisdiction in motion on behalf of his client, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers; and that he would, therefore, be entitled to a verdict on the plea of not guilty, if an action were brought against him in respect of such an act of trespass. But, where, by a special plea like the one in question, he admits, and undertakes to justify, his concurrence in it, we are of opinion that he can only make out his justification by shewing a legal authority under which he acted; and, consequently, that is essential to the defence in the present case, that the order relied upon should be a valid order. Accordingly, we think that the plea, when it avers that the judge of the sheriffs' court "duly and according to the form of the statute, ordered that the plaintiff should be committed for forty days," &c., must be understood to aver that the judge made a valid order to that effect; and that the replication, by denying that he did order that the plaintiff should be committed, in manner and form, &c., raised an issue which the defendant could not support without proving a valid order: for, if this issue were to be found for him, it would be inferred, **[292]** after verdict, that the judge, at the trial, had construed the plea in the sense requisite for its validity, and that, consequently, such a order had been proved: otherwise, the jury would not have found for the defendant (*a*).

But, in fact, the order produced at the trial was in the very terms of the warrant which this court has already decided,—on the occasion of the plaintiff's applying for his discharge under a writ of habeas corpus,—to be invalid on the face of it, on the same ground of objection as that taken in the present case against the validity of the order on which the warrant was founded. And it appears to us, that, on the principle of that decision, we must consider the order to be invalid, and that, therefore, the defendant failed to maintain the issue, and the judge ought to have directed the jury to find for the plaintiff.

For these reasons, we think that the rule must be made absolute for a new trial.

Rule absolute accordingly.

[293] HOPWOOD *v.* THORN. June 25, 1849.

[S. C. 19 L. J. C. P. 94; 14 Jur. 87. Referred to, *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 532.]

A declaration for slander and libel stated, by way of inducement, that the plaintiff was minister of a dissenting congregation at T., deriving emoluments from his said calling; that he had formerly been a draper at S., in partnership with H. P., his brother-in-law; that the partnership had been dissolved, and that there were certain accounts and money transactions between the plaintiff and H. P. in relation thereto; that false and scandalous reports concerning the plaintiff and the said partnership accounts and transactions had been circulated among the congregation at T., and it was proposed that one E. H. should examine into the said accounts and transactions, on the part of the plaintiff; and that a correspondence and discussion afterwards took place between the defendant and one R. A., relating to those accounts and transactions: the first count then proceeded to allege that the defendant, intending to injure the plaintiff in his office and character of minister of the congregation at T., and to cause him to be deprived of that office, &c., in a discourse of and concerning the plaintiff, and of and concerning him in his said calling and ministry, and of and concerning the said partnership, and the said accounts and money transactions with H. P., spoke these words,—with proper innuendos,—"I do not go by reports: I go by a knowledge of facts. Mr. H. (the plaintiff) is a rogue; and I can prove him to be so, by the books at S. Mr. H. pretends to say he has been as good as a father to him (meaning H. P.); but, you see, he has been robbing him. He has cheated Mr. P. of 200l.: so you see what sort of a father he has been to him. I will so expose Mr. H. (the plaintiff), that he will not be able to hold up his head in T. pulpit, or any other. I said to Mr. P., I do not wish to see the books, but he desired me to come in and see them; and he told me he did not care who saw them. Mr. H. (the plaintiff) has out-generalled him in every thing (meaning, that the plaintiff had taken an unfair advantage of the said H. P., and had conducted himself in an improper manner towards him in relation to and in connection with the said partnership and the said accounts). Now, I do not go by what I have heard; but I know it to be true."—In the second count, the words charged were,—"Mr. H. (the plaintiff) has cheated Mr. P., his brother-in-law, of upwards of 200l. Mr. H. (meaning the said E. H.) has been to S., and found all true as I represented to Mr. H. I wonder how any respectable person can countenance such a man by their presence. I have been advising some other persons to go to the Wesleyan chapel; as they would there hear plain honest men."—The fifth count charged the defendant with having written and published, of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts between the plaintiff and H. P., and of and concerning the said false and scandalous reports,—"It has all through been admitted, that Mr. H. (the plaintiff), in his dealings with relatives, kept clear

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(*a*) But the statement of facts which precedes the allegation that the judge duly ordered the committal, would, according to the decision of this court in *Ex parte Kinning*, ante, vol. iv. p. 507, appear to preclude the possibility of the existence of a valid order of imprisonment.

of the meshes of the law. The charges brought against him are not founded on strictly illegal acts, but on overreaching, &c., &c., his late partner."—The sixth count charged the defendant with having, in answer to a letter addressed to him by R. A. (the plaintiff's friend), containing, among other things, the following passage,—"You have even said in T., that Mr. H. (the plaintiff) has cheated his relations out of 2000l."—written and published, of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and H. P., and of and concerning the words referred to in the letter of R. A., as follows:—"I beg to tell you, that you do not understand the matters at all; that you have been grossly deceived; and that you are advocating a case the most disreputable that has come within my knowledge for many a day; and this you will freely admit, when the facts of it are fully comprehended: and this, my own opinion of the matter, is held in common with all the gentlemen and ministers who have heard both sides of the question,"—thereby meaning that the plaintiff had been and was guilty of improper and unbecoming conduct, and had behaved himself in a manner unworthy a preacher and minister as aforesaid.—The declaration then alleged for special damage, that the plaintiff had been injured in his calling as a minister and preacher, and brought into public scandal, &c., and that divers persons frequenting the said chapel at T., had withdrawn therefrom, and refused to permit the plaintiff to preach there, whereby the plaintiff had been prevented from obtaining profits, &c.—It appeared that the words charged in the first and second counts, were intended, and were understood, to convey an imputation that the plaintiff had taken advantage of his brother-in-law in the course of the partnership transactions and accounts, though by what precise means did not appear; and that the libels which were the subject of the fifth and sixth counts were written by the defendant in answer to a letter from the plaintiff's friend, R. A., who had been in correspondence with the defendant on the subject of the charges against the plaintiff, with the sanction and concurrence of the latter.—The only evidence of special damage was, that of a witness who stated that the plaintiff had told him he was to receive 30l. a year for preaching in T. chapel; but there was no evidence as to the way in which that sum was to be raised, or who were the parties to pay it; neither was there any evidence that any of the congregation had absented themselves from the chapel in consequence of the reports, or that the plaintiff had sustained any pecuniary damage therefrom:—Held, that, in the absence of proof of special damage, the words charged in the first and second counts,—not being spoken of the plaintiff in reference to his office of minister,—were not the subject of an action; and that the letters declared on in the fifth and sixth counts were in the nature of confidential and privileged communications.

This was an action upon the case for defamation. The declaration contained nine counts.

The first count stated, that the plaintiff, before and [294] at the time of the committing, &c. was, and continued to be, a minister of a certain sect of persons dissenting from the church of England, to wit, called or known as independents, and was from time to time called [295] upon, and required and employed, to preach to a certain congregation of persons so dissenting as aforesaid, at a certain chapel situate and being, to wit, at Thatcham, in the county of Berks, for that purpose regularly and in due form of law licensed and authorised by law, and had used and exercised, and at the said times thereinafter mentioned, and each of them, did use and exercise, his said calling of such minister as aforesaid, and his said office of such preacher as aforesaid, with propriety and religious demeanour in all things thereto appertaining, and during all the time aforesaid was deriving great gains, &c., from his said calling, and, but for the said grievances, would have continued so to do; and that the plaintiff, until the committing of the said grievances as thereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst the said congregation, and his neighbours, and other good and worthy subjects of this realm to whom he was in any wise known, to be a person of piety, honesty, good name, fame, and credit: That the plaintiff had not ever been guilty, nor, until the time of the committing of the said grievances by the defendant thereinafter mentioned, been suspected to have been guilty, of the offences and misconduct as thereinafter stated to have been charged upon and imputed to him by the defendant: That, by means of the premises, the plaintiff, before the committing of the said grievances by the defendant as thereinafter mentioned, had deservedly obtained the good opinion and credit of the said congregation, and of all his neighbours and other good and worthy subjects, &c., and had also thereby obtained, and was then duly and honestly acquiring great gains and profits in his said calling of minister and preacher as aforesaid, to the plaintiff's comfortable support and maintenance: That, long before the committing of the said grievances by the defendant as **[296]** thereinafter mentioned, to wit, up to, and until, a certain day and year preceding the committing of the said grievances, to wit, the 1st of January, 1841, the plaintiff had carried on, in partnership with Henry Pinhorn, the brother-in-law of the plaintiff, a certain trade or business, to wit, the trade and business of a linen-draper, in the town of Southampton, in the county of Southampton: That afterwards, and before the committing of the said grievances by the defendant as thereinafter mentioned, to wit, on the 1st of June, 1841, the said partnership between the plaintiff and the said Henry Pinhorn was dissolved, and thereupon divers accounts and money transactions relating to the said business, and the said partnership, and the said dissolution of the said partnership, had arisen, existed, and taken place between the plaintiff and the said Henry Pinhorn: That afterwards, and before the committing of the said grievances by the defendant as thereinafter mentioned, certain false and scandalous reports concerning the plaintiff, and concerning the said partnership accounts and money transactions, had been circulated among divers members of the congregation, to wit, at Thatcham aforesaid, which said reports were by the plaintiff supposed to have been so circulated as aforesaid by one Mrs. B., and thereupon, afterwards, and before the committing of the said grievances, to wit, on the day and year aforesaid, it was proposed that one Edward Hunt should examine into the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, on the part of the plaintiff: That afterwards, a certain correspondence and discussion had taken place between the defendant and one Robert Ainslie, respecting, touching, and relating to the said partnership accounts and money transactions, and respecting, touching, and relating to the said reports: Yet that the defendant, well knowing the premises, but greatly **[297]** envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit in his said office and character of minister and preacher as aforesaid, and otherwise, and to bring him into public scandal, infamy, and disgrace with and amongst the said congregation and all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by that congregation and those neighbours and subjects that the plaintiff had been, and was, guilty of the offences and misconduct thereinafter stated to have been charged upon and imputed to him by the defendant, and to induce the said congregation to leave the said chapel, and to cause the plaintiff to be deprived of the preachership of the said chapel and congregation, to wit, at Thatcham aforesaid, and to vex, harass, &c., the plaintiff in his said calling and ministry, and otherwise, theretofore, to wit, on the 14th of March, 1845, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in his said calling and ministry, and of and concerning the said partnership, and the said accounts and money transactions with the said Henry Pinhorn, in the presence and hearing of divers good and worthy subjects of our lady the Queen, and then, in the presence and hearing of the said last-mentioned subjects, and in the presence and hearing of divers members of the said congregation, to wit, at Thatcham aforesaid, to wit, Sarah Pinnock and Edmund Pinnock, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said ministry and calling, and of and concerning the said partnership, and of and concerning the said accounts, and of and concerning the said money transactions with the said Henry Pinhorn, the false, scandalous, malicious, and defamatory words **[298]** following, that is to say,—"I (meaning the defendant) do not go by reports; I go by a knowledge of facts. Mr. Hopwood (meaning the plaintiff) is a rogue: and I can prove him to be so, by the books at Southampton (meaning the said books of account of the said partnership and business of the plaintiff and the said Henry Pinhorn). Mr. Hopwood (meaning the plaintiff) pretends to say he has been as good as a father to him (meaning the said Henry Pinhorn); but you see he (meaning the plaintiff) has been robbing him (meaning the said Henry Pinhorn). He has cheated Mr. Pinhorn (meaning the said Henry Pinhorn) of 2000l.: so you can see what sort of a father he (meaning the plaintiff) has been to him (meaning the said Henry Pinhorn). I will so expose Mr. Hopwood (meaning the plaintiff), that he (meaning the plaintiff) will not be able to hold up his head in Thatcham pulpit (meaning the pulpit of the said chapel), nor any other. I (meaning the defendant) said to Mr. Pinhorn (meaning the said Henry Pinhorn), I did not wish to see the books (meaning the said last-mentioned books): but he (meaning the said Henry Pinhorn) desired me to come in and see them; and he told me he did not care who saw them. Mr. Hopwood (meaning the plaintiff) has out-generalled him (meaning the said Henry Pinhorn) in every thing (thereby meaning that the plaintiff had taken an unfair advantage of the said Henry Pinhorn, and had conducted himself in an improper manner towards him in relation to, and in connection with, the said partnership and the said accounts). Now, I (meaning the defendant) do not go by what I have heard; but I know it to be true (thereby meaning that he, the defendant, knew it to be true that the plaintiff had taken such unfair advantage of the said Henry Pinhorn, and had so conducted himself in an improper manner towards him in relation to **[299]** and in connection with the said partnership and the said accounts)."

In the second count, the words charged to have been spoken, were,—"Mr. Hopwood (meaning the plaintiff) has cheated Mr. Pinhorn, his brother-in-law (meaning the said Henry Pinhorn), of upwards of 2000l. Mr. Hunt (meaning the said Edward Hunt) has been to Southampton, and found all true, as I (meaning the defendant) represented: and Mr. Hunt (meaning the said Edward Hunt) has washed his hands of it (meaning, the said proposed examination into the said accounts and money transactions between the plaintiff and the said Henry Pinhorn) altogether. I (meaning the defendant) wonder how any respectable person can countenance such a man (meaning such a man as the plaintiff) in their presence. I (meaning the defendant) have been advising some other persons to go to the Wesleyan chapel (meaning a chapel other than the said chapel at Thatcham), as they (meaning the said other persons) would there (meaning, at the said Wesleyan chapel) hear plain honest men (thereby meaning that the plaintiff was a dishonest person, and unfit to preach at the said chapel at Thatcham)."

The fifth count stated that the defendant, further contriving and intending as aforesaid, afterwards, to wit, on the 8th of August, 1845, unlawfully, falsely, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts between the plaintiff and the said Henry Pinhorn, and of and concerning the said false and scandalous reports, a certain false, scandalous, malicious, and defamatory libel, contained in a letter then written and addressed by the defendant to the said Robert Ainslie, in which said **[300]** letter, among other things, were contained the false, scandalous, malicious, and defamatory matter of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts, and of and concerning the said false and scandalous reports, following, that is to say, "It has all through been admitted that Mr. H. (meaning the plaintiff), in his dealings with relatives (meaning the said partnership transactions and accounts), kept clear of the meshes of the law. The charges brought against him (meaning the plaintiff) are not founded on strictly illegal acts; but on overreaching, &c. &c. his late partner (meaning the said Henry Pinhorn, and thereby then meaning that the plaintiff had cheated and defrauded the said Henry Pinhorn in the said partnership transactions and accounts)."

The sixth count stated that the defendant, further contriving as aforesaid, afterwards, to wit, on the 19th of August, 1845, in answer to a certain letter which before then, to wit, on the 15th of August, 1845, had been written and addressed by the said Robert Ainslie to the defendant, which contained, amongst other things, the words following, that is to say, "You (meaning the defendant) have, my dear Sir, even said in Thatcham (meaning in Thatcham aforesaid), that Mr. Hopwood (meaning the plaintiff) has cheated his (meaning the plaintiff's) relatives out of 2000l.," unlawfully, falsely, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, and of and concerning the said supposed words in the said letter of the said Robert Ainslie, above alleged to have been spoken by the defendant, a certain false, scandalous, malicious, and defamatory libel, contained in a certain letter then addressed and written **[301]** by the defendant to the said

Robert Ainslie, wherein was contained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, and of and concerning the said supposed words in the said letter of the said Robert Ainslie, above alleged to have been spoken by the defendant, as follows, that is to say, "I (meaning the defendant) beg, then, to tell you (meaning the said Robert Ainslie), that you (meaning the said Robert Ainslie) do not understand the matters at all: that you (meaning the said Robert Ainslie) have been grossly deceived: and that you (meaning the said Robert Ainslie) are advocating a case (meaning the said case of the plaintiff) the most disreputable that has come within my (meaning the defendant's) knowledge for many a day: and this you (meaning the said Robert Ainslie) will freely admit, when the facts of it are fully comprehended. And this, my own (meaning the defendant's) opinion of the matter is held in common by all the gentlemen and ministers who have heard both sides of the question (thereby meaning that the plaintiff had been and was guilty of improper and unbecoming conduct, and had behaved himself in a manner unworthy a preacher and minister as aforesaid)."

The remaining counts were abandoned.

The declaration concluded with averring, that, by means of the committing, &c., the plaintiff had been and was greatly injured in his good name, fame, and credit, and in his said calling as a minister and preacher as aforesaid, and brought into public scandal, infamy, and disgrace with and amongst the said congregation, to wit, at Thatcham aforesaid, and with and amongst all his neighbours and other good and worthy subjects of this [302] realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on account of the committing, &c., as aforesaid, from thence suspected and believed, and still did suspect and believe, the plaintiff to have been and to be a person guilty of the offences and misconduct above charged to have been imputed upon him, and to be a person wholly unfit and improper for his said ministry and calling as aforesaid, and had therefore wholly refused, and still did wholly refuse, to have any acquaintance or discourse with the plaintiff; and divers of the said persons so frequenting the said chapel, to wit, at Thatcham aforesaid, by reason of the committing of the said several grievances as aforesaid, had wholly withdrawn from the said chapel, and had wholly refused to suffer or permit the plaintiff to preach at the said chapel, as he had before the committing of the said grievances been wont to do, for divers great gains and profits in that behalf, and had withdrawn from the plaintiff their countenance and support; and the plaintiff had thereby been prevented from obtaining divers great gains, profits, and emoluments, which, but for the committing of the said several grievances by the defendant as aforesaid, would thereby have accrued to the plaintiff.

The defendant pleaded not guilty.

The cause was tried before Wilde, C. J., at the sittings in London, after Hilary term, 1847. The plaintiff was the minister of a dissenting chapel at Thatcham, near Newbury, in Berkshire. The defendant was the pastor of an independent congregation at Winchester. The circumstances under which the alleged slanderous words were spoken, and the libellous letters written, were these:—

The plaintiff, prior to his connexion with the congregation at Thatcham, had, in partnership with his [303] brother-in-law, Henry Pinhorn, carried on the business of a linen-draper at Southampton. Shortly after his arrival at Thatcham, certain rumours prejudicial to the character of the plaintiff, with reference to his transactions with Pinhorn, reached the ears of the congregation, and at a prayer-meeting of some of its members, on the 1st of November, 1844, some remarks fell from a Mrs. B., the wife of one of the deacons, which induced the plaintiff to read a paper from the pulpit of his chapel, after the service on Sunday, the 26th of January, 1845, to the following effect:—

"I think I may fairly presume that it is well known to most, if not to all, of you, that my character has been greatly scandalized by the wife of one of the deacons of this church, and that, too, with a zeal worthy of a better cause. It was my intention to have passed it by, as beneath my notice: and many of you can bear me witness, that, when you were anxious to acquaint me, I would not listen to what had been said. But, finding since that statements most flagitious have been made, and widely circulated, I am, from a sense of duty to myself, to the office which I sustain, and to the cause of truth, compelled to take some direct notice of them; otherwise, longer silence on my part, might be, and probably would be, construed into conscious guilt. If the scandal had been confined to the church, I should have felt it my duty to have brought the matter before the church: but, as the statements have been made to members of the congregation, have been generally circulated through the congregation, and even through the village, so as to have become the talk of the public-house, I deem it advisable to speak in this public manner, and to demand of the party having made the statements, to substantiate them; that is, to prove them before persons who shall be thought by both parties qualified to **[304]** investigate and to form a sound judgment, that, if I deserve to be branded as an infamous character, and a vile character, I may publicly receive the brand, and retire into the shade. This party,—the wife of one of the deacons of the church,—has said, speaking of me, that 'he is an infamous character—he is a vile character,' and much more to the same purpose. I, therefore, observe, demand an investigation, that it may not only be shewn that my character is not vile or infamous, but that there is no foundation at all for the assertions. And I defy the aforesaid party to prove any one single thing to blot my moral character before men. If this demand be not met in a fair and open way, I shall ask of you to certify that the demand was made, and refused. I beg, moreover, to state that I decline any personal communication with the aforesaid party, or written communication from the party, but will appoint a friend, and hope that the aforesaid party will appoint another, that the matter may be thoroughly sifted."

In consequence of this requisition of the plaintiff, one Edward Hunt was appointed on the part of the plaintiff, and the defendant on the part of Mrs. B., to enter upon the investigation. In the course of the inquiry to which the defendant was thus invited, he had several interviews with Mr. Henry Pinhorn, at Southampton, and a good deal of correspondence took place between the defendant and Mr. Hunt; and it was upon one of these occasions, and with reference to the partnership transactions and dealings between the plaintiff and Henry Pinhorn, that the words charged in the first and second counts were spoken by the defendant.

The circumstances under which the words were spoken, and also those under which the letters which formed the subject of the charges in the fifth and sixth **[305]** counts were written, are fully detailed in the judgment of the court; as also is the evidence offered on the part of the plaintiff at the trial to prove special damage from the speaking of the words.

A verdict having been taken for the plaintiff, on the first and second counts, for 250l., and, on the fifth and sixth, for 100l.,

Talfourd, Serjt., in Easter term, 1847, obtained a rule nisi to enter a verdict for the defendant on the issues raised on those counts, or some of them, or to arrest the judgment, or for a new trial, as for a verdict against evidence. He cited *Parrat* v. *Carpenter* (Cro. Eliz. 502, Noy, 64), *Lumby* v. *Allday* (1 C. & J. 301, 1 Tyrwh. 217), *Ayre* v. *Craven* (2 Ad. & E. 2, 4 N. & M. 220), and *Pemberton* v. *Colls* (10 Q. B. 461, 16 Law Journ., N. S., Q. B. 403). [Wilde, C. J., observed, that he thought at the trial, that the letters were written under circumstances which rendered them not actionable without proof of express malice,—having the case of *Blackburn* v. *Blackburn* (4 Bingh. 395, 1 M. & P. 33, 3 C. & P. 146) in his mind at the time.]

Cockburn and E. James, in Easter term, 1848, shewed cause. The words charged in the first and second counts, clearly were actionable, having been spoken of the plaintiff in his office or calling of a minister. [Cresswell, J. They were spoken of him when filling that office, but not concerning anything done by him in his office.] The slanderous words, it is true, were not spoken of the plaintiff in relation to his ministry; but they imputed to him conduct of a nature wholly to disqualify him for it. [Cresswell, J. *Ayre* v. *Craven* is very like this case.] The general rule of **[306]** law is, that injurious matter falsely spoken of a man in his profession is actionable. If it imputes to the party such a degree of moral turpitude as to shew him unfit for the office, an action lies. There are some callings,—and this is one,—in which moral worth and conduct are as essential as knowledge. *Ayre* v. *Craven* has confessedly gone to the very verge of absurdity. In *Pemberton* v. *Colls*, the words which were held to be actionable, had no reference to any thing done by the plaintiff in his character of a minister of the gospel. [Cresswell, J. They imputed to him cheating and swindling while a clergyman: here, however, the transactions alluded to took place long before the plaintiff's character of a minister had existence.] To say of a clergyman that he has been guilty of conduct of this description, is calculated most materially to impair and destroy his utility as a clergyman. [Wilde, C. J. The question is, whether the misconduct is imputed to him in his character of minister. Coltman, J. The slander in question certainly does seem to have some reference to the plaintiff's clerical character: it alleges him to be unfit to fill the office of minister, by reason of his former alleged misconduct.] In *Lumby* v. *Allday*, the words spoken of the plaintiff had no immediate connection with his office of clerk of the gas-company. The language of Bayley, B., is strongly in favour of the maintenance of this action. "Every authority," he says, "which I have been able to find, either shews the want of some general requisite, as, honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk." **[307]** Applying that doctrine to this case,—the imputations here cast upon the plaintiff necessarily do imply a total want of those qualities which not only ought to be possessed by, but which are indispensably necessary to, a person filling the character of a clergyman. In *How* v. *Prin* (Sir J. Holt, 652), it was held to be actionable to say of a justice of peace and deputy-lieutenant of a county, that "he was a jacobite, and for bringing in the Prince of Wales and popery, to destroy the nation, &c.;" Holt, C. J., saying,—"To charge one in a public office with ill principles that are of such a nature as make him unfit to bear that office or employment, is actionable: for, if he had such thoughts to bring in the pretended Prince of Wales into this kingdom, it is necessary he should be removed from his trust; and he, as justice of peace, ought to punish popery: sure, then, if such person is for introducing popery, he ought not to be trusted with an office the duty whereof is to punish and suppress it."

Then, as to the fifth and sixth counts,—it is insisted, on the part of the defendant, that the letters addressed to Mr. Ainslie were equally privileged with those written to Mr. Hunt. They, however, clearly stand upon a totally different footing. The object of the correspondence with Mr. Hunt was, the promotion of an investigation which the plaintiff had himself courted: whereas, it was perfectly clear, upon the evidence, that the correspondence with Mr. Ainslie was carried on maliciously, and not for any legitimate purpose: the investigation was then at an end. Nor can it be said that the communication was privileged, as relating to a matter essential to the interests of society.

As to the special damage,—it appeared that some of the congregation had absented themselves from the **[308]** chapel. It is true, no persons were named who had ceased to attend: but that is not necessary in a case like this. [V. Williams, J. Where the naming the individuals would lead to inconvenient prolixity, the rule is relaxed.] In the case of a gin-shop, where the special damage consisted in the loss of customers, it would manifestly be impossible to name them. [V. Williams, J. *Hartley* v. *Herring* (8 T. R. 130) seems an authority to shew that the allegation of special damage here is sufficient. That was an action for consequential damage for slander imputing incontinence to the plaintiff; and it was held to be sufficient to state, that the plaintiff was employed to preach to a dissenting congregation at a certain licensed chapel, that he derived considerable profit from his preaching, and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had, and otherwise would have, given,"—without saying who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 Ann. c. 2.

Talfourd Serjt., and Atherton, in support of the rule. The words charged in the first and second counts are clearly not actionable per se. They are not alleged to have been spoken of the plaintiff in relation to his office or calling of a dissenting minister: all the innuendos apply them to the partnership transactions between the plaintiff and Henry Pinhorn, and to a time anterior to the plaintiff's assumption of the ministry. They charge no indictable offence: and there is no special damage well alleged or proved. It is scarcely possible to conceive slander calculated more seriously to affect the pro-**[309]**-fessional success of a physician, than that which was held not to be actionable in *Ayre* v. *Craven*. Lord Denman there says: "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery,—*Parrat* v. *Carpenter* (Noy, 64, Cro. Eliz. 502),—and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution,—per Twisden, J., in *Wharton* v. *Brook* (*b*)[1]. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but, not being applicable to their conduct therein, no action lay." Suppose the defendant, in that case, had gone on to say,—"I will so expose Dr. Ayre that he will not be able to obtain admission to a single family in Hull,"—would that have made any difference? These words would merely have supported the colloquium: but they would have had no effect beyond that. *Lumby* v. *Allday* also shews that words, to be actionable as spoken of a man in his office, must be spoken of him in reference to his character or conduct in such office. *Pemberton* v. *Colls* is decisive: it marks precisely the distinction between what is, and what is not, spoken of the party in reference to his office or calling. The first count of the declaration there stated words spoken of the plaintiff in his profession, as follows,—with innuendos, and an inducement stating only that the plaintiff was vicar of a church, and the defendant a clergyman, and that the plaintiff had always conducted himself well in his profession,—"The very day I came into residence, Dr. Pemberton (the plaintiff) sent for me: I went, and dined with him; and the wine must have been drugged, for, I took but two glasses, and was quite stupefied. While in this condition, Dr. Pemberton put a bill into **[310]** my hands, and requested me to sign it, saying, 'I wish to have it as a security for the payment of 130l. per annum for reading for you at the new church.' I answered, 'Well, give me a pen, and I will sign it.' Immediately I had signed it, Dr. Pemberton snatched it up, and, laughing, said, 'This will be quite safe.' The bill, I think, was drawn for 2500l. or 2600l: but, having been stupefied with the wine, I do not rightly remember. You cannot suppose that I can visit a man who so cheated me at my first coming,"—innuendo, that the plaintiff fraudulently obtained the bill from the defendant while he was stupefied with drugged wine. The second count stated the words spoken of the plaintiff in his profession,—with innuendos, but no further material inducement,—as follows: "Dr. Pemberton placed before me a bill. I signed. I do not know for what amount it was, whether for 2000l. or 3000l.: for, I was completely pigeoned by Dr. Pemberton,"—innuendo, that the plaintiff had obtained the bill from the defendant by fraud. The declaration alleged, for special damage, that the plaintiff's curate believed him guilty of the misconduct, and, by reason thereof, was prevented from cordially and effectually assisting the plaintiff in the clerical duties and spiritual concerns of the parish. After verdict for the plaintiff, it was held, on a motion in arrest of judgment,—that the first count was good, because the words therein set forth reflected upon the plaintiff in his profession: but that the second count was bad, because the words there did not so reflect. That case, it is conceived, presents the true principle for the decision of this. It is not because the party is a clergyman, that any peculiar injury to his prospects would necessarily result from an imputation of dishonesty. There is but one rule of moral conduct propounded for all men. The quality, the presence or absence of which is imputed, must have a special refer-**[311]**-ence to the calling or profession of the plaintiff. To impute to a clergyman or a physician want of legal, or to an attorney want of theological or medical, knowledge, would be no offence. In *Hartley* v. *Herring*, the plaintiff lost his office: all the congregation were alleged to have left the church. The special damage must be a direct consequence of the speaking of the words to the person to whom they were addressed, not of the illegal repetition of them by another. [Wilde, C. J., referred to *Ward* v. *Weeks* (*a*).]

With respect to the fifth and sixth counts, the alleged libellous letters were clearly written under circumstances which rendered the writing of them privileged. They were communications addressed by the defendant to a gentleman, who, as the plaintiff's friend, had been deputed with him to inquire into certain charges which had been whispered against the plaintiff: and, although that inquiry was at an end when the letters in question were written, the defendant might fairly consider, from the circumstances, that the communications would still be privileged (*b*)[2].

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

(*b*)[1] 1 Ventr. 21. And see *Welby* v. *Elston*, ante, p. 142.

(*a*) 7 Bingh. 211, 4 M. & P. 796. And see *Edsall* v. *Russell*, 4 M. & G. 1090, 5 Scott, N. R. 801.

(*b*)[2] It would seem to be immaterial whether the defendant believed the communications to be privileged or not.

This was an action to recover damages for verbal and written slander. The declaration contained nine counts. The first and second counts were founded upon the verbal slander; the third and fourth counts, and also the seventh, eighth, and ninth counts, were abandoned at the trial, and it is, therefore, unnecessary to advert to them; and the fifth and sixth counts were framed upon the written slander.

[312] A verdict was found for the plaintiff upon the first and second counts, with 150l. damages; and upon the fifth and sixth counts a verdict was found for him, with 100l. damages.

A rule has been obtained by the defendant, calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant upon the first, second, fifth, and sixth counts, or such of them as the court should think fit, or why the judgment should not be arrested, or why there should not be a new trial.

Upon the argument of the rule before us, the questions were,—first, whether the words which formed the subject-matter of complaint in the first and second counts were actionable, either by reason of the imputations conveyed in them, or by reason of their having been uttered in relation to the plaintiff's profession, character, or office of a dissenting minister, or by reason of special damage, properly alleged, resulting from them, and of which evidence was given at the trial: and, as to the fifth and sixth counts, whether, on the evidence given at the trial, the letters which contained the alleged defamatory matter, were written under circumstances entitling them to be considered as a privileged communication: and a further question was made, whether, if the words in the first and second counts were actionable only by reason of special damage, special damage was properly alleged in the declaration.

We have considered the several points which have been argued; and, first, with regard to the verbal slander. The inducement states, that, before the committing of the grievances, the plaintiff had been in trade, in partnership with one Pinhorn, his brother-in-law; that the partnership had been dissolved, and that certain false and scandalous reports concerning the plaintiff, and concerning the said partnership accounts and money transactions, had been circulated; and that the defend-**[313]**-ant, in a certain discourse of and concerning the plaintiff, and of and concerning him in his calling and ministry, and of and concerning the matter before set forth, had said—"He is a rogue; and I can prove him to be so, by books. He pretends he has been as good as a father to him; but you see he has been robbing him. He has cheated Mr. Pinhorn of 2000l.; so you see what sort of a father he is. I will so expose him that he shall not be able to hold up his head in Thatcham pulpit, or any other. He has out-generalled him in every thing."

The words complained of in the second count, are—"He has cheated his brother-in-law of upwards of 2000l. I wonder how any respectable person can countenance such a man by their presence. I have been advising some persons to go to the Wesleyan chapel; for, they would there hear plain honest men."

The words set forth in these counts were uttered in the course of some lengthy communications referring to transactions between the plaintiff and Pinhorn; and the context with which the words complained of were connected, fully explained the sense in which they were used, and that the imputation intended to be conveyed, and which, as the evidence shewed, was understood by them, was, that the plaintiff had taken advantage of his brother-in-law, in the course of their partnership transactions, and had obtained a great pecuniary advantage in the adjustment of their accounts; but by what precise means that was imputed to have been accomplished, was not explained. The words had no relation to any conduct pursued by the plaintiff as a minister, or connexion with any of the duties of his office; although the defendant alleged that the plaintiff was unfit to be a minister, by reason of misconduct at a former period, before he became a minister, and when he was a tradesman. The words themselves are clearly not actionable per se: and **[314]** the authorities referred to in the course of the argument, establish that they cannot be deemed to have been spoken of the plaintiff in his character or office of a minister, in any sense which will subject the defendant to an action in that respect. It is, therefore, only upon proof of special damage having resulted from the speaking of the words, that the action can be maintained. But, upon reference to the evidence, it is clear no such damage was proved. The only evidence applicable to that subject is, that a witness stated that the plaintiff had told him that he was to receive 30l. a year as his remuneration for his ministerial duties; but nothing was said of the mode in which such sum was to be raised, or of the parties by whom it was to be paid. It was also stated that rents were paid for the occupation of the pews: but, by whom received, or how applied, there was no evidence. It was further stated, that the attendance at the chapel had lately diminished in number; but, from what cause, or whether the parties seceding were pew-renters, or contributors in any way to the funds of the meeting, did not appear. It was also proved, that, before the uttering of the words complained of, the plaintiff had determined to quit his office of minister of that meeting, and had given notice to the congregation of such his intention. It was likewise proved that there had been such very unusual and unseemly altercations during divine service, as might reasonably account for a diminution of the number of attendants at the meeting or chapel: and there was no evidence that could properly be submitted to the jury, to authorise them to find, as a fact, that any one person had ceased to attend in consequence of the words complained of, or that the plaintiff had sustained any pecuniary damage whatever.

In the absence, therefore, of all evidence of any diminution of the number of attendants at the chapel, or [315] of any pecuniary loss or damage in consequence of the imputation made by the defendant against the plaintiff, unless the words themselves are actionable, the plaintiff has no cause of action: and the authorities shew, that, in point of law, such words are not actionable.

Secondly,—with respect to the written matter complained of,—the question is, whether the letters in which such matter was contained, were written under circumstances which brought them within the principle recognised, of a privileged communication.

It appears that the plaintiff had desired that an investigation should take place into the truth of some charges which had been made by a Mrs. B., who was a member of the congregation over which the plaintiff presided, and that the defendant had acted as Mrs. B.'s representative and advocate during those investigations; that, after some meetings, and various communications had taken place upon the subject, a Mr. Ainslie, a dissenting minister, had been invited by the plaintiff to pursue the investigation on his behalf; that, in the course of doing so, Mr. Ainslie had had an interview with a Mr. Pinhorn, of Southampton, from whom it was supposed and alleged the charges against the plaintiff had originated; and that, after such interview, Mr. Ainslie had, in the defendant's absence, called at the defendant's residence, for the purpose of communicating with him upon the subject of those charges. It further appeared that the defendant, upon being informed of the application of the plaintiff's friend, Mr. Ainslie, had written to Mr. Ainslie upon the subject, and that the letters complained of were written in the course of a correspondence between the defendant, who had been acting as the friend and advocate of Mrs. B., and Mr. Ainslie, the advocate of the plaintiff. And it further appeared that this correspondence was carried on by Ainslie in concurrence with the plaintiff, who furnished the materials for Ainslie's answers to the defendant's letters.

[316] The result is, that the communication between the defendant and Ainslie arose out of an invitation to the defendant, made by the plaintiff's friend, with his concurrence, to enter into a discussion upon the charges made against the plaintiff in respect of his transactions with Pinhorn, and that Ainslie must be considered as representing the plaintiff, in the correspondence that took place. And it seems to the court that the letters written in relation to the matters under discussion, fall within the principles of a privileged communication. The sole object of Ainslie's communication with the defendant was, to discuss the matters the defendant alleged against the plaintiff, with a view of establishing that the imputations made against the plaintiff were unfounded, and with the intention of the result being made known to the congregation.

Attending, therefore, to the circumstances under which the letters were written, we think that they constituted a privileged communication, for which, under the circumstances of this case, no action can be maintained. And, as we think that no action can be maintained for the verbal slander which forms the subject of the first and second counts, or for the written slander which forms the subject of the fifth and sixth counts, and as no evidence was offered in support of the other counts in the declaration, a nonsuit must be entered.

The view thus entertained by the court renders it unnecessary to express any opinion upon the other points which have been argued in the course of the case.

Rule absolute.

[317] CHARLES FREDERICK AUGUSTUS WILLIAM, SOVEREIGN DUKE OF BRUNSWICK AND LUNEBURG, *v.* ABRAHAM SLOWMAN, JOHN BAKER, JOHN TOWNSHEND, JAMES MILES, AND BENJAMIN BROWN. June 25, 1849.

[S. C. 18 L. J. C. P. 299.]

Where a plea justifies a trespass under a fi. fa., on the ground that the outer door was open at the time of the entry and seizure, that allegation is put in issue by the replication de injuriâ.—A., a sheriff's officer, to whom a writ of fi. fa. was directed, offered, for a pecuniary consideration, to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with A., afterwards illegally executed the writ, by breaking open an outer door; and A. subsequently withdrew his men from possession on payment of the amount indorsed on the writ, and of a bonus to himself:—Held, sufficient to warrant the jury in finding A. to be a co-trespasser, as having authorised the unlawful act of his partner, B.—In such a case, the damages are peculiarly in the discretion of the jury: and they may include the sum paid for the withdrawal of the execution.—Quære, to what extent a seizure of goods under a fi. fa. can be justified, when properly pleaded, where the possession of the goods has been illegally obtained.

This was an action of trespass brought by His Serene Highness the Duke of Brunswick against Slowman and Baker, officers of the sheriff of Middlesex, Townshend, an attorney, and Miles and Brown, assistants to the officers, for breaking and entering the plaintiff's dwelling-house, making a noise and disturbance therein, breaking open doors, seizing his goods and chattels, and compelling him to pay a sum of money to induce them to withdraw from possession.

The defendants severally pleaded not guilty, and also a justification of all the trespasses complained of,—except that Slowman justified only the entry and seizure,—under a writ of fieri facias, at the suit of one Charlotte Munden, against the goods and chattels of the plaintiff, for 200l. debt, 9l. 10s. damages, and 4l. per cent. interest,—the outer door being at the time open.

The plaintiff joined issue on the plea of not guilty, and, admitting the writ, replied de injuriâ, absque residuo causæ, to the pleas of justification.

[318] The cause was tried before Wilde, C. J., at the sittings at Westminster, after Hilary term, 1848. It appeared that the defendants Slowman and Baker, who were in partnership as officers of the sheriff of Middlesex, having in their hands a fi. fa. against the goods of the Duke of Brunswick, upon a judgment obtained against him at the suit of one Charlotte Munden, Baker, on the 15th of May, 1847, accompanied by his assistants Miles and Brown, and by Townshend, the attorney of the execution-creditor, proceeded to the duke's mansion in the Regent's Park, for the purpose of making a levy. The officers, taking advantage of the gate's being opened for the purpose of letting in some one else, rushed in, and, as was alleged by the plaintiff's witnesses, broke open the front door, and so effected a seizure.

On the other hand, several witnesses, called on the part of the defendants, as distinctly swore, that the outer door of the house was open when they first gained access to the garden: and that, one of the officers having entered the house, and having been forcibly ejected by the plaintiff's porter, the officers, assisted by Townshend, again broke in, and made the levy.

It did not appear that Slowman was present during any part of the transaction; but it was proved, that, before the levy was made, he had called upon the duke's attorney, and offered, for a consideration of 20l., to delay the execution for a few days, as he had been informed that the duke purposed to apply for an injunction. It further appeared, that the plaintiff tendered (under protest) to Baker the amount indorsed on the writ, but that Baker declined to accept it, or to withdraw, without the assent of Slowman, and Slowman declined to assent except on payment to him of a bonus of 20l.; and that ultimately that sum, together with the amount directed to be levied under the writ, having been tendered to Slowman, under protest, was accepted, and the officers withdrawn.

[319] The learned judge left the case to the jury upon the whole of the evidence,—telling them, that, if they were of opinion that the plaintiff had paid the money in order to induce the defendants to withdraw the execution, they might give the amount so exacted, as part of the damages.

The jury returned a verdict for the plaintiff, damages 720l., observing that that sum was meant to include the 220l. paid by the plaintiff to induce the defendants to withdraw the execution.

In the following Easter term,

E. James, for the defendants Baker and Brown, and Wilkins, Serjt., for Townshend and Miles, obtained rules nisi for a new trial, on the ground that the verdict was against evidence, and upon affidavits, or to reduce the damages.

The affidavits were those of Charles Burrows and Henry Archer, police constables (who had both been examined as witnesses for the defendants at the trial), and of Charles Cadwell, a sheriff's officer's assistant, and John Baker, one of the defendants. The affidavits of Burrows and Archer stated, in substance, that Bate, the plaintiff's porter, had, in the course of conversation with them, while on duty at the spot, admitted that the sheriff's officer (meaning Baker) had rushed by him through the garden gate, when he, the porter, opened it to admit some one else, and that the officer then ran across the garden, and up the hall steps into the hall, and thence into his, the porter's, room, and that he, Bate, ran after him, and took him by the trowsers and back of his neck, dragged him out of the house, and threw him on the gravel-walk. Cadwell's affidavit alleged a similar conversation to have taken place between himself and Bate, whilst he, Cadwell, was remaining in possession under the fi. fa. at the plaintiff's [320] house. Baker, in his affidavit, stated, that, immediately the garden gate was opened by the porter, he rushed in, ran across the garden and up the steps into the hall, the door being open, and went into a room, which he believed to be Bate's room; that, whilst there, and while he was in the act of pulling out his warrant, Bate entered, and caught hold of him, and dragged him out, and threw him down on the gravel-walk in the garden; and that the writ had been returned fieri feci.

Byles, Serjt., on behalf of Slowman, obtained a similar rule, and also to enter a verdict for him on the second issue, on the ground that he was not present at the time of the alleged trespass, and that what was done by him before and after the transaction, did not render him liable as a co-trespasser. The learned serjeant submitted, that, as regarded the 220l., that sum had been improperly included in the damages, inasmuch as it appeared that there had been a legal judgment and execution against the present plaintiff for that sum, and that he had paid it to the sheriff, who had handed it over to the execution-creditor. And he referred to the Year Book, 18 E. 4, fo. 4 a.(*a*) (cited with approbation in *Semayne's case* (5 Co. Rep. 91)), and also to Bac. Abr. Execution (N.), pl. 7 (*c*), and *Yates* v. *Delamayne*, cited in Bac. Abr. tit. Execution (N.).

Allen, Serjeant, Lush, and Henniker, shewed cause. There was evidence on both sides; and, the case being one peculiarly for the consideration of a jury, and there having been no manifest wrong done in the conclusion to which they came, there is no pretence for disturbing [321] the verdict. And, with regard to the affidavits, two of them are by witnesses who were examined at the trial, and all refer to a matter which was then before the jury; and therefore they can hardly afford ground for a new trial.

The damages were peculiarly for the determination of the jury. In *Kerbey* v. *Denby* (1 M. & W. 336, Tyrwh. & Gr. 688), upon a motion to reduce the damages, in an action for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, under colour of a writ of ca. sa., Lord Abinger said: "I think, if I had tried the cause, I should probably have said, that, if parties, knowing what the law is, wantonly violate it, the jury should not be sparing in the damages. It is the safest way to say, that he who knowingly violates the law in one respect, must take all the consequences."

It is said that the learned judge who tried the cause was wrong in telling the jury that they were at liberty to include in their estimate of damages, the amount of the levy indorsed on the writ. A dictum in *Semayne's case* (5 Co. Rep. 93 a.), is relied on to shew that the execution having been executed, and the money levied and paid over

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(*a*) An answer by Littleton, J., with the assent of the other justices of C. P., to a case put by Catesby, K. S.

(*c*) Citing *Semayne's case*.

to the execution-creditor, it cannot be recovered back. That dictum,—which is as follows, "It is said in 18 E. 4, 4 a., by Littleton, and all his companions, it is resolved that the sheriff cannot break the defendant's house by force of a fieri facias, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good,"—is copied in Bac. Abr. Execution (N.), pl. 7, where the following is added in a note,—"In Trinity term, 17 G. 3, in the cause of *Yates and Others* v. *Delamayne*, the court set aside an execution levied on the defendant's goods in his dwelling-house, because the officer forcibly broke into the house to execute the writ." In *Buckenham* v. *Francis* (11 J. B. Moore, 40), in **[322]** trespass for breaking open the outer door of the plaintiff's dwelling-house, &c., a plea justifying the entry, generally, under a pluries fi. fa., not averring that the outer door was open at the time of the entry, was held bad, on special demurrer. *Kerbey* v. *Denby* is an authority to the same effect. That was an action of trespass for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, &c. The defendants pleaded,—first, not guilty,—secondly, as to all the trespasses alleged, except the breaking of the dwelling-house, a justification under a writ of ca. sa. and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. The plaintiff replied (admitting the writ and warrant) de injuriâ suâ propriâ absque residuo causæ. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him. And it was held, that the averment in the plea, that the outer door was open, was a material averment, for, that the door's being open was a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door. Parke, B., in that case, says: "I believe the result of the uniform course of precedents will be found to be, that the door being open is a condition precedent to executing the writ in the dwelling-house, and therefore that the averment is material: and, if so, it is well traversed by the replication de injuriâ absque residuo causæ." If an execution under a fi. fa. illegally executed may be upheld, it is difficult to say why an execution under a ca. sa. should not also be valid. This court, in *Barratt* v. *Price* (9 Bingh. 566, 2 M. & Scott, 634, 1 Dowl. P. C. 725), held, that, where a **[323]** sheriff had illegally arrested the defendant under one writ, he could not lawfully detain him under another writ in his hands at the time: and, in *Hodgson* v. *Towning* (5 Dowl. P. C. 410), where the defendant had been arrested on a ca. sa., to execute which the sheriff's officer had broken an outer door, Patteson, J., discharged him out of custody. [Wilde, C. J. If the law were not so, much time was unnecessarily wasted, in *Lee* v. *Gansel* (Cowp 1), in discussing whether the door which was broken open, was an outer door or an inner door.]

The only remaining question is, whether the defendant Slowman was, under the circumstances, responsible with the other defendants for the trespasses committed by them. The warrant was, it appears, directed to Slowman and his partner Baker. Before the execution, Slowman proposed to the plaintiff's attorney to delay enforcing it for a few days, upon his being paid a gratuity of 20l. And, after the seizure, when applied to for his assent to the withdrawal of the officers from possession, Slowman declined to give it unless he received the 20l.; and the money was paid to him under protest. Slowman thus so far identified himself with the trespass, as to render him liable for all the consequences. *M'Laughlin* v *Pryor* (4 M. & G. 48, 4 Scott, N. R. 655), is very analogous to the present case. There, the defendant and others hired a job-carriage and four post-horses, with two postillions, to go to Epsom races: on the road, the postillions, in "cutting in" to the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was seated, and severely injured him: after the accident had happened, the defendant, who was on the driving-box, offered money to the injured party, and gave his card; and, upon the owner of the gig afterwards calling upon him, **[324]** the defendant observed that "cutting in" was all fair upon such occasions, and that "he intended, if the gig had gone quietly out, to have pulled up to let it in again:" it was held, that the jury were warranted in inferring that the postillions had acted as they did with the sanction of the defendant, and consequently that he was liable in trespass for the injury done. Tindal, C. J., in his judgment in that case, evidently relies more upon the conduct of the defendant after the transaction, than upon what was actually done by him, or by his direction, before. All that was decided in *Wilson* v. *Tumman* (6 M. & G. 236, 6 Scott, N. R. 894), which will probably be cited on the other side, was, that a bare assent by A. to a trespass already committed by B., is not equivalent to a previous command, and therefore will not make A. a trespasser. That has no application here.

Byles, Serjt., and Bramwell, appeared to support the rule obtained on behalf of Slowman. The defendant Slowman clearly was entitled to a verdict on not guilty: he took no part in the trespass, if any was committed; nor did he ratify it by his subsequent conduct. What is alleged to have passed between him and the plaintiff's attorney before the levy, clearly cannot make him liable. To render him responsible, as a co-trespasser, he must be shewn to have authorised or directed it. In *Robinson* v. *Vaughton* (8 C. & P. 252), Alderson, B., says (8 C. & P. 255): "If I give a man leave to go on a field over which I have no right, and he goes, that will not make me a trespasser: but, if I desire him to go and do it, and then he does it, that is a doing of it by my authority, which is quite a different thing, and I should be liable." In Comyns's Digest (title Trespass (C. 1), citing 4 Inst. 317), it is said that trespass lies "against **[325]** all who procure or command the trespass; or against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it." Here, the act complained of was not done at the command of Slowman; nor was it done in his name, or for his benefit. Even if he expressly ratified it, therefore, he would not be liable. *Wilson* v. *Tumman* is precisely in point. It was there held, that, where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit, under the act of A. Tindal, C. J., in delivering the judgment of the court, there says: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 H. 4, fo. 35 (H. 7 H. 4, fo. 24, pl. 1),—that, if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time: but, if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports, 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the **[326]** other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for, once he was a trespasser, and his intent was manifest.' In the present case, the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act at that time as agents or bailiffs of the then plaintiff, Tumman; but they acted as the servants of another, viz. the sheriff, by virtue of the process directed to him by the court." So, here, the acts complained of were not done in the name of Slowman, but by parties acting in the name and under the authority of the sheriff; Slowman, therefore, could not ratify them. [V. Williams, J. Was there no evidence of previous authority here?] Only of authority to levy in a lawful manner. In *Lyons* v. *Martin* (8 Ad. & E. 512, 3 N. & P. 509), it is laid down, that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service, but not so if the act is, in itself, unlawful, and is not proved to have been authorised by the master,—as, if a servant authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them.

Semayne's case is a distinct authority to shew that the execution itself is valid, although the officers may be liable for having levied it in an unlawful manner. A fi. fa. differs from a ca. sa. in this, that, in the case of the latter, the rights of third parties would be interfered with by invalidating the execution: and it may **[327]** well be that the law justifies a stricter construction in the case of a ca. sa., out of regard to the liberty of the subject. The sheriff could not return nulla bona. [Wilde, C. J.

Why not?] He had in fact levied the money. The plaintiff has had the advantage of the payment, in discharge of the execution; he surely cannot be allowed to have it in the shape of damages also.

Wilkins, Serjt., and Cleasby, in support of the rule obtained by Townshend and Miles, and E. James, in support of that obtained by Baker and Brown, relied principally on the verdict being against the weight of evidence, and the damages excessive.

Cur. adv. vult.

Coltman, J., now delivered the judgment of the court (*a*).

This was an action of trespass, in which the plaintiff complained of the outer door of his house having been broken open, and his goods having been seized, and of his having been compelled to pay a certain sum of money to induce the trespassers to withdraw from his house.

The defendants severally pleaded not guilty; and the defendant Slowman also pleaded a special plea, not justifying the breaking, but justifying the entry and seizure of the goods under a writ of fi. fa. against the plaintiff; the plea alleging the outer door of the house to have been open at the time of the entry.

A verdict was found for the plaintiff, with 750l. damages, the jury having stated that the sum which had been paid to induce the trespassers to withdraw, was included in that amount of damages.

[328] A rule nisi was granted for a new trial, upon several grounds,—first, that the verdict was against the evidence,—secondly, upon affidavits,—thirdly, upon the ground of excessive damages. The rule also called upon the plaintiff to shew cause why the damages should not be reduced to the sum of 500l., by deducting the sum which had been paid to the defendant Slowman; such sum being, the amount of the levy indorsed on the writ of fieri facias, under colour of which the parties had committed the trespasses complained of.

The defendant Slowman also obtained a rule nisi for a new trial, upon the ground, —first, that the verdict against him was not supported by the evidence, he not having been present at the time the original trespass was committed, by breaking open the outer door,—secondly, that he had not made himself party to such trespass, by any subsequent conduct,—thirdly, that no subsequent adoption could, in point of law, make him responsible as a party to the original trespass.

Upon the discussion of the rule by the counsel for the several parties, the evidence given at the trial was minutely investigated and presented to our attention: and, upon consideration of that evidence, we are of opinion that the verdict was consistent with it, and that the rule nisi ought not to be made absolute, upon the ground that the verdict was against the evidence.

There was, no doubt, a great conflict of testimony upon the trial,—positive evidence being given upon both sides; and the decision depended upon the credit to be given to the different witnesses: and, upon an attentive consideration of the evidence, it is clear that that given on the part of the plaintiff, if believed, warranted the jury in giving the verdict which they found: and, as the credit of the witnesses was a matter peculiarly within the province of the jury, the arguments **[329]** urged on the part of the defendants have not satisfied us that the conclusion to which the jury came was erroneous: and therefore we are not authorised to set aside the verdict which they have pronounced; and we are of opinion that further inquiry would not be likely to render the truth of the case more apparent.

With regard to the affidavits which have been filed, it is to be observed that Burrows and Archer, two of the deponents, were called upon the trial, and might have been examined upon the matters stated in their affidavit; and, further, that it appears that the jury did not adopt the testimony which they in fact did give; and the affidavits made by them do not furnish any grounds for disturbing the verdict.

As to Cadwell, the other deponent, the evidence which it is suggested he would give upon a future trial, relates to alleged declarations by Bates, of the same import as those which had been imputed to him by several witnesses examined on the part of the defendant upon the trial; and the verdict shews that the jury gave credit to Bates, and not to the defendants' witnesses. And, further, it is not stated that Cadwell was not in attendance upon the trial. Considering, therefore, that Bates's

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(*a*) Wilde, C. J., Coltman, J., Cresswell, J., and V. Williams, J.

credit in regard to his denial of the same expressions as are sworn to by Cadwell, and the several witnesses already examined on the part of the defendant, has already been submitted to the jury, we do not think that Cadwell's affidavit furnishes sufficient ground for granting a new trial.

With respect to the damages being excessive,—the trespasses complained of were of a very serious nature; such trespasses having been committed by officers of the law, under colour of the law, breaking open the outer door with great violence. Such conduct is calculated to lead to dangerous conflicts; and, when it is **[330]** proved, to the satisfaction of a jury, to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances, that it is very difficult to discover any standard by which to measure the amount: much must be left to the discretion of the jury; and the court cannot upon the present occasion perceive any ground which calls upon it to set aside the verdict which they have found, upon the objection to the amount of damages.

As to that part of the rule which asks to reduce the damages by the amount of the levy indorsed on the writ of fieri facias, it is to be observed that the only plea of justification under the writ of fieri facias, is a plea which alleges that the defendants entered for the purpose of making the levy, the outer door being open; and that allegation was a material and substantial part of the plea (*a*)[1], which was put in issue by the replication de injuriâ. The jury by their verdict found that allegation to be disproved; which entitled the plaintiff to a verdict upon the issue joined on that plea: and the only other plea upon the record was the plea of not guilty, the issue upon which was also found for the plaintiff. The defendants, therefore, could not avail themselves of the writ of fieri facias under the plea of the general issue, and were, upon the state of the record, without defence in regard to the amount exacted to induce them to withdraw from the possession of the plaintiff's house: the jury were warranted in including the amount so exacted in the damages: and the consequence is, that there is no ground for reducing the verdict, by deducting that amount.

The state of the record before mentioned renders it **[331]** unnecessary to consider how far, and to what extent, a levy under a writ of fi. fa. can be justified, where properly pleaded, when the possession of the goods has been illegally obtained.

The remaining point relates to the objections urged on the part of the defendant Slowman,—the question being, whether there was evidence proper to be submitted to the jury, of his having authorised the original trespass. It appears by the evidence, that the warrant granted by the sheriff of Middlesex, upon the writ of fieri facias against the plaintiff, was directed to Slowman and his partner, Baker; and that, Slowman, having heard that the plaintiff wished to postpone the execution of the writ for a few days, in order that he might apply to a court of equity for an injunction, he informed the plaintiff's attorney that he would forbear to levy under the writ for a few days, provided the plaintiff would give him 20l.; which the plaintiff's attorney refused to do. It further appears, that, after Slowman's partner, Baker, had entered, and the plaintiff had tendered to Baker, under protest, the amount demanded, Baker declined to accept the amount of the levy, or to withdraw, without the assent of Slowman; and Slowman, upon application to him, offered to withdraw the men in possession, provided he had a present of 20l.; and, on the Monday, Slowman received the amount, tendered to him also under protest, and withdrew the men.

We think these facts were evidence proper to be submitted to the jury upon the points insisted upon on the part of the plaintiff, viz. that Slowman assumed and took upon himself the control and direction of the execution of the warrant, and authorised the illegal mode of execution that was adopted. And we think there is no sufficient ground for saying that the conclusion to **[332]** which the jury came was wrong: and, therefore, as the court is of opinion that the several grounds upon which the rule was obtained, have failed, the rule must be discharged.

Rule discharged (*a*)[2].

End of Trinity Vacation.

(*a*)[1] Vide Com. Dig. Execution (C. 5); *Kerby* v. *Denby*, 1 M. & W. 336.

(*a*)[2] Vide *Reynolds* v. *Newton*, 1 Gale & D. 153; *Albridge* v. *Stanford*, 3 M. & G. 409.

[333] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term, were—Wilde, C. J., Maule, J., V. Williams, J., Talfourd, J.

MEMORANDA.

The Hon. Sir Thomas Coltman, one of the judges of the court of Common Pleas, died on the 11th of July last.

On the 28th of the same month, Mr. Serjt. Talfourd was appointed one of the judges of the court of Common Pleas, in the room of the late Mr. Justice Coltman. He shortly afterwards received the honour of knighthood, and took his seat on the first day of this term

[334] COX AND ANOTHER *v.* BEAVAN. Nov. 3, 1849.

In proceeding to outlawry after final judgment, the writ of allocatur exigent is properly tested on the day of the return of the exigi facias, and need not bear teste upon the quarto die post.

The plaintiffs having obtained judgment against the defendant, issued a ca. sa. against him on the 10th of November, 1848, returnable on the 21st of November.

A writ of exigi facias was afterwards issued, tested the 24th of November, and returnable on the 11th of January, 1849. The exigi facias was filed on the 27th of January, and on that day a writ of allocatur exigent issued, bearing teste the 11th.

Prideaux now moved for a rule to shew cause why the writ of allocatur exigent and subsequent proceedings should not be set aside for irregularity, with costs, on the ground that it was improperly tested on the return day of the exigi facias, instead of on the quarto die post. In Tidd's Practice, it is laid down (9th edit. pp. 129, 132), that, "where the plaintiff means to proceed to outlawry, the capias should be tested on the quarto die post of the return of the original, the alias on the quarto die post of the return of the capias, and the pluries on the quarto die post of the return of the alias; and there must be fifteen days at least between the teste and return of each writ;" and that the writ of exigi facias "should be tested on the quarto die post of the return of the pluries capias before, or of the capias after judgment." The practice is similarly laid down in 3 Bl. Comm. 283. And this view seems to receive confirmation from the 5th and 6th sections of the uniformity-of-process act, **[335]** 2 W. 4, c. 39 (*a*). In *Taylor* v. *Waters* (2 B. & C. 353, 3 D. & R. 575), the exigent was return-

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(*a*) The 5th section enacts, that, "upon the return of non est inventus as to any defendant against whom such writ of capias shall have been issued,* and also upon the return of non est inventus and nulla bona as to any defendant against whom such writ of distringas as hereinbefore mentioned shall have issued, whether such writ of capias or distringas shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of exigi facias and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of capias ad respondendum issued after an original writ: Provided always that every such writ of exigent, proclamation, and other writ subsequent to the writ of capias or distringas, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of capias or distringas, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of capias or distringas shall be sufficient for the able on the 17th of May, and the allocatur exigent, which was issued on the 30th of May, was tested on the quarto die post, which was the last day of Easter term. [V. Williams, J. The form (c) of the alloca-[336]-tur exigent given by Mr. Tidd, is, "We command you, that, allowing those ——— county courts (or, if in London, 'those ——— hustings') at which C. D. was demanded, and did not appear, as you have this day returned to our justices at Westminster, you do cause the said C. D. to be further demanded," &c. Maule, J. In *Stowell v. Lord Zouch* (Plowden, 371), which is cited in 2 Chitty's Archbold (8th edit. p. 1138), Dyer says: "that, if, upon the exigent, it is returned, that the party is quarto exactus, and that there is one county wanting, and upon this another writ issues allocato comitatu, this fifth county ought to be that which is next after the fourth, for, if it be not, but if the day of the fifth county is the day of the return of the exigent, or is passed before the date of the second writ, or if, upon other accident, the county at which he is outlawed be not the next after the fourth, it has been held by us in the Common Bench to be error; for, a time commenced ought to be continued without intermission." Wilde, C. J. The defendant is not bound to appear if only exacted at four courts or hustings. Your main argument, therefore, fails.] The direction at the end of the form in Tidd, to make the teste of the allocatur exigent "the day of the return of the exigent," is not supported by any authority: and there certainly is no reason why the allocatur exigent should in this respect be different from any of the other proceedings.

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* Since the passing of the 1 & 2 Vict. c. 110, the only mode of proceeding to outlawry is upon the writ of distringas.

Wilde, C. J. It appears to me that the objection to the writ of allocatur exigent in this case, cannot be sustained. The only direct authority that has been referred to on the subject is, the form in Mr. Tidd's Appendix, to which my brother Williams called our attention, and which expressly shews that the teste of [337] the allocatur exigent is to be the day of the return of the exigi facias. I think Mr. Tidd could hardly have been so mistaken as to introduce the formal allegation, "as you have this day returned," &c., without some good foundation.

The rest of the court concurring,

Rule refused (a).

HEGINGBOTHAM *v.* THE SOUTH-EASTERN AND CONTINENTAL STEAM-PACKET COMPANY. Nov. 5, 1849.

In case against the defendants for disturbing the plaintiff in his occupation of an hotel, —the defendants pleaded that they were a joint-stock company, registered pursuant to the 7 & 8 Vict. c. 110, for the purpose of establishing and carrying on a communication, by means of steam-boats, between England and certain ports of France, being a purpose of great general and public utility and advantage; that it was necessary for them, for the purpose of carrying on the said communication, to construct and repair steam-boats and other vessels, and the machinery thereof; that it was greatly for the public advantage that the said construction and repairs of the

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purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed."

And the 6th section enacts, that "after judgment given in any action commenced by writ of summons or capias under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: Provided always that every outlawry or waiver had under the authority of this act shall and may be vacated or set aside by writ of error, or motion, in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside."

(c) Tidd's Forms, 8th edit. 44. And see Chitty's Forms, 6th edit. 531.

(a) In proceedings by original writ, the capias not being returnable on a day certain, the first writ of exigent could not bear teste of a day earlier than that on which the court became seised of the proceedings, by the actual return of the capias,—that is, the quarto die post. But, inasmuch as the exigi facias was returnable on a day certain, the allocatur exigent might, and usually did, bear teste of the actual return day of the exigi facias.

said steam and other vessels should be executed at some convenient place near to the port of F., because the same could be there done at less expense, and so the company would be enabled to charge the public lower rates or fares; that the premises where the alleged nuisances were committed, were a convenient place near to F. for the purpose aforesaid; and that the noises, &c., complained of, were necessarily and unavoidably made in the execution of such repairs, &c.—The plaintiff replied, admitting that the defendants were a joint-stock company registered pursuant to the statute, de injuriâ suâ propriâ absque residuo causæ; and added the similiter, and, on the 7th of July, delivered the issue, with notice of trial for the then next assises.—On the 17th of July, the defendants gave notice that they had struck out the similiter, and delivered a demurrer to the replication, on the ground that, the plea not consisting of mere matter of excuse, de injuriâ was inapplicable. On the 29th, a judge, on summons, set aside the demurrer as frivolous, and ordered that the issue delivered should stand, and the cause be tried accordingly. The cause was tried, and the plaintiff obtained a verdict:—Held, that the order was properly made, and the trial regular.

This was an action upon the case. The declaration stated that the plaintiff, before and at the time of the committing of the grievances thereinafter mentioned, **[338]** was and continued possessed of a messuage, &c., in the county of Kent, called the Royal George Hotel, and carried on the trade and business of an hotel-keeper; and that the defendants were possessed of certain workshops, buildings, and premises situate near the said messuage, &c., of the plaintiff: nevertheless, that the defendants, contriving and intending, &c., to interrupt, disturb, disquiet, and annoy the plaintiff and his family in the peaceable and quiet possession and occupation of the said messuage, &c., and in the exercise therein of his trade, &c., on the 20th of May, 1849, and on divers other days and times, &c., wrongfully, &c., made, and caused to be made, in and upon their said workshops, buildings, and premises, divers loud, heavy, jarring, stunning, hammering, and battering sounds and noises, to wit, in the working of iron, and in making and repairing divers iron boilers, funnels, and other iron vessels, instruments, and things, and continued, &c., for divers long spaces of time, and at unseasonable hours and times, to wit, throughout all the days aforesaid; and that, by means of the premises, the plaintiff and his family had been and were greatly disturbed and disquieted, incommoded, interrupted, and annoyed in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage, &c., and the said messuage, &c., of the plaintiff had been and were, by means of the several premises aforesaid, greatly lessened in value; and also that, by means of the several premises, the plaintiff, for and during all the time afore-**[339]**-said, had been greatly disturbed and interrupted in his said trade and business, and divers, to wit, two hundred, guests, who would otherwise have remained and resided in his said hotel, to his great profit, did, by reason of the said noises and sounds, quit and leave the same, and divers, to wit, two hundred, other persons who would have otherwise come to reside at his said hotel, to his great profit, did, by reason of the said noises and sounds, abstain from so coming to reside as aforesaid; and the plaintiff, by reason of the premises, and of the said noises and sounds, was prevented from carrying on and exercising his said trade and business in his said messuage, &c., in as beneficial and profitable a manner as he otherwise might and could have done, &c.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff was not possessed of the messuage, &c., in manner and form, &c.,—thirdly, that the defendants were not possessed of the said workshops, buildings, and premises, in manner and form, &c.,—fourthly, that, before and at the time, &c., the defendants were, and from thence hitherto had been, and still continued, a joint-stock company, registered pursuant to the provisions of a certain act of parliament made and passed in the eighth year of the reign of Her Majesty Queen Victoria, intituled "An act for the registration, incorporation, and regulation of joint-stock companies" (7 & 8 Vict. c. 110), and constituted and formed, under and according to the provisions of the said act, for the purpose of establishing and carrying on a convenient and efficient communication by means of steam-boats between the several ports of the counties of Kent and Sussex, approached by a certain railway called the South-Eastern Railway, and, amongst others, the port of Folkstone, in the county of Kent aforesaid, and various ports on the continent of Europe, and, amongst others, the ports of Boulogne and

Calais, in France, the said [340] purpose being of great general and public utility and advantage: that, during all the said time in the introductory part of this plea mentioned, they had, according to the said purpose, carried on, and still did carry on, a convenient and efficient communication between the said several ports, by means of steam-boats and other vessels used by the defendants for the conveyance and transmission, for reasonable hire and reward to the defendants at certain rates and fares charged and demanded by the defendants in that behalf, of passengers and goods to and from the said several ports, to the great advantage of the public: that, during all the time aforesaid, it became and was necessary for the defendants, for the purpose of carrying on the said communication, from time to time to construct divers steam-boats and other vessels, and also to do and execute divers necessary repairs of the said steam-boats and other vessels, and of the machinery belonging to, and connected with, the same: that, during all the said time, it was greatly for the public advantage that the said construction of the said steam-boats and other vessels, and the said repairs of the same, should be carried on, done, and executed at some convenient place near to the port of Folkstone aforesaid, because the same respectively could be carried on, done, and executed at such place, at a much less expense to the defendants, to wit, at 5000l. less annual expense to the defendants, than would have been necessarily incurred by them in carrying on, doing, and executing the same respectively at a place not near to the said port of Folkstone aforesaid, and by reason thereof the defendants were enabled to charge and demand upon and from the public cheaper and less rates and fares for such conveyance and transmission of passengers and goods to and from the said several ports as thereinbefore mentioned, to wit, to the amount of 5000l. annually less than they would otherwise necessarily [341] have charged and demanded as reasonable rates and fares in that behalf: that the said workshops, buildings, and premises of the defendants in the declaration mentioned, were a convenient place near to the port of Folkstone for the carrying on and doing and executing of the construction of the said steam-boats and other vessels, and of the said repairs of the same as aforesaid, and that there were no other place near to the port of Folkstone aforesaid equally convenient for the said purpose: that, during the said time in the introductory part of this plea mentioned, to wit, on, &c., and on other days from time to time as occasion required, they did, in the said workshops, buildings, and premises of the defendants in the declaration mentioned, construct divers, to wit, fifty steam-boats and other vessels, and also there did and executed divers necessary repairs in and upon the same, and in and upon divers, to wit, one hundred other steam-boats and other vessels of the defendants, to be used by the defendants for the said purpose thereinbefore mentioned, and for no other purpose, constructing, doing, and executing the same respectively in a reasonable and proper manner, and at reasonable and proper times and hours, to wit, during the daytime, making no unnecessary noise and disturbance, and, in so doing, did necessarily make the said loud, heavy, jarring, stunning, hammering, and battering sounds and noises in the declaration mentioned, the same being necessary and unavoidable, therein, and not in any unnecessary or unreasonable degree,—verification. There were other pleas, to which it is unnecessary more particularly to advert.

To the fourth plea the plaintiff replied, that, although true it was that the defendants were and continued a joint-stock company registered pursuant to the provisions of the said statute, and constituted and formed under and according to the provisions of the said act, as [342] in the said fourth plea in that behalf mentioned; yet that the defendants, of their own wrong, and without the residue of the cause by them in the said fourth plea alleged, committed the grievances in the declaration mentioned, in manner and form as in the declaration alleged,—concluding to the country.

The plaintiff's attorneys, having added a similiter, delivered the issue on the 13th of July, 1849, with a notice of trial for the next assizes at Maidstone. The defendants' attorneys, on the 17th, gave notice that they had struck out the similiters to the replications to the fourth, fifth, and last pleas, and demurred to the replication to the fourth plea, on the ground that, the plea not setting up mere matter of excuse for the committing of the grievances in the declaration mentioned, the replication de injuriâ was inappropriate. In the margin of the demurrer was the usual note,—"the grounds of demurrer are specially stated in the body of it."

On the 18th of July, the plaintiff's attorneys took out a summons before Lord Denman, calling upon the defendants to shew cause why the demurrer should not be set aside, on the ground that no sufficient statement appeared in the demurrer, or the margin thereof, of any matter of law intended to be argued, and that such demurrer and statement were frivolous; and why the issue already delivered, and notice of trial, should not stand. And on the 19th, his lordship made an order in the terms of the summons.

On the same day (the 19th) the defendants' attorneys took out a summons to rescind that order, which was attended before Lord Denman on the following day,—when his lordship, conceiving the demurrer to be frivolous, dismissed the summons: whereupon the defendants' attorneys gave notice to the plaintiff's attorneys, that, if the plaintiff proceeded to trial, he would do so at his peril, and that the defendants would move the court in **[343]** the ensuing term to set aside the order of the 19th of July and any trial or other proceedings which might be had or taken under or in pursuance thereof, and to restore the defendants' demurrer.

The cause was taken as undefended, and a verdict found for the plaintiff, with 15l. damages.

Willes now moved for a rule nisi to set aside the order of Lord Denman, and all subsequent proceedings. Independently of the question whether the demurrer was frivolous or not, the trial was irregular,—there having been no issue joined with the assent of both parties. The learned judge had no power to fetter the defendants in the way he has assumed to do: the proper course would have been, to enable the plaintiff to sign judgment, if he thought the demurrer frivolous. The demurrer, however, was not frivolous. The objection to the replication appears to have been, that the general replication de injuriâ was inapplicable to a plea which did not set up mere matter of excuse, but amounted to a denial (though possibly an argumentative denial) of the matters alleged in the declaration. [Maule, J. And therefore was a plea that should have been demurred to, as affording no answer to the action at all. *The King* v. *Russell* (6 B. & C. 566, 9 D. & R. 566).]

Wilde, C. J. It strikes me that the order of Lord Denman was, under the circumstances, quite correct. When the issue was delivered, it was competent to the defendants to strike out the similiter. They do so, and then demur to the replication to the fourth plea. The plaintiff, thinking the demurrer frivolous, applies to Lord Denman to strike out the demurrer, and leave the record as it stood before. The defendants insists before **[344]** the learned judge upon their right to retain their demurrer. He thinks they are not entitled to it, and makes an order accordingly, directing the trial to proceed upon the issue as delivered. The defendants then give a written notice, that, if the plaintiff proceeds to trial upon that order, they will move to set it aside, and to restore the demurrer. No offer was made of any judgment, as is now suggested (by way of after-thought) to have been the proper course: the judge and the plaintiff were entirely misled.

Maule, J. I agree with my lord chief justice that there is no ground for this application. I also agree that the demurrer was frivolous. The plea was a plea in excuse (*a*), and not in denial,—setting up a reason, and a bad one, for doing that which was complained of in the declaration.

The rest of the court concurring,

Rule refused (*b*).

[345] Westropp and Others *v.* Solomon. Nov. 7, 1849.

[S. C. 19 L. J. C. P. 1; 13 Jur. 1104. Distinguished, *Raphael* v. *Burt*, 1884, Cab. & El. 328.]

On the 10th of March, 1847, A. employed B., a share-broker and member of the London Stock-Exchange, to sell for him certain documents which purported to be scrip or certificates, each for fifty shares, in a projected railway company. On the 27th B. sold these certificates to C., and handed over the proceeds to A. The

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(*a*) See *Crogate's case*, 8 Co. Rep. 66, 1 Smith's Leading Cases, 53.

(*b*) The plea states that the operations complained of, enabled the defendants to charge and demand from the public less rates and fares; but, whether any benefit had arisen, or was likely to arise, to the public, does not distinctly appear.

certificates being subsequently found to be forged, B. was, on the 11th of May, called upon and obliged to pay (pursuant to a resolution of a committee of the Stock-Exchange) to C. a certain agreed value as for genuine certificates of that company, and which considerably exceeded the price for which he had sold the spurious certificates.—In an action by B. against A. to recover the sum so paid by him to C., the declaration contained a special count averring a promise by A. that the certificates were genuine, and a count for money paid. Upon the latter count, A. paid into court the sum he had received on the original sale, with interest: Held, that B. was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine; and that, under the count for money paid, B. was only entitled to recover the amount actually paid by him to A.—Held also, that the resolution of the committee of the Stock-Exchange, made after the transaction was completed, however it might bind the members of that body, could not affect A.

This was an action of assumpsit. The first count of the declaration stated that the plaintiffs, before and during all the times thereinafter mentioned, had carried on, and still did carry on, the trade or business of share-brokers, in co-partnership together; and that thereupon, and before the commencement of the suit, to wit, on the 12th of May, 1846, in consideration that the plaintiffs, as such brokers, at the request of the defendant, would, for certain reasonable reward to be therefore paid to the plaintiffs as brokers as aforesaid by the defendant in that behalf, sell for the defendant and on his account, certain, to wit, 5000, scrip or certificates for shares, purporting to be script or certificates for shares in a certain company, to wit, "The Buckinghamshire, Oxford, and Bletchley Junction Railway Company," at the best market price to be then obtained for the same, the defendant then promised the plaintiffs, as such brokers as aforesaid, that the said scrip or certificates for shares were genuine scrip or certificates for shares in that **[346]** company, and issued by them the said company: that the plaintiffs, as brokers as aforesaid, confiding in the promise of the defendant, afterwards, to wit, on the day and year last aforesaid, received and took from the defendant the said scrip or certificates for shares, purporting as aforesaid, and, as brokers as aforesaid, afterwards, to wit, on the day and year aforesaid, sold and disposed of the same as genuine scrip or certificates for shares in the said company, and issued by the said company, to divers persons, at certain reasonable, and the best market prices to be then obtained for the same, for and on account of the defendant, to wit, the market price, amounting in the whole to 492l. 10s. 6d., paid by the said purchasers thereof to the plaintiffs as such brokers, and which last-mentioned sum of money the plaintiffs thereupon then, to wit, on the day and year last aforesaid, paid over to the defendant,—being the purchase-money on the sale of the said scrip or certificates for shares so delivered by the defendant to the plaintiffs: yet that the defendant did not perform or regard his said promise, but then deceived and defrauded the plaintiffs, in this, to wit, that the said scrip or certificates for shares purporting to be such in the said company, were not, nor were any of them, genuine scrip or certificates for shares in the said company, and issued by the said railway company; but that, on the contrary thereof, the same, and every of them, were forged, false, spurious, and invalid scrip or certificates for shares, and of no use, interest, or value in the said company, and of no use, interest, or value whatever to the said purchasers of the same as aforesaid. The count then proceeded to state, that afterwards, and before the commencement of this suit, to wit, on the 1st of May, 1846, the said purchasers of the said false scrip from the plaintiffs, as brokers as aforesaid, as genuine as aforesaid, ascertained, as the fact was and is, that **[347]** the said scrip or certificates for shares delivered by the defendant to the plaintiffs, as brokers as aforesaid, were and are forged, false, spurious, and invalid scrip or certificates for shares in the said company, and were not, nor were any one of them, issued by the said company, or by their authority; and that afterwards, to wit, on the day and year last aforesaid, the said purchasers of the same from the plaintiffs, as brokers as aforesaid, called on the plaintiffs, as such brokers as aforesaid, according to the law and usage in that behalf, to repay to them the said sums of money or prices aforesaid, amounting, to wit, to 492l. 10s. 6d., together with certain large damages which they then claimed and demanded of and from the plaintiffs, as such brokers, and which the said purchasers had incurred and lost by reason of the said premises, and together with certain large damages which they then claimed and demanded of and from the plaintiffs, by reason of the premises aforesaid, for divers large sums and moneys which they the said purchasers had lost and would have obtained and gained, on the rise of the market price and value of genuine scrip or certificates for shares in the said company, issued by them the said company, amounting to a large sum, to wit 1300l., and which the plaintiffs were then forced and obliged to pay to the said purchasers, by reason of the said scrip or certificates turning out, as the fact was and is, false and spurious as aforesaid, according to law and usage in that behalf: and that the moneys so paid by them to the said purchasers were less than were required or were necessary or sufficient to enable the said purchasers, or the plaintiffs, to replace to them the purchasers genuine scrip or certificates for shares in the said company, and issued by the said railway company, by purchasing equal numbers respectively of genuine scrip or certificates for shares, at such prices as it was then possible for them respectively to purchase the same.

[348] The declaration also contained a count for money paid, money had and received, and interest, and a count for money due upon an account stated.

The defendant pleaded,—first, to the first count, non assumpsit,—secondly, to the same count, that the said scrip or certificates for shares were genuine scrip or certificates for shares in the said company, and were issued by the said company; concluding also to the country,—thirdly, as to the causes of action in the second, third, and fourth counts mentioned, so far as they related to the said sum of 492l. 10s. 6d., parcel, &c., that the plaintiffs ought not further to maintain their action in respect thereof, because the defendant brought into court 492l. 10s. 6d. ready to be paid to the plaintiffs, and the defendant said that the plaintiffs had not sustained damages to a greater amount than the said sum of 492l. 10s. 6d. in respect of the causes of action in the introductory part of that plea mentioned; verification, &c.,—fourthly, as to the residue of the causes of action in the second, third, and fourth counts mentioned, and not before pleaded to, non assumpsit.

The plaintiffs joined issue on the first, second, and fourth pleas; and, as to the third, replied by taking out of court the 492l. 10s. 6d., in satisfaction and discharge of the causes of action in the second, third, and fourth counts respectively mentioned, so far as they related to that sum.

The cause came on for trial before Wilde, C. J., at the sittings in London after Hilary term, 1847, when a verdict was entered for the plaintiffs for 1300l., subject to the opinion of the court upon the following case:—

The plaintiffs are stock and share brokers, and members of the Stock-Exchange in London. The defendant is a bill discounter in London: he is not a member of the Stock-Exchange.

On the 9th of March, 1846, a person applied to the **[349]** defendant, requesting him to make an advance of money by way of loan, upon the security of certain instruments purporting to be certificates of certain shares issued by the Buckinghamshire, Oxford, and Bletchley Junction Railway Company, and which were in the form set out at the end of the case,—each certificate purporting to relate to fifty shares.

On the 10th of March, 1846, the defendant took one of the instruments so offered as the security for the advance, to the plaintiffs' office, and inquired of Melhado, one of the plaintiffs, if the instrument was good. Mr. Melhado said it was good, but to satisfy the defendant he would go into the market, and inquire if it was good. He did so, and returned and said "it is good—it is all right;" or, as the witness believed the words were, "it is all right."

The defendant, after receiving this information, on the same day, made the required advance upon the security of the said certificates,—being the same as those sold by the plaintiffs for the defendant, as hereinafter mentioned.

On the 27th of March, 1846, the defendant employed the plaintiffs to sell for him the ten certificates upon which the defendant had made the advance of money under the circumstances before mentioned; and the defendant delivered the certificates to the plaintiff for that purpose.

The plaintiffs sold the ten certificates according to the defendant's orders, and paid him the balance of the proceeds of the sales, after deducting the commission payable in respect of the sale.

The gross proceeds were	£487	10	0
Commission deducted	15	12	6
Net proceeds, paid by plaintiffs to defendant . .	£471	17	6

[350] A part of the certificates, that is to say, four certificates, were sold by the plaintiffs to Grisewood & Co., three to John Jones, and one to J. Starling, who were all members of the Stock-Exchange; and the sales were made to them in the Stock-Exchange. Other part of the said certificates, that is to say, two, were sold to a person of the name of Miles, who was not a member of the Stock-Exchange; and the sale was not made to him in the Stock-Exchange.

After the sales, suspicion arose in the share-market, that forged certificates purporting to refer to shares issued by the before-mentioned company, were in circulation: and that suspicion was followed by an exhibition at the office of the company of numerous certificates: and the ten certificates sold by the plaintiffs as above stated, among many others, were found to be forgeries.

In consequence of the discovery of the forgeries, a committee was appointed by the subscribers of the Stock-Exchange, to deliberate and determine what was proper to be done among the parties who had had transactions and dealings in that establishment, relating to such forged certificates: and that committee adopted and published the following resolution upon the subject:—

"That the holders of shares of the Buckinghamshire Railway Company, which have been declared by the company to be spurious, shall have the right to demand of the sellers thereof genuine shares in exchange, or, until such can be procured, to pay for the same at the rate of 2l. 12s. per share (10s. premium); such amount to be retained until genuine shares are delivered."

By the regulations and practice of the Stock-Exchange, all brokers, although they may, in fact, be dealing for others as principals, are deemed to be principals, and liable as such; and are required to meet the responsibilities they so incur, under pain of expulsion.

[351] The rules and regulations of the Stock-Exchange profess to apply only to members of the establishment, and to transactions taking place within such establishment.

A copy of the rules and regulations accompanies this case, and is signed by the respective attorneys; and they may be referred to by either side, in the argument, so far as the court shall be of opinion that either party is entitled by law to use them against the other, but no further,—their being produced to the court by consent, not to be deemed to import a consent or admission entitling either party to use or refer to them, except so far as by law they may.

After the discovery of the forgeries, the plaintiffs were called upon by the respective purchasers, to refund the purchase-money, or to indemnify them from loss: whereupon the plaintiffs called upon the defendant, as their principal, for instructions and indemnity; and the following correspondence took place between them:—

"London, 9th May, 1846.

"Leon Solomon, Esq., Jermyn St.

"Dear Sir,—In addition to our personal communications with you upon the subject, we deem it necessary to inform you that 500 scrip shares in the Buckinghamshire Railway Company, which you delivered to us for sale on the 27th of March, numbered as at foot, and which we passed into the market, have been found to be spurious documents, not issued from the office of the company; and that they will be brought back to us with a claim from the purchasers for authentic scrip certificates, which we shall immediately be compelled to meet on your account, by the delivery of good and undoubted documents. We would strongly urge you, therefore, at once to give us authority to purchase on your account the number of proper shares, while the [352] price of them continues low; as, otherwise, we may be forced to do so at a high price, the whole loss of which falls upon yourself, as, of course, we look to you, from whom we received the spurious documents, to bear us harmless in the transaction. We earnestly recommend your immediate attention to this matter, as the premium on Buckinghamshire shares is hourly on the increase.—Yours faithfully,"

(Signed) "WESTROP, PRINSEP, & MELHADO.

"No. 22,951 @ 23,000	50
40,401 @ 40,450	50
22,901 @ 22,950	50
40,101 @ 40,150	50

No. 22,851 @ 22,900	50
40,051 @ 40,100	50
22,601 @ 22,650	50
40,701 @ 40,750	50
40,501 @ 40,550	50
22,551 @ 22,600	50"

No answer was sent to that letter: and, on the 11th of May, 1846, the plaintiffs delivered to the defendant the following letter:—

"75 Old Broad St., 11 May, 1846.

"Leon Solomon, Esq., 66 Jermyn St.

"Dear Sir,—With reference to our letter of Saturday's date, we have now to inform you that we have been called upon by the parties who received your Buckinghamshire scrip from us, to deliver to them good and authentic scrip in lieu of those which have been proved at the office of the company to be spurious. We have, therefore, to inform you that it has become absolutely necessary for you to authorise us to-morrow to purchase such shares on your account, to enable us to deliver them. And we request you will put us in funds for the purpose, as, by the rules of our market, we shall **[353]** not be able to put off the claim. We must particularly request that you will favour us with your answer before twelve o'clock,—in fact, the earlier the better,—as it is possible the market may be more unfavourable for your interests than at present. They were done to-day at $\frac{3}{4}$ premium.—Yours faithfully,"

(Signed) "WESTROPP, PRINSEPP, & MELHADO."

The defendant refused to give any instructions or indemnity; and the plaintiffs afterwards, yielding to the demands made upon them by the respective purchasers of such forged certificates, paid certain sums of money by way of damage or compensation to such respective purchasers,—such payments being calculated and adjusted upon the principle laid down in the resolution of the Stock-Exchange committee; and which payments amounted in the whole to the sum of 1300l., that is to say,

	£	s.	d.
To Grisewood & Co., who were, as before stated, members of the Stock-Exchange, and in respect of sales made to them in the Stock-Exchange	520	0	0
To Mr. John Jones, like member of the Stock-Exchange	260	0	0
To J. Starling do.	260	0	0
To Mr. Miles, the sum of	260	0	0

It is to be taken as an undoubted fact, that both the plaintiffs and the defendant acted throughout, up to the time of the forgeries being discovered by inquiry at the office of the company long after the sales, in the belief that the certificates referred to, were genuine available certificates, duly issued by the company mentioned therein. **[354]** The forgeries were so well executed as to excite no suspicion, and passed currently in the market with genuine scrip.

The defendant has paid into court the sum of 492l. 10s. 6d.

The instruments referred to were in the form following; and each purported to apply to fifty shares:—

"1845. "Buckinghamshire Railway, (and Oxford and
"Scrip. Bletchley Junction.)

"Provisionally registered.

"Capital £2,250,000, in shares of £20 each. Deposit, £2 2 0 per share.

"No. 22,601 to 22,650. The holder of this voucher is entitled to

"Fifty Shares.

in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares.

"By order of the provisional committee of management,

"W. HARDING, Secretary."

The prices of genuine scrip on the 27th of March, 1846, and thence up to the 16th of May following, were as follows,—£20 per share, 2l. 2s. paid:

"March 27. 1l. to 1l. 5s. discount.
28. 1l. to 17s. 6d. discount, and so continued to the 1st of April.
April 1. 1l. 2s. 6d. to 15s. discount.
From April 1 to April 24 the price fluctuated from 1l. 5s. to 15s. discount.
From April 24 to April 28 nothing appears to have been done in them.
April 28. Prices quoted at from 12s. 6d. to 15s. discount.
[355] April 29. Prices quoted at from 12s. 6d. to 5s. discount.
30. At par.
31. At par. 1s. to 5s. discount.
May 2. At par, to 2s. 6d. discount.
4. At par, to 5s. premium.
May 4 to 8. Prices fluctuated between par and 7s. 6d. premium.
8. From 1l. 2s. 6d. to 10s. premium.
9. From 1l. to 12s. 6d. premium.
11. From 17s. 6d. to 10s. premium.
12. At 10s. premium.
May 13. From 10s. to 5s. premium.
14, 15. At 10s. premium.
16. From 5s. to 10s. premium: and they went gradually down to discount."

The court is to adopt such inferences of fact from the statements in the case, as it may think a jury ought or might properly have drawn.

The question for the opinion of the court is,—whether the plaintiffs are entitled to recover against the defendant any, and, if any, what, sum of money exceeding the amount paid into court. If the court shall be of opinion that the plaintiffs are entitled to recover, then a verdict is to be entered for the plaintiffs for such sum, on such counts, and on such issues, as the court shall direct. If the court shall think the plaintiffs are not entitled to recover any sum beyond the amount paid into court, then a nonsuit to be entered.

Hoggins, for the plaintiffs (*a*). Under the circumstances stated in this case, the plaintiffs are entitled to [356] call upon the defendant for a full indemnity. The case, in effect, resolves itself into one of principal and agent. The general rule of law is thus laid down by Dr. Story (Story on Agency, 3rd edit. p. 435): "If an agent has, without his own default, incurred losses or damages, in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor (*b*). Thus, for example, if an agent, in consequence of a deception practised upon him by his principal, and in pursuance of orders, innocently makes a false representation of the quality of the goods of his principal, and he is compelled to pay damages to a purchaser on account thereof, he will be entitled to a full remuneration from the principal (*c*). So, if an agent has innocently, and without any notice of an adverse title, converted the property of a third person, under the direction or authority of his principal, claiming it as owner, and a recovery is subsequently had against him therefor by such third person, he will be entitled to a

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(*a*) The points marked for argument on the part of the plaintiffs, were,—"That, having sold for the defendant, at his request, and as his brokers, the scrip or certificates for shares purporting to be scrip or certificates for shares in the Buckinghamshire, Oxford, and Bletchley Junction Railway, which turned out to be forgeries, and of no value, they were entitled to recover from the defendant the proceeds of such sale, which they paid to him (492l. 10s. 6d.), with interest thereon from the time of such payment, and also damages amounting to 1300l., which the plaintiffs had been forced to pay, and had paid, to the purchasers of the said scrip or certificates from the plaintiffs, as brokers for the defendant."

(*b*) Citing *Ramsay* v. *Gardner*, 11 Johns. R. 439; *Powell* v. *The Trustees of Newburgh*, 19 Johns. R. 284; *D'Arcy* v. *Lisle*, 5 Binn. R. 441; *Stocking* v. *Sage*, 1 Day, Conn. R. 522; *Hill* v. *Packard*, 5 Wend. R. 375; *Rogers* v. *Kneeland*, 10 Wend. R. 219.

(*c*) Citing Paley on Agency (by Lloyd), 152, 301; *Southern* v. *How*, Bridgman, 125; 2 Molloy de Jur. Marit. b. 3, ch. 8, § 6, pp. 329, 330; Cro. Jac. 468.

reimbursement from his principal (*d*). Indeed, it may be stated, as a general prin-**[357]**-ciple of law, that an agent, who commits a trespass, or other wrong, to the property of a third person, by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts bonâ fide, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby (*a*). For, although the general doctrine of the common law is, that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification, that the parties know, at the time, that it is a wrong (*b*). And, in all these cases, there is no difference, whether there be a promise of indemnity or not; for, the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently, and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him." In *Brittain* v. *Lloyd* (14 M. & W. 762), it was held that an action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, **[358]** express or implied, of the defendant, with an undertaking, express or implied, to repay it. The rule which prevents contribution or indemnity as between tort-feasors, applies only where the act is of an obviously illegal character: *Betts* v. *Gibbins* (2 Ad. & E. 57, 4 N. & M. 64). Here, the plaintiffs were compelled, by the rules and regulations applicable to persons in their position, to refund the money to those who purchased the scrip of them; and there are several authorities which shew, that, under these circumstances, they are entitled to call upon their principal for an indemnity, even though the principal be ignorant of the existence of the rules which bind the agent: *Sutton* v. *Tatham* (10 Ad. & E. 27, 2 P. & D. 308: *Bayliffe* v. *Butterworth* (1 Exch. 425; *Bayley* v. *Wilkins* (ante, vol. vii. p. 886). In *Sutton* v. *Tatham*, Littledale, J., says (10 A. & E. 30): "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." So, in *Bayliffe* v. *Butterworth*, Parke, B., says: "I take it to be clear law, that, if there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way:" and Alderson, B., adds: "A person who deals in a particular market, must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place." And Coltman, J., in *Bayley* v. *Wilkins*, says: "A person who goes into the Stock-Exchange to buy shares, must be supposed to have a knowledge of **[359]** the usual course of business there, and of the law applicable to it." *Young* v. *Cole* (3 N. C. 724, 4 Scott, 489) is precisely in point: there, the plaintiff, a stock-broker, sold for the defendant four Guatemala bonds, and paid him the amount: the bonds, after they had been in the hands of the purchasers two days, were discovered not to be marketable, whereupon the plaintiff took them back, and reimbursed the purchaser: and it was held that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant. Tindal, C. J., there says: "The money which the plaintiff delivered to the defendant was his own money, for, he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered

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(*d*) Citing Paley on Agency (by Lloyd), 152, 301; *Adamson* v. *Jarvis*, 4 Bingh. 66, 12 J. B. Moore, 241; *Allaire* v. *Ouland*, 2 Johns. Cas. 54; *Coventry* v. *Barton*, 17 Johns. R. 142; *Avery* v. *Halsey*, 14 Pick. R. 174.

(*a*) *Adamson* v. *Jarvis*, 4 Bingh 66, 12 J. B. Moore, 241: *Fletcher* v. *Harcot*, Hutton, R. 55; *Powell* v. *The Trustees of Newburgh*, 19 Johns. R. 284; *Avery* v. *Halsey*, 14 Pick. R. 174; *Coventry* v. *Barton*, 17 Johns. R. 142.

(*b*) *Merryweather* v. *Nixan*, 8 T. R. 186; *Adamson* v. *Jarvis*, 4 Bingh. 66, 12 J. B. Moore, 241. (The case of *Farebrother* v. *Ansley*, 1 Campb. 343, seems overruled in its leading principle by that of *Adamson* v. *Jarvis*), 2 Liverm. on Agency, 316-318 (edit. 1818), 320, 324, 325; *Fletcher* v. *Harcot*, Hutton, R. 55; (*Battersey's case*) Winch, R. 48; *Humphrys* v. *Pratt*, 2 Dow & Clark, 288; *Betts* v. *Gibbins*, 2 Ad. & E 57, 4 N. & M. 64; *D'Arcy* v. *Lisle*, 5 Binn. R. 441; *Powell* v. *The Trustees of Newburgh*, 19 Johns. R. 284: *Coventry* v. *Barton*, 17 Johns. R. 143; *Avery* v. *Halsey*, 14 Pick. 174.

the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock-Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money, has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." And Bosanquet, J., says: "No consideration has been given for money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock-Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. According to the principle established by *Child* v. *Morley* (8 T. R. 610), the defendant was bound to reimburse the plaintiff what he was thus compelled **[360]** to pay: for, it appeared to be the custom of the Stock-Exchange, that, in these cases, the broker is treated as principal, and liable to be expelled if he does not make good his differences." And Coltman, J., says: "The bonds which the plaintiff had sold at the defendant's request were not Guatemala bonds, in the sense of the Stock-Exchange. Therefore, even considering the plaintiff only as agent, when he received authority from the defendant to sell the bonds, he received an implied authority to act as all brokers do upon similar occasions, that is, to rescind the contract, if the article delivered turns out not to be the article sold." [Maule, J. There, the money had been paid under a mistake.] That is precisely the case here. And there is no substantial distinction between the money paid as the value of the scrip, and the money paid as damages for the losses sustained by the sub-purchasers. In *Lamert* v. *Heath* (15 M. & W. 486), the defendant, a share-broker, bought for the plaintiff scrip certificates, which were sold in the share-market at a premium, as "Kentish Coast Railway scrip," and were signed by the secretary of the railway company: the genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority: in an action to recover back from the defendant the price paid to him by the plaintiff for this scrip, and for his commission, on the ground of the scrip not being genuine,—it was held that the proper question for the jury, was, whether what the defendant intended to buy was that which was sold in the market as "Kentish Coast Railway scrip." So, here, the question is, was the scrip sold genuine scrip of the Buckinghamshire, Oxford, and Bletchley Junction Railway Company? [Maule, J. That case is totally beside the present. The order there was, **[361]** to buy Kentish Coast Railway shares, generally: here, the order was, to sell the particular certificates, the party having the identical pieces of paper then in his hands.] It is submitted that the plaintiffs are entitled to recover, as well upon the special count as upon the count for money paid, upon the principle of indemnity. It may be urged, on the other side, that the plaintiffs, upon the facts stated in the case, warranted to the defendant that the scrip was genuine, and so induced him to advance money upon it. The inquiry, however, stated in the case, must be taken to have referred to the character and market value of the line, and not to the genuineness of the documents. The broker would have no peculiar means of knowledge on that subject. [Maule, J. I should have thought that the proper way of ascertaining whether the scrip was genuine or not, was, to inquire at the office of the company.] The proper measure of damages will be, the market value of the shares at the time of the breach of contract: *Shaw* v. *Holland* (15 M. & W. 136); *Tempest* v. *Kilner* (ante, vol. iii. p. 253). The contract was broken on the 11th of May, 1846, when the defendant refused to supply genuine scrip. At that date, the shares were at 10s. premium, which the plaintiffs have been compelled to pay: and to that extent they are clearly entitled to call upon the defendant for an indemnity.

Cowling, for the defendant (*c*). The defendant having repaid the plaintiffs the

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(*c*) The points marked for argument on the part of the defendant, were,—"That, as to the first count, he was entitled to the verdict, there being no proof of the agreement declared on, and particularly of the alleged promise: that, if not, the verdict should be reduced to nominal damages, because the rules of the Stock-Exchange, or at least those relied on by the plaintiffs, were not admissible against him, and because the breach of promise occurred at the time of the sales by the plaintiffs: and, as to the last issue, that the verdict should be for the defendant, the plaintiffs having been paid all the defendant received from them."

amount he received for the cer-**[362]**-tificates in question, and interest, is liable no further; and consequently the plaintiffs must be nonsuited. It is a fallacy to treat this as a case of principal and agent. Suppose the defendant had himself sold the scrip to the several purchasers,—apart from the rules of the Stock-Exchange,—what liability would he have incurred? Clearly none, beyond the liability to refund the sum he had received. This is not a sale of shares generally, or of shares to be delivered at a future time: it is a sale of a specific article, which both parties at the time conceived to be genuine scrip. It turned out that they were forged. The sale took place under a mistake: the result is, that the vendees have to return the shares, and the vendor the money. This is very like the well-known case of *Jones* v. *Ryde* (5 Taunt. 488, 1 Marsh. 157), where it was held, that a person who discounts a forged navy-bill (*b*), or who receives forged bank-notes in payment, from another, who passes them without knowledge of the forgery, may recover back the money, as money had and received to his use upon failure of the consideration. "The defendant," said Gibbs, C. J., "has put off this instrument as a navy-bill of a certain description; it turns out not to be a navy-bill of that amount (*c*)[1], and therefore the money must be recovered back. Both parties were mistaken in the view they had of this navy-bill: the one, in representing it to be a navy-bill of this description; the other, in taking it to be such. Upon its afterwards turning out that the bill was to a certain extent a forgery, we think he who took the money ought to refund it, to the extent to which **[363]** the bill is invalid. A case somewhat similar very frequently occurs in practice, on which I should not rely as governing the law, but that it is said by my brother Lens to be sanctioned on the authority of a case so decided at nisi prius by Mansfield, C. J., viz. where forged bank-notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be." The law is in all cases reluctant to raise implied promises: Com Dig. Covenant (A. 2). When a man sells a horse, no warranty is implied, even that it is his own horse, unless he so represents it at the time. This question was recently very much discussed in the court of Exchequer, in *Morley* v. *Attenborough* (3 Exch. 500), where it was held that there is no implied warranty of title, in the contract of sale of a personal chattel; and that, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct. Here, the sale was a sale of the specific documents, which were handed to the plaintiffs at the time. [Maule, J. A sale of ten scrip or certificates, at large, would import a contract to deliver genuine scrip.] Exactly so. In Kent's Commentaries (vol. ii. p. 468), it is said: "If the subject-matter of sale be in existence, and only constructively in the possession of the seller, as, by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future actual delivery (*c*)[2]. But, if the article intended to be sold has no existence, there can be no contract of sale. Thus, if A. sells his horse to B., and it turns out that **[364]** the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So, if A., at New York, sells to B. his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house, and not the ground on which it stood, was the essential inducement to the purchase" (*a*). If that be so, where the party himself is the seller, how does the case differ, because the sale is effected through a broker? It cannot be inferred that the defendant gave the brokers any authority to warrant the shares genuine. Then, do the rules and regulations of the Stock-Exchange impose upon the principal a liability he would not otherwise have incurred? The only rule set out in the case, is one which declares that brokers are liable inter se as principals. That merely places the plaintiffs in the same position as the defendant would have been in if he had sold the shares himself. [Maule, J. It may be that the rules of

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(*b*) Or victualling-bill,—*Bruce* v. *Bruce*, 5 Taunt. 495, n., 1 Marsh. 165.

(*c*)[1] The sum had been fraudulently altered after the issuing of the bill.

(*c*)[2] Citing *Boyd* v. *Siffkin*, 2 Campb. 326; *Withers* v. *Lyss*, 4 Campb. 237.

(*a*) Citing Pothier Contr. de Vente, n. 4; *Hitchcock* v. *Giddings*, 4 Price, 135, Daniel's Exch. R. 1; Story's Com. on Equity Jurisprudence, 157; *Allen* v. *Hammond*, 11 Peter's U. S. Rep. 63.

the Stock-Exchange apply to sales at large, and not to sales of specific shares. In that case it may be a wise and just regulation. I cannot help thinking that it is the common course to sell in that general way.] No rule is pointed out that at all affects this case: indeed, the circumstance of a committee of inquiry having been appointed, shews that there was no existing rule applicable to it. [Maule, J. The decision of the committee was after the date of the contract. How could the defendant be bound by any resolution come to under such circumstances? Hoggins. Every person who becomes a member of the Stock-Exchange signs an undertaking to be bound by any rules there-**[365]**-after to be made. Maule, J. That does not shew that he is to be bound by the decision of a committee to be appointed to investigate and decide on a particular case.] It may be conceded,—according to the authority of *Sutton* v. *Tatham*, *Bayliffe* v. *Butterworth*, and *Bayley* v. *Wilkins*, that, if there be any rule of the Stock-Exchange which pledges the broker to the genuineness of scrip sold by him, the principal is bound thereby. But this case is distinguishable. And, assuming that the rules do apply here, they can only apply to such of the dealings as took place on the Stock-Exchange.

As to the first count,—there is no such contract as therein alleged. The plaintiffs are merely stated to be share-brokers; nothing is said about the Stock-Exchange, or its rules. The consideration is, that the plaintiffs will sell for the defendant certain scrip or certificates for shares, purporting to be scrip or certificates for shares in a certain company,—not, that they will sell them as genuine scrip: and, if any promise that the scrip was genuine could be implied, it could only be implied from the authority to sell it as genuine. [Maule, J. The declaration would not be bad on that account: the contract is executory.] A promise to indemnify is all that the law will imply, as between principal and agent: and that is not the promise here alleged. And, as to the second count, the defendant clearly incurs no liability beyond the amount he has paid into court.

At all events, the damages can only be nominal. The question is, at what time the plaintiffs incurred a liability to their vendees. If there was any implied warranty, the breach of it took place at the very moment of the sale, and not at the time the discovery was made that the scrip was forged: *Howell* v. *Young* (5 B. & C. 259, 8 D. & R. 14). *Shaw* **[366]** v. *Holland* and *Tempest* v. *Kilner* are distinguishable: in both, the shares were to be delivered on a future day. In *Brittain* v. *Lloyd*,—the authority of which is not disputed,—the money was paid by the auctioneer at least under the implied authority of his employer. In *Betts* v. *Gibbins*, there was an express authority. *Young* v. *Cole* is a distinct authority to shew that the money paid into court in this case, is all that the plaintiffs could under any circumstances be entitled to recover.

Hoggins, in reply. *Sutton* v. *Tatham* shews that the plaintiffs are entitled to a full and complete indemnity. [Maule, J. There, the employment was to sell shares, generally, to be delivered at a future day: it was a mere speculation on the price.] The case finds, that, by the regulations of the Stock-Exchange, all members dealing as brokers are liable as principals. All are bound to obey the rules, under pain of expulsion. The determination of the committee to whom the question as to this particular scrip was referred, though, perhaps, not legally binding, was a finding as to what was right and just between the parties. The contract here is one of indemnity: no breach, therefore, could arise until the plaintiffs were called upon to pay the damages sustained by their vendees, and the defendant refused to repay them; and that state of things arose on the 11th of May. In *Morley* v. *Attenborough*, the defendant sold the specific chattel: there was no warranty of title. In *Jones* v. *Ryde* and *Bruce* v. *Bruce*, the plaintiffs had sustained no damage beyond that which they sought to recover: those cases, therefore, are materially distinguishable from the present. All the authorities as to implied warranty, will be found collected in the two cases of *Morley* v. *Attenborough* and *Burnby* v. *Bollett* (16 M. & W. 644). In **[367]** both of them the ground of action failed, because there was neither warranty, express or implied, nor fraud.

Maule, J. (*a*). This is an action of assumpsit: the declaration consists of a special count, and the common counts for money paid, &c. The special count in substance states, that the plaintiffs were share-brokers; that, in consideration that they would,

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(*a*) Wilde, C. J., and Cresswell J., were sitting on criminal appeals, and Talfourd, J., was at nisi prius.

as such brokers, sell for and on account of the defendant certain scrip or certificates for shares in a company called the Buckinghamshire, Oxford, and Bletchley Junction Railway Company, at the best market price of the day, the defendant promised them that the said scrip or certificates for shares were genuine scrip or certificates for shares in that company, and issued by the company; that the plaintiffs, confiding in that promise, sold the scrip as genuine, and paid the proceeds over to the defendant: it then alleges for breach, that the scrip was not genuine, but forged and spurious, and that the plaintiffs, as such brokers, were called upon by the purchasers thereof, according to the law and usage in that behalf, to repay them the money they paid for the same, and also certain damages for the loss of profit on the re-sale of the scrip. It appears that there was in the market certain scrip which purported to be scrip or certificates for shares in the Buckinghamshire, Oxford, and Bletchley Junction Railway Company; that some of these documents were in the possession of the defendant, who had been asked to advance money upon them; that the defendant took one of these certificates to the plaintiffs' office, and inquired if it was good; that one of the plaintiffs said it was good, but, to satisfy the defendant, he would go into the market and inquire: **[368]** and that he did so, and returned and said that it was "good," or "all right." Now, there may be something equivocal in these expressions: it may be doubtful whether the plaintiff was desired to ask whether the scrip was genuine scrip such as it purported to be, or whether it was worth the sum, or more than the sum, paid upon it. But, whatever was meant, I do not think that material: for, I do not think our decision of the case ought to be at all influenced by what took place on that occasion. Both parties were innocent of any intention to deceive or mislead. The mere expression of an opinion, bonâ fide given at the defendant's request, certainly does not amount to a warranty of the genuineness of the scrip, or impose any liability upon the person giving it. After having received this information, the defendant advanced money upon the scrip. Then comes the important part of the case. On the 27th of March, 1846, the defendant employed the plaintiffs to sell for him the ten certificates upon which the defendant had made the advance of money under the circumstances before mentioned, and delivered them the scrip for that purpose. The case states that the plaintiffs sold the ten certificates, according to the defendant's orders, and paid him the balance of the proceeds, after deducting their commission. That is all that is said about the plaintiffs' employment, and the plaintiffs' performance of their duty in respect of that employment. The case then proceeds to state the sale of eight of the certificates by the plaintiffs upon the Stock-Exchange to members of the Stock-Exchange, and the sale of the other two off the Stock-Exchange to a party who was not a member. It then states that suspicion arose in the market that forged certificates for shares purporting to be shares in this company, were in circulation; that, upon inspection, the certificates so sold by the plaintiffs for the defendant, were found to **[369]** be forgeries; that a committee was appointed by the subscribers of the Stock-Exchange, to determine what ought to be done between members who had had dealings in the forged scrip; and that the committee came to the following resolution, —"that the holders of shares of the Buckinghamshire Railway Company, which have been declared by the company to be spurious, shall have the right to demand of the sellers thereof genuine shares in exchange, or, until such can be procured, to pay for the same at the rate of 2l. 12s. per share (10s. premium), such amount to be retained until genuine shares are given." By the regulations of the Stock-Exchange, brokers are considered as principals. The plaintiffs were called upon by the respective purchasers of the scrip, to refund the purchase-money, or to indemnify them from loss. They therefore applied to their principal, the defendant, for instructions or indemnity; and, the defendant declining to comply with their demand, they made certain payments to the parties to whom they had sold the scrip, such payments being based upon the principle laid down by the Stock-Exchange committee.

The question for our determination now is, whether the plaintiffs are entitled to recover, under either count of their declaration, this ulterior amount. With respect to the general liability of the defendant, under the circumstances stated, there is no substantial difference between the learned counsel: it seems to be agreed, that, where a principal employs an agent, the former is bound to indemnify the latter in respect of all payments which may be made by him in the due course of his employment. There seems also to be little doubt that the agent may recover moneys so paid by him, either under a special count stating a promise to indemnify, and a breach, or under a count for money paid. The judgment of the court of Exchequer in [370] *Brittain* v. *Lloyd* sufficiently shews that. And the law in this respect is correctly stated by the late Dr. Story, in the passage cited by the plaintiffs' counsel from his treatise on Agency. *Brittain* v. *Lloyd* states a rather more general proposition; for, it is there said that an action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it. The main question in that case was, whether the money could be recovered under a count for money paid to the use of the defendant, where the payment was made under circumstances which did not relieve the defendant from an action or a liability at the suit of a third person,—which was contended to be necessary, on the authority of a case of *Spencer* v. *Parry* (3 Ad. & E. 331, 4 N. & M. 770). The expressions in *Spencer* v. *Parry* which seem to favour that argument, must be construed with reference to the circumstances of the particular case. That the defendant would be liable to the extent of what the plaintiffs necessarily paid in the course of the due performance of their duty as his brokers, seems not to be the subject of any doubt at all. The only question is, what was the extent of the plaintiffs' liability under the circumstances of the present case.

It may be convenient at once to dispose of the question of pleading. It appears to me that the special count cannot be sustained, upon this one ground—that the contract therein alleged, though a contract which might exist, is not proved by the facts set out in this special case. The contract stated is, that, in consideration that the plaintiffs, as brokers, would sell for and on account of the defendant certain scrip in the Buckinghamshire, Oxford, and Bletchley Junction Railway [371] Company, the defendant promised them that the said scrip was genuine scrip of that company, and issued by them. If that were the contract between the parties, it would follow, that, if the scrip was not genuine, but was sold in the market, and the money received by the seller, the sale never being questioned by the buyer,—who might be content to retain the spurious documents,—the plaintiffs, upon proof that the scrip was not genuine, might be entitled to a verdict for a breach of that promise. I cannot conceive any promise that would lead to such a consequence as that. The only promise, as I conceive, which the law would under the circumstances imply is, a promise to indemnify. I therefore think the first count is out of the question.

With respect to the second count, the situation of the parties is this:—The plaintiffs were employed as brokers to sell these particular certificates. There is no statement in the case, that the defendant authorised them to enter into a contract for the sale of shares generally, or that, in fact, any such contract was entered into. The statement in the case is, that the defendant employed the plaintiffs to sell these identical certificates, and that the plaintiffs sold them according to that employment. Under these circumstances, we cannot proceed upon an assumption of any other sale than of these particular ten certificates. The question is, what is the result of such a sale, when the certificates turn out not to be genuine. There was no fraud or negligence on either side: the certificates were such as to deceive everybody who had anything to do with them. Still, they were invalid. There cannot be a doubt, then, that the vendees would be entitled to recover back the money they had paid for them. They did receive it back; and the plaintiffs have been repaid that sum. The question is whether the plaintiffs, the brokers who sold the scrip, can recover any more from their principal. [372] What they have paid beyond the mere return of the purchase-money, appears to have been paid under an order of resolution of the committee of members of the Stock-Exchange. The case does not shew any course of dealing between the parties which would bind the defendant to that extent. Cases have been referred to for the purpose of shewing that a man who employs a broker to buy or to sell shares for him, authorises him to deal according to the ordinary and accustomed mode. It is not stated here that these shares are commonly sold on the Stock Exchange. And it may very well be doubted whether the rules and regulations of the Stock-Exchange are applicable to a sale of shares made under circumstances like these. But, supposing that it were so, and that it appeared that the Stock-Exchange was a place where sales of shares are ordinarily made, so as to bind the principal,—what rule is there to shew that such a resolution of a committee of inquiry as before adverted to, would be binding and obligatory as between the broker and his principal? I cannot find any such rule: nor does it appear to me that the circumstances of the present case, bring it within that resolution of the committee. Their decision may have been perfectly correct, and may have been intended to apply to the case of a sale of shares generally, to be performed by the delivery of genuine shares; but it does not necessarily apply to the case of a sale of specific scrip, such as this was. It seems to be agreed by Mr. Hoggins, that this resolution of the committee is binding as between these parties, no further than as being declaratory of what is right and just. No doubt it is right and just that the defendant should refund to the plaintiffs the money he received.

The question, then, reduces itself to this,—whether, as a matter of law, the plaintiffs were bound to repay to their vendees anything further than the amount of **[373]** the purchase-money? If they were, then they are entitled to recover against the defendant to that extent. I do not think they were liable, or that they are entitled in this action to recover, to a greater extent than the amount of the purchase-money. It seems to me that the transaction very much resembles the getting change for a forged bank-note; in which case the person passing it takes it back, and restores the money he obtained for it That is all As soon as the vendor had sold the certificates and got the money, at that instant the purchaser was entitled to say—"These certificates are not genuine: give me back my money." His right of action arose immediately, in that way, and at that time. That right of action,—throwing the special count out of consideration,—is, a right to sue as for money paid. As the sale was a sale of specific things, I do not think the purchasers would be entitled to demand genuine scrip.

Upon the whole, I am of opinion that the amount to be recovered by the plaintiffs in this action is, the amount for which they were liable to their vendees at the very moment the latter were entitled to recover the money back. They cannot say they paid any more to the defendant's use, because no more was necessarily paid. The defendant having paid into court all that the plaintiffs were entitled to recover, a nonsuit must be entered.

V. Williams, J. I am of the same opinion. The facts stated in the case furnish no evidence of the promise alleged in the special count, viz. that the scrip was genuine. As to that count, therefore, the plaintiffs must fail.

With respect to the count for money paid, I think the defendant must be taken to have employed the plaintiffs as brokers to sell the scrip in question accord-**[374]**-ing to the usual course of dealing, that is, as genuine scrip: and I think that the facts stated in the case shew an implied promise on the part of the defendant to indemnify them against any legal liability which might result from their executing that authority. I do not dispute that that indemnity would cover any liability imposed upon the plaintiffs by the rules and regulations of the Stock-Exchange. But it seems to me, that, under the circumstances as here stated, the plaintiffs were not liable to their vendees, by reason of the scrip not being genuine, to an amount greater than the (nominal) value of the scrip. They clearly would not have been liable to any greater extent, if the sale had taken place elsewhere than upon the Stock-Exchange: and I cannot discover that any larger degree of liability is imposed upon the plaintiffs, in reference to this transaction, by the Stock-Exchange rules. There is no good reason for saying that the decision of the committee imposed upon them any additional liability. As, therefore, the money paid into court is enough to cover all that the plaintiffs are, in our judgment, entitled to claim, a nonsuit will be entered.

Rule accordingly.

[375] Clemence Camp *v.* Pote. Nov. 25, 1849.

The defendant was taken in execution upon a ca. sa. at the suit of the plaintiff, in June, 1841; in August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburgh, but had never been heard of since. Upon an affidavit of these facts, and shewing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found,—the court (in 1849) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney for costs.

The defendant was arrested on the 12th of June, 1841, upon a ca. sa. on a judgment obtained against him by the plaintiff, indorsed to levy 92l. 18s., being 71l. 1s. 9d. for debt, and 21l. 13s. 3d. for costs, and was conveyed to the Queen's Prison, where he had ever since remained in execution under the above judgment only. In August, 1841, the plaintiff, being in insolvent circumstances, left England, with her daughter, in order to avoid her creditors, since which time she had not been heard of, either by her own attorney, or by the defendant, or by any other person to his knowledge, except as hereinafter mentioned. Being desirous of obtaining his liberty, the defendant caused inquiries to be made, in 1843, by one Galanté, a merchant at Hamburgh, by whom he was informed that the plaintiff and her daughter had been seen at St. Petersburgh in 1841, when she left that city for Moscow, and was reported to have died upon the road. In February last, the defendant received a letter from a Russia merchant named Boville, confirming the report of the plaintiff's death on her journey to Moscow, and informing him that a person answering the description of the plaintiff's daughter had since been seen at various places beyond the confines of Europe, unaccompanied by her mother.

Upon affidavits stating the above facts, and also that search had been made at the proper office in Doctors' **[376]** Commons, to see if any will of the plaintiff had been proved, or any letters of administration to her estate and effects taken out, and that none such had been discovered,

Scott, on a former day in this term, obtained a rule calling upon the personal representatives (if any) of the plaintiff, upon notice of the rule to be given to them or to the attorney in this cause of the said late plaintiff, why the defendant should not be forthwith discharged out of the custody of the keeper of the Queen's Prison as to this action. He cited *Broughton* v. *Martin* (1 B. & P. 176), *Parkinson* v. *Horlock* (2 N. R. 240), and *Taylor* v. *Burgess* (16 Law Journ., Exch., N. S. 204).

Lush, on behalf of the attorney upon the record, now appeared to shew cause.

Scott, for the defendant, submitted that the attorney was not entitled to be heard; referring to *Shoman* v. *Allen* (1 M. & G. 96, n.), where it was held that cause cannot be shewn on behalf of the attorney who claimed a lien on the verdict for his costs,—the court saying, "The death of the party is a revocation of the authority of the attorney. Non constat that the administrator, when appointed, may think fit to go on with the cause. Administration must first be taken out, and then the cause may proceed."

Lush. Being served with the rule, the attorney is entitled to come and shew cause against it. He has a lien upon the judgment for his costs, and therefore he has a personal interest in the matter. The affidavits upon which the rule was obtained, shew no ground for **[377]** discharging the defendant without payment of debt and costs.

Scott, in support of his rule. It is idle to say that the defendant is only to be discharged upon satisfying the judgment, when it appears to the court, with reasonable certainty, that the plaintiff is dead, and is unrepresented, and therefore that there is no person who has authority to receive the money. *Pyne* v. *Erle* (8 T. R. 407) distinctly shews that the defendant is entitled to his discharge, without regard to the plaintiff's late attorney's lien. And the circumstance of the attorney having had notice of the rule, though it may justify his appearing, will not entitle him to his costs of opposing the rule: *Johnson* v. *Marriat* (2 Dowl. P. C. 343).

Wilde, C. J. We are of opinion that the rule for discharging the defendant out of custody, must be made absolute. The defendant's affidavit lays reasonable ground for presuming that the plaintiff is dead. It appears that she has been absent from England for more than eight years, and was last seen alive, in St. Petersburgh, in 1841. The plaintiff's late attorney, who now comes to oppose the defendant's discharge, does not present to the court any circumstances tending to impeach the defendant's affidavit. No will of the plaintiff has been proved; nor have any letters of administration of her effects been granted; nor does the plaintiff's attorney profess to have had any communication with his client. What, then, is the situation of the attorney? He no longer represents the plaintiff; and he has no authority to receive the debt. If so,—the judgment debt being an entire thing,—it is very difficult to say that the defendant ought to pay any part of it to the **[378]** attorney as the price of his discharge. No case has been produced by Mr. Lush, where a party applying for his discharge under such circumstances, has been made to pay the attorney's costs. In the absence, therefore, of any authority, we are of opinion that the attorney's lien does not extend so far as to warrant us in giving effect to it in the same manner here sought.

Rule absolute.

ELIZA HICKS v. W. H. GREGORY, Executor of Robert Gregory, Deceased. Nov. 24, 1849.

[S. C. 19 L. J. C. P. 81; 13 Jur. 1030.]

The reputed father of an illegitimate child, upon ceasing to cohabit with the mother, wrote to her as follows:—"As I always promised that you and your child should never want, I will allow you 100l. a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you:"—Held, by Wilde, C. J., and Maule, J. (dissentiente V. Williams, J.), that the letter disclosed a sufficient consideration for the promise to pay the annuity, viz. the mother's properly bringing up the child.

This was an action of assumpsit. The declaration stated, that, before the making of the promise of the said Robert Gregory, thereinafter mentioned, to wit, on the 26th of October, 1810, the plaintiff, being then sole and unmarried, and having theretofore always conducted herself with chastity and decorum, was seduced by the said Robert Gregory, who then debauched and carnally knew the plaintiff, so being sole and unmarried as aforesaid, and by means of which said seduction and carnal knowledge the plaintiff then became pregnant, and afterwards, and in the life-time of the said Robert Gregory, and before the making of the promise thereinafter mentioned, to wit, on the 28th of September, 1813, was delivered of a bastard child, to wit, a daughter, which said child had been and was begotten by the said Robert Gregory, and is still living; that after-[379]-wards, and in the life-time of the said Robert Gregory, and before the making of the said promise thereinafter mentioned, the plaintiff, so being sole and unmarried as aforesaid, and having wholly relinquished and given up all cohabitation and immoral intercourse with the said Robert Gregory, deceased, had, at his request, undertaken and then had the care and nurture of the said child; that thereupon, afterwards, and in the life-time of the said Robert Gregory, to wit, on the 4th of July, 1814, in consideration of the premises, and that the plaintiff would behave well, and continue to take charge of and properly bring up her said child, he the said Robert Gregory then promised the plaintiff, that he, the said Robert Gregory, his executors or administrators, would allow and pay to the plaintiff 100l. a year for and during the life of the plaintiff and that of the said child, to be paid quarterly, that is to say, on the 1st of July, 1st of October, 1st of January, and 1st of April, in each and every year during the time aforesaid, the first of such quarterly payments to be payable on the 1st of July, 1814; that the plaintiff had always, from the time of the making of the said promise, behaved well and in a moral and proper manner, and continued to take charge of, and so properly to bring up, and hath so properly brought up the said child; that, before and at the commencement of this suit, the said child was, and still remained, alive,—of all which premises respectively the defendant, executor as aforesaid, afterwards, and after the death of the said Robert Gregory, to wit, on the 6th of September, 1847, had due notice; that afterwards, and after the death of the said Robert Gregory, and before the commencement of this suit, to wit, on the 1st of April, 1848, a large sum of money, to wit, 200l., of the said yearly sum of 100l., for eight quarters of a year, which then and after the death of the said Robert Gregory had elapsed, became due and payable to the plaintiff under and by [380] virtue of the said promise of the said Robert Gregory in that behalf; nevertheless, the defendant, executor as aforesaid, not regarding the said promise of the said Robert Gregory, had not at any time paid to the plaintiff the said 200l., or any part thereof, although often requested so to do, but had thenceforward, wholly neglected and refused so to do, and the same was wholly due and unpaid, contrary to the said promise of the said Robert Gregory, in that behalf made as aforesaid, &c.

The defendant pleaded,—first, that the said Robert Gregory did not promise, in manner and form, &c.

Secondly, the defendant, executor as aforesaid, said, that theretofore, and in the life-time of the said Robert Gregory, to wit, on the 7th of September, 1841, by a certain indenture then made between the said Robert Gregory and the defendant of the one part, and one James Joseph Wheble of the other part, the said Robert Gregory did, for himself, his heirs, executors, administrators, and assigns, covenant with the said James Joseph Wheble, his executors, administrators, and assigns, that he the said Robert Gregory, his executors, &c., would pay to the said James Joseph Wheble, his executors, &c., the sum of 7000l., and interest thereon at the rate of 6l. per cent. per annum, on a day which had passed before the commencement of this suit, to wit, the 7th of September, 1842, which said indenture was still in full force, and at the commencement of this suit there was, and still remained, due and owing, upon and by virtue of the said indenture and covenant, the said sum of 7000l., and a large sum of money for interest thereon, to wit, 500l.; that theretofore, and in the life-time of the said Robert Gregory, to wit, on the 26th of January, 1846, by a certain indenture then made between the said Robert Gregory and the defendant of the first part, one George Eyton of the second part, and one James Joseph Wheble of the third part, the said Robert Gregory did, for himself, his heirs, &c., **[381]** covenant and agree with and to the said James Joseph Wheble, that he, the said Robert Gregory, and his heirs, would pay to the said James Joseph Wheble, his executors, administrators, and assigns, the sum of 18,000l., with interest for the same at the rate of 6l. per cent. per annum, on a day which had passed before the commencement of this suit, to wit, on the 27th of January, 1847, without any deduction or abatement whatsoever, and that the last-mentioned indenture was in full force, and that, at the commencement of this suit, there was still due and owing upon and by virtue of the said indenture and covenant, the said sum of 18,000l., and a large sum of money for interest thereon, to wit, 3000l.: and that the defendant had fully administered all and singular the goods and chattels which were of the said Robert Gregory, deceased, at the time of his death, and which had ever come to the hands of the defendant to be administered, except goods and chattels of small value, to wit, 5l., and that he, the defendant, had not at the time of the commencement of this suit, or at any time since, nor had he then any goods or chattels which were of the said Robert Gregory, deceased, at the time of his death, in his, the defendant's, hands to be administered, except the said goods and chattels of the small value aforesaid, which were not sufficient to satisfy the said debt due and owing upon and by virtue of the said indentures and covenants, and which were subject and liable to satisfy such debt,—verification.

The plaintiff joined issue on the first plea, and as to the last prayed judgment of assets quando.

The cause was tried before Platt, B., at the Oxford summer assises, 1847, when it appeared, that, in the year 1810, an illicit connection subsisted between the plaintiff and the testator Robert Gregory, then an under-graduate of the university of Oxford, which connection resulted in the birth of a female child; and **[382]** that the parties continued to live together down to the month of July, 1814, when the following letter was written and sent to the plaintiff by the testator:—

"Dublin, July 4th, 1814.

"My dear Eliza,—I this day received your letter, and was much surprised at your not having heard from me, as I have written to you very often, sending you money. I suppose you have seen Townsend, informing you of the absolute necessity of my parting with you altogether. My father never would have done anything for me, if I continued living with you. But, as I always promised that you and your child should never want, I will allow you 100l. a-year for life, and little Emma's, to begin from the 1st of July, and to be paid quarterly into the bank wherever you live; which, I think, will be sufficient to keep you in great comfort. As I shall always be most anxious for yours and child's welfare, I would by all means advise you immediately to leave Oxfordshire, and live in some county where you are not known. My father will write to Mr. Walker, the banker, about your money, as long as you remain in Oxford. I hope you will let me know what you mean to do, and any advice or assistance I can ever give you, I will with pleasure. Pray send me all my receipts, and whatever papers you have of mine of any consequence. Let me know if you owe any money, and I will pay it. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you. But I am sure you never will. I have written to Townsend to give you all the advice he can; and, with sincere wishes for your's and child's happiness, believe me your most sincere friend,

"ROBERT GREGORY.

"Write soon, and Townsend will direct it."

[383] The annuity was duly paid, pursuant to the above agreement, down to the time of the testator's death, in 1847. The plaintiff rested her case upon that letter, relying upon the authority of *Jennings* v. *Brown* (9 M. & W. 496).

On the part of the defendant, it was insisted that the letter of July the 4th, 1814, contained no promise binding the testator.

The learned judge was of opinion that the letter was sufficient to entitle the plaintiff to maintain the action; but he reserved to the defendant leave to move to enter a nonsuit, if the court should think otherwise.

A verdict having been found for the plaintiff for 200l.,

Whateley, in Michaelmas term following, obtained a rule nisi accordingly.

Keating and Phillimore now shewed cause. The question arises upon the construction of the letter of the 4th of July, 1814. It is submitted that it shews a sufficient consideration for the promise alleged in the declaration. Mere past cohabitation would not be a sufficient consideration: *Binnington* v. *Wallis* (4 B. & Ald. 650); *Beaumont* v. *Reeve* (8 Q. B. 483). But, in *Jennings* v. *Brown* (9 M. & W. 496), where the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child, and keep secret their connexion—it was held that the maintenance of the child was a sufficient consideration to sustain assumpsit. "The woman," said Parke, B., in the course of the argument, "has supported the child, and that is a good consideration. It is a matter of bargain that she is to take care of the child, and to exonerate the father." In *Gibson* v. *Dickie* (3 M. & Selw. 463),—cited by Patteson, J., in *Beaumont* v. **[384]** *Reeve*,—an agreement by the defendant to allow the plaintiff, with whom he had cohabited, an annuity, provided she would continue single, was held valid. The court must be prepared to overrule *Jennings* v. *Brown*, if they come to the conclusion that the consideration in the present case is insufficient. [Maule, J. The consideration in *Jennings* v. *Brown* was, the mother's keeping the secret and the child: here, it is, her keeping the child and being of good behaviour. I should think that ample consideration. V. Williams, J. In *Gibson* v. *Dickie*, there was some arrangement about bank-stock: the case is very loosely reported; but it is not material to the present question.] The authorities are summed up, and the conclusion now suggested arrived at in 2 Wms Saund. 137 i. There are many moral considerations that will support an express promise: *Atkins* v. *Banwell* (2 East, 505). The adequacy of the consideration is not in question.

Whateley and Gray, in support of the rule. This case may be disposed of without at all interfering with *Jennings* v. *Brown*. The question is, whether the letter imports a contract such as that stated in this declaration. The only fair construction of it is, that it contains a mere expression of the writer's intention to allow the plaintiff, with whom he had cohabited, and by whom he had had a child, for whose support he was morally responsible, an annuity of 100l. so long as she should, in his judgment, conduct herself properly, and properly bring up the child. The testator clearly might have discontinued the payment at any time during his life. It does not amount to a contract legally binding him to pay the annuity until the woman forfeits it by mis-**[385]**-conduct. [Wilde, C. J. Is not that the sense in which she understood it, and in which he, at the time of writing the letter, meant it? I do not see what other fair construction can be put upon it.] That which is alleged to be the consideration for the promise comes in a subsequent part of the letter. It amounts, no doubt, to a strong moral obligation; but no more.

WILDE, C. J. Upon the best judgment I can form, I am of opinion that there is upon the face of the letter of the 4th of July, 1814, a sufficient consideration for the testator's promise to pay the annuity sought to be recovered in this action. The promise is by the father of an illegitimate child, upon whom certain moral duties rested; and to the mother of the child. Looking at the circumstances and relative position of the parties, the consideration is much stronger than occurs in many cases of guaranties. The object of the writer of the letter seems to have been, to preserve the child from want, to relieve himself from being compelled to support it, and to secure to the child the mother's care. It is very probable that some latent feelings of regard for a woman with whom he had been living upon terms of familiar intercourse, may have influenced his mind; but the principal object he had in view was, the care and maintenance of the child. Suppose the letter had been addressed to a stranger, who had no interest in the child, and upon whom there rested no duty or obligation to bring it up, still, if he had abided by the terms of it, and brought up the child in the prescribed manner, there would have been ample consideration for the promise to pay the annuity. I cannot help thinking the testator was actuated by a high sense of justice and moral duty, in entering into this engagement. It is impossible, in cases of this kind, to measure precisely the adequacy of the consideration the party receives: **[386]** nor does the law require it. In order to ascertain the writer's intention, we must not look at the particular collocation of the sentences, but at the whole letter together. In one part, he says: "As I always promised that you and your child should never want, I will allow you 100l. a year for life and little Emma's, to begin from the 1st of July, and to be paid quarterly into the bank wherever you live; which I think will be sufficient to keep you in great comfort." And, in another part, he says,—"Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you." The writer's object is here plainly developed, that the child shall be brought up in a proper manner; and more particularly as he refers to a former promise that the mother should never want, and to his desire to keep the mother and child in comfort. Looking at the whole letter, I am unable to say to what extent the testator measured the allowance by his feelings towards the mother: but I think it is manifest that his principal object was, to relieve himself from the obligation of bringing up the child, and to cast it upon the mother: and that appears to me to be a sufficient consideration for the promise. I think, therefore, the rule should be discharged.

Maule, J. I am of the same opinion. The motion for a nonsuit,—which I must confess I thought at the time should not have been granted,—is grounded on a suggestion that the promise and the consideration were not so proved as to entitle the plaintiff to maintain the action. Now, the promise is, to pay the plaintiff 100l. a year. And the substance of the consideration upon which that is to be paid is, that the plaintiff shall properly bring up a child. The letter shews the great anxiety of the writer for the child's welfare; and it refers to some former promise,—"I always promised **[387]** that you and your child should never want. I will allow you 100l. a year for life, and little Emma's." No doubt the promise was proved. The early part of the letter offers an inducement to the mother to bring up the child properly; and, in the subsequent part, the writer points to the consequence of a failure to do this, viz. the loss of the allowance. It is a promise upon an executory consideration. If the child is properly brought up, then the contract being executed by the other party, the testator was bound to pay her the consideration upon the faith of which she performed the duty cast upon her. The agreement having been thus acted upon, there is, and there must have been intended to be, a binding contract. It never could have been meant, that, after the plaintiff had maintained the child upon the faith of the testator's promise, the payment of the annuity should be made or withheld at his option or caprice. I entertain no doubt that there was a binding contract, and that the consideration is accurately stated.

V. Williams, J. There is no doubt the promise in this case is properly laid and proved. And it is equally clear, that, morally speaking, the annuity ought to be paid, so long as the plaintiff continues to observe the conditions upon which it was granted. It is also clear, that the promise is valid, and capable of being enforced, if it was founded upon the consideration that the plaintiff would properly bring up the child; and that it was invalid, and incapable of being enforced, if the consideration for it was the by-gone cohabitation. The only question, therefore, is, what is the true construction of the letter of the 4th of July, 1814. I am extremely glad that the lord chief justice and my brother Maule have come to the conclusion that the promise was founded upon an adequate legal consider-**[388]**-ation; for, I must confess that my own impression is, that the testator merely intended to confer upon the plaintiff a bounty which he might recall at pleasure: but, as the majority of the court entertain a different opinion, the rule will be discharged.

Talfourd, J., having been counsel in the cause, took no part in the discussion.

Rule discharged (*a*).

(*a*) See *Linnegar* v. *Hodd*, ante, vol. iv. p. 437.

Fagan v. Harrison. Nov. 17, 1849.

[S. C. 19 L. J. C. P. 105.]

A., a merchant at Dublin, contracted, through the agency of C. & F., merchants at Liverpool, to purchase of B., a ship-builder at Quebec, a vessel, described in the contract as then building,—B. engaging that she should be finished "in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds' surveyor;" and A. agreeing to pay the stipulated price by his acceptance of B.'s draft at six months after date from the day the vessel should be ready to take in cargo: and the agreement contained the following clause,—"In case of the ship not being according to B.'s representation and the within agreement, and should, on her arrival in Dublin, exhibit any defect which shall be declared as such by any two competent persons, B. hereby agrees to put it to rights, at his own expense, on her second voyage."—The vessel being finished, notice of that fact was sent to A., and on the 14th of June, 1845, a draft for the price was forwarded to him through D., for his acceptance. On the 17th, A. wrote to D. as follows:—"From the course adopted by B. we shall have some difficulty, unless you take the position which C. & F. stood in to me, viz. to guarantee that B. will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in two essential points, &c. Immediately on hearing from my agent in Quebec, I wrote to C. & F., who replied that they would be responsible as agreed on. The course taken by B. is, to avoid this, and, by getting me to accept the bill sent through your hands, would leave me no remedy but to go to law. I only require the guarantie from you that B. will perform his contract and the representations he made of the vessel. With regard to the survey which must be had,—if you agree to appoint one merchant, I will appoint the other: let them agree to an umpire. Give me a letter of guarantie that B. will abide by the award, and that he will perform his part without delay."—To this letter, D. replied,—"We are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept B.'s bill, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of B.'s contract: and, as C. & F. have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship's arrival, you have any cause of complaint."—Upon receipt of D.'s letter, A. accepted the bill, and paid it at maturity. On the ship's arrival at Dublin, A. wrote to D., informing him that he had appointed Brooke to survey her on his behalf: to this D. replied,—"As your contract was made through C. & F., we leave them to adjust all differences, and we will be responsible for whatever they award."—C. & F. appointed Pope to survey the vessel with Brooke. These two, having surveyed the vessel, reported that 351l. (exclusive of 25l., their fees and expenses) was required to complete her according to contract; whereupon C. & F. made their award as follows:—"We, the undersigned, having been authorised by D. of London, to estimate the sum which A., of Dublin, is entitled to receive from B. of Quebec, for the deficient state in which he turned out the ship 'J. F.,' contrary to the terms of his contract, and not feeling ourselves competent for such a task, —that is, the estimating in a tradesmanlike manner such deficiencies,—did for that purpose appoint W. Pope to meet J. W. Brooke, they two to decide on the deficiencies of the said vessel, and to estimate an equivalent in money for the said deficiencies; and, those gentlemen having, after due examination, and by written certificate, declared that sum to be 351l., and surveyors' fees 25l.; we hereby award that the said sums together (376l.), be paid to A. by D., on behalf of B., with interest," &c.:—Held, upon a special case setting out the above facts and correspondence, that there was no evidence that A. had ever acquiesced in the proposal of reference to C. & F., or that the latter ever professed to act under any authority derived from A.; and, consequently, that A. was not entitled to recover against D. the sum mentioned in the so-called award.

This was an action of assumpsit. The declaration stated, that, theretofore, and before the making of the promises by the defendant thereinafter mentioned, **[389]** to wit, on the 21st of February, 1845, an agreement in writing was made and entered into between Thomas Conrad Lee, therein described as of Quebec, in the province of Lower Canada, and the plaintiff, whereby the said T. C. Lee agreed to sell, and the plaintiff agreed to buy, a new ship or vessel then building at Quebec, and not then launched, to be of the registered tonnage (old measure) of about five hundred and sixty tons; which said vessel was in a great state of forwardness, **[390]** and would be launched first open water, and got ready for sea, and fitted with all dispatch, so as to sail amongst the first ships from Quebec: the said ship to be sold with her hull, masts, and spars, standing and running rigging, sails, anchors, and chains all complete, as per inventory annexed to the said agreement, and ready for sea, deliverable to the plaintiff at Quebec the day the said ship would be ready to commence taking in cargo after she was launched; from which day the plaintiff's ownership was to commence, but prior to which the ship was to be at the risk of the said T. C. Lee: that T. C. Lee thereby engaged that the said ship would be finished in a complete and workmanlike manner, and be furnished with the certificate to that effect from Lloyds' surveyor, W. Jameson; that her anchors and chains should be new, and of the size and weight required for her size, to pass Lloyds' surveyor there for classification, except that her chains should be of the length of ninety fathoms each, as per inventory, and should be the same as the ship "Rose"; that the said ship should have at least one full suit of sails all new, and that her rigging should be all new, and of the sizes required for a ship of her tonnage; masts and spars to be all good and sufficient, and to have all the masts' heads of sufficient length; that the said ship should be copper-fastened, like the "Rose," except the centre rows, which were iron, and in consideration of which T. C. Lee agreed to allow the plaintiff an abatement off the price of the ship to the extent of 25l.: that the ironwork should be all of proper size, and sufficient for both hull and spars; that the said ship should have a sufficient windlass, on the principle of Tysack & Dobson's patent; and also to have three boats, new and good, and of sufficient size for the vessel; that all the carpenters' and joiners' work should be well and thoroughly finished, and the whole ship finished and put out of **[391]** hand in a thorough workmanlike manner: and the plaintiff thereby agreed to pay the said T. C. Lee for the said ship 8l. per ton, on the old measurement tonnage, payable by his acceptance of T. C. Lee's draft at six months from the date when the ship should be ready to take in cargo; which draft the plaintiff thereby bound himself to accept on receipt of such advice of her being launched, and ready to take in, as would enable him to protect himself by insurance, which advice the said T. C. Lee thereby bound himself to give him at the same time that he notified the drawing of the said bill: the said ship was to be registered in the name of the plaintiff, and the register was to be taken out accordingly: the said ship was to be fitted similarly to the "Rose," and in accordance with the inventory annexed to the said agreement: the said ship was to be delivered at Quebec by the said T. C. Lee, who would charge on the amount thereof the rate of commission usual at that place: in case of the said ship not being according to the said T. C. Lee's representation, and the said written agreement, and that the said ship should, on her arrival in Dublin, exhibit any defect which should be declared as such by any two competent persons, the said T. C. Lee thereby agreed to put it to rights, at his own expense, on her second voyage: and, lastly, it was further agreed that, in lieu of the 25l. as before stated to be abated by the said T. C. Lee, the plaintiff preferred to leave it to the said T. C. Lee's generosity and liberality to give him an equivalent in workmanship, or any other manner, in lieu thereof. The declaration then averred, that, the said agreement being so made as aforesaid, and the said ship being built and ready to receive cargo, the said T. C. Lee, to wit, on the 7th of May, 1845, drew upon the plaintiff a certain bill of exchange for payment of the said price so agreed to be given for the said ship or vessel, to wit, the sum of 4389l. 7s. 3d., **[392]** payable six months after the date thereof: that the said ship or vessel not having been registered in the name of the plaintiff, and the register thereof not having been taken out accordingly, but, on the contrary thereof, the said ship or vessel having been registered in the name of the said T. C. Lee, and the said ship not having been well built, in a complete and workmanlike manner, and the said agreement not having been in these and in other respects fulfilled or performed by the said T. C. Lee according to the terms, true intent, and meaning thereof, and the plaintiff having by reason thereof refused to accept the said bill of exchange so drawn upon him as aforesaid, thereupon, afterwards, to wit, on the 19th of June, 1845, in consideration that the plaintiff, at the request of the defendant, would accept the said bill of exchange so drawn by the said T. C. Lee upon the plaintiff as aforesaid, and would promise and agree on his part to abide by, perform, and keep the award and determination of one E. Chaloner and one Q. Fleming, who should be appointed by and on behalf of the plaintiff and of the defendant to decide and determine what ought to be done, in case, upon the said ship's arrival at Dublin, the plaintiff should have any cause of complaint against the said T. C. Lee in respect of the said agreement, and to adjust all differences between the plaintiff and the said T. C. Lee in respect of the said agreement,—with power to the said E. Chaloner and Q. Fleming to call in two competent surveyors to survey and report upon the alleged defects and deficiencies of the said vessel, and to estimate the amount thereof; the defendant then promised the plaintiff that he would be responsible to the plaintiff for whatever the said E. Chaloner and Q. Fleming should award and determine in that behalf, and would fulfil, abide by, and perform the award of the said E. Chaloner and Q. Fleming in the premises. The declaration then **[393]** averred, that the plaintiff, confiding in the said promise and undertaking of the defendant, afterwards, to wit, on the day and year last aforesaid, did accept the said bill of exchange so drawn by the said T. C. Lee as aforesaid, and afterwards, at the maturity thereof, duly paid the same; that, the said ship or vessel having arrived at Dublin, and the said E. Chaloner and Q. Fleming having taken upon themselves the burthen of determining and adjusting the said matters so referred to them, did, on the 6th of April, 1846, by a certain note in writing, award and adjudge that the sum of 376l. should be paid to the plaintiff by the defendant on behalf of the said T. C. Lee, with interest from the date of his the plaintiff's acceptance for the ship falling due, and that the said award should be paid on presentation thereof; that the said award was afterwards, to wit, on the day and year last aforesaid, duly presented to the defendant, and that he then had notice thereof; yet that the defendant had not paid to the plaintiff the said sum of 376l., or any part thereof.

The defendant pleaded,—first, non assumpsit,—secondly, that Messrs. Chaloner and Fleming did not take on them the burthen of the reference,—thirdly, that Chaloner and Fleming did not make any award.

The cause came on for trial, at the summer assizes for the southern division of Lancashire, in 1848, when a verdict was found for the plaintiff, subject to the opinion of the court upon a special case, which stated, in substance, as follows:—

The plaintiff in this action is a merchant and ship-owner, carrying on business in Dublin. The defendant carried on business, under the style of Robert Harrison & Co., in London, and acted as agent for Thomas Conrad Lee, a ship-builder at Quebec.

On the 21st of February, 1845, an agreement was made between the said Thomas Conrad Lee, at Liverpool, and the plaintiff, as follows:—

[394] "Memorandum of agreement made this 21st of February, 1845, between Thomas Conrad Lee, of Quebec, Lower Canada, and James Fagan, of Dublin, for the purchase of a new ship or vessel, now building at Quebec, and not yet launched, to be of the registered tonnage, old measure, of about five hundred and sixty tons, and got ready for sea, and fitted with all despatch. Thomas Conrad Lee agrees to sell the said ship to James Fagan, hull, masts, spars, rigging, sails, anchors, and chains, all complete, as per inventory annexed, and ready for sea; deliverable to him at Quebec the day she is ready to commence taking in cargo, from which day Mr. Fagan's ownership is to commence. Thomas Conrad Lee engages that she shall be finished in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyd's surveyor, Mr. Jameson. And for the said ship James Fagan agrees to pay Thomas Conrad Lee 8l. sterling per ton, payable by his acceptance of Thomas Conrad Lee's draft at six months after date from the day she is ready to take in cargo; which draft James Fagan hereby binds himself to accept, on receipt of such advice of her being launched and ready to take in, as will enable him to protect himself by insurance; which advice Thomas Conrad Lee hereby binds himself to give him at the time that he notifies the drawing of the bill. The ship to be registered in the name of James Fagan, and register taken out accordingly. In case of the ship not being according to Mr. Lee's representation and the within agreement, and should on her arrival in Dublin exhibit any defect which shall be declared as such by any two competent persons, Thomas Conrad Lee hereby agrees to put it to rights at his own expense on her second voyage." (Signed) "THOMAS C. LEE.
"JAMES FAGAN.

"Witness, Quintin Fleming."

[395] The vessel was launched shortly afterwards, and was examined and passed by the said Mr. Jameson. The vessel was not registered in the plaintiff's name, but in that of Thomas Conrad Lee; and on the 26th of May, Thomas Conrad Lee wrote to the plaintiff, as follows:—

"Quebec, 26th May, 1845.

"Dear Sir,—The 'James Fagan' will be loaded this week. I cannot, according to law, take out a register of the ship in your name, and have therefore been obliged to take it out in my name, and have this day forwarded to my friends, Messrs. Harrison & Co., of London, a power of attorney to transfer you the vessel, and I have to advise my having drawn on you at six months' date from the 7th of May, for 4389l. 7s. 3d., amount of the ship, which you will please to accept.

"Ship 'James Fagan,' 548$\frac{63}{94}$ths tons, at 8l. per ton = 4389l. 7s. 3d.—Yours, &c."

(Signed) "T. C. LEE.

"To James Fagan, Esq."

On the 14th of June, 1845, R. Harrison & Co. sent the plaintiff the bill of exchange, and requested him to accept the same. The plaintiff replied as follows:—

"London, 17th June, 1845.

"Gentlemen,—I have to acknowledge the receipt of your letter, with Mr. T. C. Lee's draft for amount of new ship, which I contracted for through Messrs. Chaloner & Fleming, of Liverpool. From the course adopted by Mr. Lee, we shall have some difficulty, unless you take the position which Messrs. Chaloner & Fleming stood in to me, viz. to guarantee that Mr. Lee will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in **[396]** two essential points, viz. he has not registered the vessel in my name, as he was bound by the contract to do; he has not, when called on by my agent to remove any bad and defective beams, which were pointed out to him, and which he admitted himself should not have been put in the ship. Mr. Lee represented the floors as all black birch, and it appears many are ash. Immediately on hearing from my agent at Quebec, I wrote to Messrs. Chaloner and Fleming, who replied that they would be responsible as agreed on. The course taken by Mr. Lee is, to avoid this, and, by getting me to accept the bill sent through your hands, would leave me no remedy but to go to law. You will perceive, by the contract, that I can have a survey of the ship on her arrival at Dublin; and that the alterations which the arbitrators may direct to be done, were left to be done on the arrival of the vessel in Quebec, on her second voyage. True, Mr. Lee may say he will do so; but he may make such delay, when I have no control over him that it would perhaps be better not to let the ship into his hands. Mr. Lee must have some motive in not registering the vessel in my name. I only require the guarantie from you that Mr. Lee will perform his contract, and the representations he made of the vessel. I think Messrs. Chaloner & Fleming will give you assurance that I will fulfil my part. I send you copy of contract; also copy of Mr. Lee's letter to me. You will perceive that he intended you should transfer the ship at once. With regard to the survey which must be had, if you agree to appoint one merchant, I will appoint the other: let them agree to an umpire. Give me a letter of guarantie that Mr. Lee will abide by the award, and that he will perform his part without delay: or, I will accept the bill, on receiving the transfer of the ship, short 200l. or 300l., to cover me against loss; binding myself, in case the award does not amount to **[397]** the short acceptance, to pay, at maturity, any balance in his favour.—Yours, &c."

(Signed) "JAMES FAGAN.

"To Messrs. Harrison & Co."

To this the defendant answered:—

"London, 19th June, 1845.

"Sir,—We have received your letter of the 17th instant, which we have perused with attention; and we are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept Mr. Lee's bill for 4389l. 7s. 3d., and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of Mr. Lee's contract, dated the 21st of February, for the ship 'James Fagan:' and, as Messrs. Chaloner & Fleming have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship's arrival, you have any cause of complaint.—Yours, &c."

(Signed) "R. HARRISON & CO.

"To James Fagan, Esq."

To this the plaintiff replied, on the 26th :—

"26th June, 1845.

"Gentlemen,—On my return, I received yours of the 19th; and, relying on the guarantie you give me, I send inclosed the bill, accepted for the full amount of the new ship. This I do in full confidence of your house, and that you will in course of post send me the transfer and bill of sale, which, according to contract, I should have had before I accepted." (Signed) "JAMES FAGAN.

"To Messrs. Harrison & Co."

[398] The vessel arrived in Dublin in due course; and the plaintiff then wrote to Messrs. Harrison & Co., informing them that he appointed Mr. Brooke to survey the vessel on his behalf, and requesting them to appoint some person to survey on behalf of Mr. Lee. Much correspondence took place on the subject. Afterwards, on the 5th of August, 1845, Messrs. Harrison & Co. wrote as follows :—

"London, 5th August, 1845.

"Dear Sir,—As your contract for the 'James Fagan' was made through Messrs. Chaloner & Fleming, we leave them to adjust all differences, and we will be responsible for whatever they award.—Yours, &c."

(Signed) "R. HARRISON & CO.

"To James Fagan, Esq."

Messrs. Harrison & Co. wrote also to Messrs. Challoner & Fleming on the subject, who, on the 17th of August, appointed Mr. Pope, Lloyds' Liverpool surveyor, to meet Mr. Brooke at Dublin, and notified this to Messrs. Harrison & Co.

The two surveyors surveyed the vessel, and reported, on the 30th of August, 1845, that the sum required to complete her according to contract was, 351l. exclusive of surveyors' fees and expenses, which amounted to 25l. This report was forwarded by Messrs. Chaloner & Fleming, together with the following award, to Messrs. Harrison & Co :—

"We, the undersigned, having been authorised by R. Harrison & Co., of London, to estimate the sum which Mr. James Fagan, of Dublin, is entitled to receive from Mr. Thomas Conrad Lee, of Quebec, for the deficient state in which he turned out the ship 'James Fagan,' contrary to the terms of his contract; and, not feeling ourselves competent for such a task, that is, the **[399]** estimating in a tradesmanlike manner such deficiencies, did for that purpose appoint Mr. W. Pope, Lloyds' surveyor, of this port, to meet Mr. J. W. Brooke, also of this port, they two to decide on the deficiencies of the said vessel, and to estimate an equivalent in money for the said deficiencies; and those gentlemen having, after due examination, and by written certificates, declared that sum to be 351l., and surveyors' fees 25l.: we hereby award that the said sums,—say, together, 376l.,—be paid to Mr. James Fagan, by R. Harrison & Co., on behalf of Mr. Thomas Conrad Lee, with interest from the date of his acceptance for the ship falling due; and that this award be paid on presentation hereof. Liverpool, April 6th, 1846." (Signed) "CHALONER & FLEMING."

Messrs. Harrison & Co. refused to pay the sum awarded, and said in excuse,— "We were responsible for Mr. Lee's due fulfilment of the contract; and, if, upon the return of the vessel to Quebec, in October, 1845, Mr. Lee had refused to remedy all defects according to the contract, our guarantie might have been resorted to: but, as Mr. Lee was at that time ready to do all that was necessary, we are not liable."

If the court shall be of opinion that the plaintiff was entitled to recover, then the verdict to stand, with such damages as the court shall direct. If the court shall be of a contrary opinion, then the verdict to be entered for the defendant on such issue or issues as the court shall direct.

Martin (with whom was Hugh Hill), for the plaintiff (a)[1]. The real question is, whether the defendant's **[400]** letter of the 9th of April, 1846, truly represents the contract between the parties. The original agreement with Lee was, for the purchase of a ship then in the course of building at Quebec, and not yet launched,—the builder expressly engaging that the ship "shall be finished in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds' surveyor:" and there is nothing in the subsequent part of the contract to limit his obligation to merely remedying any defects, on the vessel's second voyage: he bound himself that she should be put out of hand in a workmanlike manner. And of that contract there has been a clear breach, in respect of which the plaintiff might have sued Lee. The defendant's liability will depend upon the letters of the 17th, 19th, and 26th of June, and 5th of August, 1845, and the 9th of April, 1846. In the letter of the 17th of June, the plaintiff writes,—"From the course adopted by Mr. Lee, we shall have some difficulty, unless you take the position which Messrs. Chaloner & Fleming stood in to me, viz. to guarantee that Mr. Lee will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in two essential points." In his answer of the 19th, the defendant says,—"We are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept Mr. Lee's bill for 4389l. 7s. 3d., and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of Mr. Lee's contract: and, as Messrs. Chaloner & Fleming have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship's arrival, you have any cause of complaint." On the 26th, the plaintiff again writes to the defendant,—"Relying on the guarantie you give me, I send inclosed the bill accepted for the **[401]** full amount of the new ship." The plaintiff having subsequently written to inform the defendant that he had appointed Mr. Brooke to survey the vessel on his behalf, the defendant, on the 5th of August, answers—"As your contract for the 'James Fagan' was made through Messrs. Chaloner & Fleming, we leave them to adjust all differences, and we will be responsible for whatever they award." Is the defendant's liability on that letter to be limited to the single stipulation in Lee's contract, as to repairing defects on the second voyage? or does it amount to a general guarantie for the due fulfilment of that contract? It is submitted that the latter is the true construction. Supposing an action had been brought against Lee for the breach of his contract, and the evidence given by the surveyors had been given in court, could Lee have said that the only liability he incurred was that of making good the defects, provided the ship was sent out to him for that purpose? Undoubedly not.

W. H. Watson (with whom were James Wilde and Bovill), for the defendant (a)[2]. Harrison's letter of the 5th of August, 1845, merely amounts to a guarantie that Lee would, on the vessel's arriving out at Quebec, repair any defects that might be pointed out by the surveyors. Chaloner & Fleming never were in fact appointed arbitrators at all; for, although the defendant **[402]** was willing that they should be so appointed, the plaintiff never signified his assent. And, if they were appointed arbitrators, they never took upon themselves the burthen of the arbitration; nor did they make any award. Lee contracted to sell to the plaintiff a ship of a certain description. For any breach of that contract, Lee might be responsible in damages. All, however, that the defendant engages for is, that Lee shall perform his contract; not that he, the plaintiff, will pay such damages as may be awarded for a breach thereof. The defendant had no authority on behalf of Lee to refer the differences between him and the plaintiff to arbitration: and there is no pretence for saying that Messrs. Chaloner & Fleming ever were appointed to adjust such differences. [Wilde, C. J. The plaintiff's acceptance of the bill was the consideration for the guarantie.] Be it so: at that time, there was no such contract as that declared upon; the defendant had not agreed to be bound by the award of Messrs. Chaloner & Fleming. [Maule, J. This is the ordinary case of a contract for a good ship, with a further stipulation, that, if the purchaser is dissatisfied, on a survey had, the builder will remedy defects on the next voyage out. That may be cumulative.] The defendant merely agreed to guarantie the performance by Lee of what he had at first left unperformed: the object of the reference was, to ascertain what defects required amending. In truth, Chaloner & Fleming did nothing but appoint Pope to survey the vessel. They do not even state that they have taken upon themselves the burthen of the reference. [Cresswell, J. In fact, they say that they are incompetent.] Precisely so. [Maule, J. No formal reference or award was contemplated.]

(a)[1] The point marked for argument on the part of the plaintiff, was,—"That the facts and correspondence set out in the case establish his right to the verdict on the several issues."

(a)[2] The points marked for argument on the part of the defendant, were,—"That Messrs. Chaloner and Fleming were not appointed by him as arbitrators, with power to make an award, directing him to pay any sum of money to the plaintiff, and that the plaintiff never consented to such arbitration: that Messrs. Chaloner and Fleming did not take upon themselves the character of such arbitrators, or act in that capacity, at any time up to the moment of their making the supposed award: and that Messrs. Chaloner and Fleming did not in fact make any award as such arbitrators."

Martin was heard in reply.

Cur. adv. vult.

[403] Wilde, C. J., now delivered the judgment of the court.

This case has been argued before us on a special case which states the question for the opinion of the court to be, whether the plaintiff is entitled to recover against the defendant for any and what damages, or whether a verdict ought to be entered for the defendant on any, and, if any, on which of the issues which were joined in the cause.

The cause of action alleged in the declaration in this case is, the non-performance of an award of certain persons of the names of Chaloner and Fleming; and the declaration sets out an agreement between the plaintiff and one Thomas Conrad Lee, of Quebec, by which Lee contracted to build a ship for the plaintiff, of a certain description, and upon certain terms therein mentioned, and alleges that Lee had not performed his contract in certain respects mentioned in the declaration, and that he had drawn a bill upon the plaintiff for the price of the ship, which bill the plaintiff had refused to accept, upon the ground of the breaches of contract committed by Lee: and the declaration then alleges, that, in consideration that the plaintiff would accept such bill, the defendant had promised to abide by the award of the said Chaloner and Fleming, who should be appointed by and on behalf of the plaintiff and the defendant, to determine what ought to be done in regard to the said ship, and the differences between the plaintiff and the said Lee in relation to the said contract: and the declaration then avers that the referees undertook the burthen of the reference, and made an award directing the defendant to pay to the plaintiff the sum of money sought to be recovered in this action.

To this declaration, the defendant pleaded,—first, non assumpsit,—secondly, that Chaloner and Fleming did not take upon themselves the burthen of determining **[404]** and adjusting the matters alleged to have been referred to them,—thirdly, that Chaloner and Fleming never made any award upon the matters referred to them.

The case sets forth a great number of letters which had passed between the plaintiff and the defendant, and between the defendant and Chaloner and Fleming: but, as the agreement upon which the action is brought, is alleged in the declaration to have been made in consideration that the plaintiff would accept the bill which Lee had drawn upon him for the price of the ship, the material letters which constitute the plaintiff's evidence upon the issue of non assumpsit, are those which preceded the acceptance of the bill; and those letters are, the plaintiff's letter to the defendant, dated the 17th of June, 1845, and the defendant's answer written to the plaintiff, dated the 19th of June, and the plaintiff's reply to the defendant, dated the 26th of June.

The plaintiff's letter of the 17th of June contains the following passage:—"I only require the guarantie from you, that Mr. Lee will perform his contract, and the representations he made of the vessel:" and, in another part of the letter, he says:—"If you agree to appoint one merchant, I will appoint the other. Let them agree to an umpire. Give me a letter of guarantie that Mr. Lee will abide by the award, and that he will perform his part without delay." The defendant, in answer to this letter, says:—"If you will accept Mr. Lee's bill for 4389l., and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of Mr. Lee's contract. And, as Messrs. Chaloner and Fleming have the confidence of all parties, we suggest that they should be appointed to suggest what ought to be done, in case, upon the ship's arrival, you have any cause of complaint." In the plaintiff's reply, on the 26th of June,—which is the only other letter between the **[405]** parties before the acceptance of the bill,—he says: "Relying on the guarantie you give me, I send inclosed the bill accepted for the full amount of the new ship. This I do in the good faith and respectability of your house, and that you will, in the course of post, send me the transfer and bill of sale."

The plaintiff, it will be observed, makes no reference whatever to the proposal of reference to Chaloner and Fleming, contained in the defendant's letter: nor can the court discover any evidence whatever in the case, in support of the affirmative of the issue upon non assumpsit.

That the plaintiff did not mean to acquiesce in the proposal of reference to Chaloner and Fleming, we think, is clear, from his letter of the 19th of June: and we think that the subsequent conduct and correspondence of the parties throughout. is inconsistent with any such agreement on his part; as it will be observed that the only persons noticed as referees in any subsequent part of the transaction, up to the time of Messrs. Chaloner and Fleming writing the letter which is called an award, were, Mr. Brooke, appointed by the plaintiff to survey the ship on his behalf, and Mr. Pope, appointed by Chaloner and Fleming, on behalf of Lee, to survey with Mr. Brooke.

And we are also of opinion that Chaloner and Fleming never professed to act under any authority derived from the plaintiff.

We are, therefore, of opinion that the verdict must be entered for the defendant upon the several issues which are joined upon the record.

Judgment for the defendant.

[406] The Banwen Iron Company v. Barnett. Nov. 10, 1849.

[S. C. 19 L. J. C. P. 17; 14 Jur. 112. See *In re Nassau Phosphate Company*, 1876, 2 Ch. D. 610.]

A certificate of complete registration granted by the registrar of joint-stock companies pursuant to the 7 & 8 Vict. c. 110, s. 7, incorporates the company, according to s. 25, notwithstanding the deed omits some of the provisions required by schedule (A.) to be inserted therein. At all events, it is not competent to a shareholder, in answer to an action for a call, to object that such certificate has been granted upon the production of an insufficient deed.—Quære, whether the judgment of the registrar, in granting or withholding a certificate, is subject to review?

Debt. The first count stated that the Banwen Iron Company, the plaintiffs in this suit, by W. M. W. their attorney, complained of S. B. Barnett, the defendant in this suit, who had been summoned, &c. For that, at the time of the commencement of this suit, the defendant, as the holder of certain shares, to wit, 500 shares, in a certain company, to wit, the Banwen Iron Company, aforesaid, was indebted to the said company in a certain large sum of money, to wit, 2400l., for certain instalments of capital then due and payable in respect of the said shares: yet the defendant had not paid the said instalments, or any or either of them, or any part thereof, but the said sum of money still remained wholly due, owing, and unpaid to the said company.

There was also a count upon an account stated.

The defendant pleaded,—thirdly, to the first count, that, after the 1st of November, 1844, and before the accruing of the supposed causes of action in that count mentioned, and before the commencement of this suit, to wit, on the 1st of October, 1846, a joint-stock company, as defined in an act passed in the eighth year of the reign of our lady the Queen for the registration, incorporation, and regulation of joint-stock companies, not being a banking-company, school, or scientific or literary institution, nor a friendly society, loan society, or benefit building society, respectively, duly certified and inrolled under the statutes at any time in force respecting such societies, that is to say, a partnership [407] whereof the capital, to wit, 60,000l., was then agreed to be divided into 10,000 shares of 6l. each, and so as to be transferable without the express consent of all the co-partners, was established in that part of Great Britain and Ireland called England, to wit, in the city of London, for the purpose of profit to the shareholders thereof,—which partnership was not existing before, and the formation of which partnership was commenced after, the said 1st of November, 1844: That the said joint-stock company was never a company, as defined in the said statute, for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, harbour, ferry, or dock, which cannot, and which could not at the times of the passing and carrying into operation of the first-mentioned statute, be or have been carried into execution without obtaining the authority of parliament, nor, except as in this plea mentioned, a company as defined in such last-mentioned statute, at any time incorporated by statute or charter, or authorised by statute or letters-patent to sue and be sued in the name of any officer or person: That the said joint-stock company was, during the time aforesaid, to wit, on the 1st of October, 1846, formed for the purposes thereinafter mentioned, by deed indented then made between R. J. Browne of the first part, the several persons whose names and seals were thereunto subscribed and affixed (except the said R. J. Browne), that is to say, one S. B. Barnett, one M. R. Scott, &c. &c., of the second part (the other names of the several persons of the second part being to the defendant unknown), and E. J. Lemon of the third part; by which indenture,—after reciting as therein was recited,—the several persons whose names and seals were thereunto subscribed and affixed, declared that they had formed themselves into a company for the purpose of raising and working the mines and seams of **[408]** coal, culm, and iron-stone and iron-mine, and all and singular other the mines and minerals, fire-clay, quarries, rock, and stone, and premises comprised in and demised by the indenture of demise therein recited, and of smelting the said ironstone and iron-mine, and selling the iron produced therefrom for the benefit of the said company, and of selling and making the most in every way, subject to the provisions of the said demise, of the said mines and minerals, and fire-clay, and other the premises comprised therein and thereby saleable; and, in order to carry out the purposes aforesaid, it was intended that the said company should erect smelting-furnaces, workmen's houses, and other buildings, and steam-engines and other machinery, and make the necessary roads and tramways, and have all the powers requisite to work the said premises to the greatest advantage; and it was by the same indenture agreed and declared by and between the said parties thereto, amongst other things, as follows, that is to say, that the said company should be called the Banwen Iron Company; that the principal office for carrying on the business of the company should be at No. 23 Threadneedle Street, in the city of London, with a branch office on the same premises so comprised in and demised by the said indenture of demise, to wit, &c.; that the capital of the said company should be 60,000l., and should be divided into 10,000 shares of 6l. each, and that such capital should not be increased; [and that one S. B. Barnett, &c. &c., should be, and they were thereby appointed, directors of the said company; and the said parties to the said indenture thereby confirmed all matters, payment, acts, and deeds in and about the business of the said company at any time theretofore made or done by them, or any of them],—as by the same indenture, then sealed with the seals of the several persons parties thereto as aforesaid, except the said **[409]** E. J. Lemon, reference being had thereto, would, amongst other things, fully appear: That the nature and business of the said company as aforesaid might and did, during all the time aforesaid, and still might and did, require that the said deed of settlement should, at the time of the making thereof as aforesaid, and before the production of the same as thereinafter mentioned, and before and at the time of the granting of the certificate as thereinafter mentioned, to wit, on the 1st of October, 1846, have made provision for such of the purposes set forth in the schedule (A.) to the first-mentioned statute annexed, as were next thereinafter mentioned, that is to say, [for prescribing the maximum number of directors to be appointed, the number of shares or the amount of interest by which they are to be qualified, the period for which they are to hold office, so that at least one third of such directors, or the nearest number to one third, should retire annually, subject to re-election if thought fit, and for the determination of the persons who should so retire in each year, as in the said statute and last-mentioned schedule respectively mentioned: That such deed did not at any time make provision for prescribing the period for which the said directors in that plea mentioned were to hold office, so that at least one third of such directors, or the nearest number to one third, should retire annually, as in the said statute and last-mentioned schedule respectively mentioned and required]: That afterwards, and before the granting of the certificate thereinafter mentioned, to wit, on the 6th of October, 1846, the said indenture was produced to one Francis Whitmarsh, Esq., then being the registrar of joint-stock companies, as and for the deed of settlement of the said company, under the hands and seals of the shareholders therein, setting forth such matters, and making such provisions as are by the first-mentioned [410] statute required to be provided for, and as and for such deed so signed and certified as in the same statute is in that behalf provided, together with a complete abstract thereof previously approved by the said registrar of joint-stock companies, and also a copy of such deed, for the purpose of registering the same; and that thereupon, on the day and year last aforesaid, on such production of such deed, and not otherwise, and notwithstanding such deed was not then conformable to the provisions of the said act as aforesaid, the said registrar of joint-stock companies granted a certificate of complete registration of the Banwen Iron Company in the said indenture hereinbefore mentioned, contrary to the form of the statute in such case made and provided, that is to say, a certificate of complete registration then signed by him, and then sealed with the seal of his office, and then dated the day and year last aforesaid, and setting forth that the said company had been constituted completely; and that such last-mentioned company, when and after such certificate was granted as aforesaid, to wit, on the day and year last aforesaid, and thence to the commencement of this suit, was, and still continued, the Banwen Iron Company in the declaration mentioned: That, save as aforesaid, there never was any such body politic or corporate as the Banwen Iron Company in the declaration mentioned, and that the plaintiffs never were a company completely registered, and never had obtained a certificate of complete registration, otherwise than as in that plea mentioned: And that the defects and omissions aforesaid had never been supplied by a supplementary deed or deeds registered,—verification.

To this plea the plaintiffs replied, that the said deed in the said third plea in that behalf mentioned, did, before and at the time of the said production thereof to the said registrar of joint stock companies, as and for the deed of settlement of the said company, make [411] provision for prescribing the period for which the said directors were to hold office, so that at least one third of such directors, or the nearest number to one third, should retire annually, as in the said statute and schedule respectively mentioned and required,—concluding to the country.

The defendant demurred specially to the replication to the third plea, assigning for causes,—that it tended to raise an immaterial issue, because it was consistent therewith, that, at the time of the granting the certificate by the registrar of joint-stock companies, the deed of settlement of the company did not make any provision as in the said replication mentioned, and was not then conformable to the provisions of the act as aforesaid, as alleged in the third plea;—that it alleged that both before and at the time of the production of the said deed to the said registrar, the said deed made provision as in the replication mentioned, whereas, what the deed contained before such production, was immaterial; and, although the issue raised by such replication, if found for the plaintiffs, might be material, yet, if found for the defendant, it would be immaterial and inconclusive, and, in order to raise a material and conclusive issue on the said third plea, a repleader must be awarded;—that the said replication tended to embarrass the defendant in his proofs, and to oblige him to produce evidence of immaterial matter, to wit, that the deed, before its said production, omitted to make such provision as aforesaid;—that the replication was too general, and should have set forth either the entire deed to which it referred, or so much of it as would be necessary to shew that such provision as aforesaid was made according to the form of the said statute, &c.;—and that the issue raised by the said replication, was an issue of law simply, and was not triable, and was therefore bad, &c. &c. Joinder.

[412] The fourth plea was like the third, omitting the part within brackets in p. 408, and substituting for the lines within brackets at p. 409, the following—"for determining whether calls or instalments of payments, if any, are to be made in certain amounts and at fixed periods, and, if so, what amounts, and at what periods, as in the said statute and last-mentioned schedule respectively mentioned: That such deed did not at any time make provision for determining at what periods the said instalments of payments were to be made, as in the same statute required, although, at the time of the making of the said indentures, and during the time aforesaid, to wit, on the 1st of October, 1846, the said instalments of payments, then being the said instalments of capital in the first count of the declaration mentioned, were to be made, as by the same indenture is in that behalf provided, to wit, an instalment of 2l. in respect of each of the said shares."

To this plea the plaintiffs replied, that the said deed in the said fourth plea in that behalf mentioned, did, before and at the time of the said production thereof to the said registrar of joint-stock companies as and for the deed of settlement of the said company, make provision for determining at what periods the said instalments of payments were to be made as in the said statute required,—concluding to the country.

The defendant demurred specially to the replication to the fourth plea, assigning the same causes of demurrer as in the demurrer to the replication to the third plea.

Joinder in demurrer.

The fifth plea, to the second count, was similar to the third plea.

To this the plaintiffs demurred specially, assigning for causes,—that it amounted to the general issue merely;—that it was but an argumentative denial of **[413]** the alleged statement of accounts therein mentioned;—that, although pleaded as in confession and avoidance, it did not confess any cause of action, or give colour to the plaintiffs, inasmuch as, if the said plea as pleaded was true, and the legal inference deduced from the facts stated therein, was a valid legal inference, the plaintiffs had no colour or pretence of right to maintain the action, nor could the defendant become in any manner indebted to them as alleged;—that, if the plea sufficiently confessed a cause of action, it did not in any manner avoid the same, because, if the plaintiffs could in fact state an account with the defendant, and upon such accounting he was found indebted to them, the plea disclosed no facts or circumstances to preclude them from recovering such debt;—that, if the plea denied all power or ability in the plaintiffs to state an account with the plaintiffs, it amounted to the general issue, and was bad on that ground, and if, on the other hand, it admitted or confessed the ability of the plaintiffs to state an account, it did not disclose any legal bar or defence to an action founded on such statement of account;—that the said plea disclosed no sufficient answer to the said second count, inasmuch as it did not shew that the alleged omission from the said deed of the said provision, was wilful, or that the said registrar wilfully, and with notice of the alleged omission, granted the said certificate of complete registration, or that the said registrar did not deem the said provision one which the nature and business of the company might not or did not require;—that, as the plea distinctly alleged that the said registrar granted a certificate of complete registration, and it was not alleged or shewn that he acted wilfully or fraudulently in granting it, the law would intend that it was duly and legally granted, and was a legal and valid certificate, until the contrary was shewn;—that the plea did not shew any fact or circumstance **[414]** from which its illegality or invalidity could be inferred, in the absence of misconduct or fraud;—that, if the said registrar misconducted himself in granting the said certificate, the circumstances and nature of his misconduct should have been shewn in the plea;—that, inasmuch as the said registrar was by the statute constituted the judge of the sufficiency and completeness of the deed of settlement when produced to him, and inasmuch as the plea shewed that he did, after the production of the deed to him, grant a certificate of complete registration of the said company, which, in the absence of any allegation to the contrary, must be taken to have been granted bonâ fide, the plaintiffs were not responsible for any error in judgment of the said registrar, nor could the defendant take advantage thereof to evade the performance of his duty as a shareholder of the company, by contributing his proportion of the capital;—that the plea was repugnant and contradictory, in this, that it alleged there never was any such body politic or corporate as the Banwen Iron Company same as in the said plea mentioned, at the same time that the plea clearly shewed that there was such a body politic or corporate, and also in alleging that the plaintiffs never were a company completely registered, and never had obtained a certificate of complete registration otherwise than as in that plea mentioned, whereas the plea shewed that the plaintiffs were a company completely registered, and had obtained a certificate of complete registration.

Joinder in demurrer.

The sixth plea, to the second count, was similar to the fourth plea.

The plaintiffs replied to the sixth plea, that the defendant, of his own wrong, and without the cause or matters of excuse, or any of them, in the said sixth plea mentioned, failed and neglected to pay the said **[415]** sum of money, or any part thereof, in the said second count mentioned, in manner and form therein in that behalf alleged,—concluding to the country.

The defendant demurred specially to the replication to the sixth plea, assigning for causes, that the form of the said replication was inapplicable to the sixth plea, which did not contain any cause or matters of excuse for the breach in the second count mentioned;—that the plaintiffs ought to have traversed one or more of the averments in the sixth plea, in another form; and that the said replication traversed negative matter, and the two negative averments in the sixth plea and the replication thereto, did not make a good issue.

Joinder in demurrer.

Needham (with whom was Ellis), for the plaintiffs (a). The substance of the pleadings being, that, in the deed produced to the registrar on his being asked for a certificate of complete registration, pursuant to the statute 7 & 8 Vict. c. 110, was defective in one of the particulars pointed out in schedule (A.), the question reduces itself to this,—whether the registrar is a judicial or a ministerial officer. If he is a judicial officer, the grounds upon which his certificate is given, cannot be inquired into. All the provisions of the statute tend **[416]** to shew that a certain discretion to grant or to withhold the certificate, is conferred upon that officer. The statute begins with reciting "that it is expedient to make provision for the due registration of joint-stock companies during the formation and subsistence thereof; and also, after such complete registration as is hereinafter mentioned, to invest such companies with the qualities and incidents of corporations, with some modifications, and subject to certain conditions and regulations; and also to prevent the establishment of any companies which shall not be duly constituted and regulated according to the provisions of this act." The 4th section enacts, "that, before proceeding to make public, whether by way of prospectus, handbill, or advertisement, any intention or proposal to form any company for any purpose within the meaning of that act, whether for executing any such work as aforesaid (s. 2) under the authority of parliament, or for any other purpose, it shall be the duty of the promoters of such company, and they, or some of them, are thereby required, to make to the office thereby provided for the registration of joint-stock companies (and thereinafter called the registry-office) returns of the following particulars, according to the schedule (C.) thereunto annexed, that is to say, 1, The proposed name of the intended company, and also 2, The business or purpose of the company, and also 3, The names of its promoters, together with their respective occupations, places of business (if any), and places of residence, and also the following particulars, either before or after such publication as aforesaid, when and as from time to time they shall be decided on, viz. 4, The name of the street, square or other place in which the provisional place of business or place of meeting shall be situate, and the number (if any) or other designation of the house or office, and also 5, The names of the **[417]** members of the committee or other body acting in the formation of the company, their respective occupations, places of business (if any), and places of residence, together with a written consent on the part of every such member or promoter to become such, and also a written agreement on the part of such member or promoter, entered into with some one or more persons as trustees for the said company, to take one or more shares in the proposed undertaking, which must be signed by the member or promoter whose agreement it purports to be (but such agreements need not be on a stamp), and also 6, The names of the officers of the company, and their respective occupations, places of business (if any), and places of residence, and also 7, The names of the subscribers to the company, their respective occupations, places of business (if any), and places of residence, and also, before it shall be circulated or issued to the public. 8, A copy of every prospectus or circular, handbill or advertisement, or other such document at any time addressed to the public, or to the subscribers or others, relative to the formation or modification of such company. 9, And afterwards, from time to time, until the complete registration of such company, a return of a copy of every addition to or change made in any of the above particulars: and that, upon such registration of at the least the three particulars first before mentioned, the promoters of such company shall be entitled to a certificate of provisional registration." Then follows a clause imposing a penalty on the promoters of any company for delaying the registration thereof. And s. 7 enacts "that it shall not be lawful for any joint-stock company thereafter to be formed for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of parliament, or for any other purpose, to act otherwise than provisionally in accord-[418]-ance with the act, until such company shall have obtained a certificate of complete registration as thereinafter provided; and no joint-stock company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders therein; and in or by such deed there must be appointed not less than three directors, and also one or more auditors; and such deed must set forth in a schedule thereto, in a tabular manner, according to the order thereinafter mentioned, the following particulars, that is to say, 1, The name of the company, and also 2, The business or purpose of the company, and also 3, The principal or only place for carrying on such business, and every branch office (if any), and also 4, The amount of the proposed capital, and of any proposed additional capital, and the means by which it is to be raised; and, where the capital shall not be money, or shall not consist entirely of money, then the nature of such capital, and the value thereof, shall be stated, and also 5, The amount of money (if any) to be raised, or authorised to be raised, by loan, and also 6, The total amount of the capital subscribed, or proposed to be subscribed, at the date of such deed, and also 7, The division of the capital (if any) into equal shares, and the total number of such shares, each of which is to be distinguished by a separate number, in a regular series, and also 8, The names and occupations and (except bodies politic) the places of residence of all the then subscribers, according to the information possessed by the officers of the company in respect of such names and occupations, and places of residence, and also 9, The number of the shares which each subscriber holds, and the distinctive numbers thereof, distinguishing the numbers of the shares on which the deposit has been paid, from those on which it has not been paid, and also 10, The names of the then directors [419] of the company, and of the then trustees of the company (if any), and of the then auditors of the company, together with their respective places of business (if any), occupations, and places of residence, and also 11, The duration of the company, and the mode or condition of its dissolution: And that such deed must contain a covenant on the part of every shareholder, with a trustee on the part of the company, to pay up the amount of the instalments on the shares taken by such shareholder, and to perform the several engagements in the deed contained on the part of the shareholders; and that such deed must also make provision for such of the purposes set forth in schedule (A.) to the act annexed, as the nature and business of the company may require, and either with or without provision for such other purposes (not inconsistent with law) as the parties to such deed shall think proper; and that every such deed of settlement must be signed by at least one fourth in number of the persons who at the date of the deed have become subscribers, and who shall hold at least one fourth of the maximum number of shares in the capital of the company; and that every such deed must be certified by two directors of the company, by writing indorsed thereon in the form contained in the schedule (B.) to the act annexed; and that, on the production of such deed, setting forth such matters and making such provisions as are thereby required to be provided for, and being so signed and certified, together with a complete abstract or index thereof, to be previously approved by the registrar of joint-stock companies, and also a copy of such deed, for the purpose of registering the same, or as soon after such production as conveniently may be, the registrar of joint-stock companies shall grant a certificate of complete registration, according to the provisions of the act in that behalf; and, unless such deed and other matters be so [420] produced, and such conditions be so performed, it shall not be lawful for him to grant such certificate; and that, after such certificate shall be granted, it shall be taken as evidence of the proper provisions being inserted in such deed, and of the performance of the conditions thereby required previously to the granting such certificate of complete registration; and that any defect or omission as regards the matters thereby required in any deed of settlement, may from time to time be supplied by a supplementary deed or deeds; and that, if any such supplementary deed be not inconsistent with or repugnant to the act, or any act respecting joint-stock companies, and if it be duly registered, then it shall have the same effect as if there were only one deed for the purpose of the act; and that, unless the same be registered, it shall be of no force or effect." [V. Williams, J. Is there any mode of repealing the certificate of the register?] No. The 8th section enacts, "that, if any deed of settlement, or supplementary deed of settlement, whether made before or after the granting of the certificate of complete registration, appear to such registrar of joint-stock companies to be insufficient, by reason of the omission or incompleteness of any of the provisions therein contained, for the purposes set forth in the said schedule (A.), or if the deed contain provisions which appear to such registrar to be inconsistent with or repugnant to this act, or any act for the time being in force respecting joint-stock companies, then, as soon thereafter as conveniently may be, such registrar shall notify the same in writing to the persons or to the company by whom the deed shall have been presented for registration, specifying in such notification the particulars wherein such deed of settlement, or supplemental deed of settlement, is incomplete, or inconsistent with, or repugnant to, any such act as aforesaid." [Maule, J. What is to **[421]** happen then?] That seems to be pointed out at the end of the 7th section. The registrar is the only person to determine whether the deed does or does not comply with the requisites of the act: he is to exercise his judgment; and it is obvious that many very important matters may come in question before him. [Maule, J. The defects which are pointed out here, are defects in some particulars required to appear in schedule (A.), and not in those referred to in s. 7.] Exactly so. [Maule, J. By what clause is the company incorporated?] By the 25th, which enacts, amongst other things, "that, on the complete registration of any company being certified by the registrar of joint-stock companies, such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be, and are hereby, incorporated, as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company." Upon receiving a certificate of complete registration, the company becomes as much a corporation as if it had been so created by charter or by letters-patent: and the certificate is made evidence without other proof: s. 7. [Maule, J. Not conclusive evidence. V. Williams, J. I do not see what you want with evidence, if the certificate makes the company a corporation, proprio vigore. Maule, J. The provision that the certificate "shall be taken as evidence of the performance of the conditions by the act required previously to the granting such certificate," assumes that the performance may be disputed.] The company are not the less a corporation, though they may have chosen so to raise the question **[422]** as to make the provision as to evidence apply. This point underwent some discussion, though it was not decided, in *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (ante, vol. v. p. 440): the court, however, seem to intimate an opinion that the mere obtaining a certificate of complete registration was conclusive of the fact of incorporation. In *Brittain* v. *Kinnaird* (1 B. & B. 432, 4 J. B. Moore, 50), in trespass against magistrates for taking and detaining a vessel, a conviction by the defendants under the bumboat act, 2 G. 3, c. 28 (no defect appearing on the face of the conviction), was held to be conclusive evidence that the vessel in question was a bumboat within the meaning of the act, and properly condemned. Dallas, C. J., there says: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognised by all the modern, decisions; and the principle is, that a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it." The law is similarly laid down by Tindal, C. J., in *Cave* v. *Mountain* (1 M. & G. 257, 1 Scott, N. R. 132). "There can be no doubt," says that learned judge, "but that, if a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an action of trespass. But, if the charge be, of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation."

(a) The points marked for argument on the part of the plaintiffs, were,—"that the pleas afford no answer to the action, because each of them alleges that a certificate of complete registration was granted to the said company, and it is not alleged that the certificate was improperly obtained, by fraud, &c.: that the said pleas do not shew that the provisions alleged to have been omitted from the deed were in the judgment of the registrar such as the business of the company required, who was made by the legislature the judge of such matters: that, if they were required, still it formed no defence, but only furnished ground for registering a supplemental deed: and that the defendant, a shareholder of the company, could not insist on such a defence, in an action for calls."

So, in *The Queen* v. *Bolton* (1 Q. B. 66), it was held, that, where a conviction or order of justices is **[423]** returned to the Queen's Bench, and the proceedings are regular in form and in practice, and the case one over which the justices had jurisdiction, the court will not hear affidavits impeaching their decision on the facts, nor, if they return the evidence, will it review their judgment thereupon. *Allen* v. *Sharp* (2 Exch. 352) is an authority to the same effect: there, a party was assessed to the duty imposed on "horse-dealers"; and it was held that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action. In the course of the argument of that case, Parke, B., observes (ib. 360): "Wherever a statute gives to certain persons the power of adjudicating upon a particular matter, their decision excludes all further inquiry. Here, it is as if the statute had said that the assessor shall decide whether or no the party is a horse-dealer; and the assessor having done so, his decision is final and conclusive, unless appealed against in the manner pointed out by the act: *Brittain* v. *Kinnaird; Regina* v. *Bolton*." The position of the registrar here, is very analogous to that of the assessor there. [V. Williams, J. Your argument would shew, that, if the registrar improperly withholds his certificate, you are without remedy.] It is not necessary to say that.

The fifth plea is like pleading a fact shewing that the account could not have been stated: it is a special denial of that which should have been traversed generally.

The court called on

Peacock to support the pleas. It may be conceded, that, if the registrar of joint-stock companies is a judicial officer, his judgment is conclusive. But it is submitted that the statute has not invested him with **[424]** any such power. [V. Williams, J. Do you contend that the certificate is void, if the act has not been in every particular complied with?] If the registrar grants a certificate in a case where the statute says he shall not grant it, the certificate is void. [V. Williams, J. If there is any false statement in the deed, the certificate is void?] Yes. [Maule, J. That would be a very inconvenient doctrine.] The inconvenience is obviated by the provision which enables the company to supply any defect by a supplemental deed. [Maule, J. There are in schedule (A.) thirty-eight purposes for which provision is required to be made by the deed of settlement. If your argument is correct, there might be a plea that the nature and business of the company required that such and such provisions should be contained in the deed, and were not; and that would have to be tried by a jury! There is a manifest distinction between conditions and provisions: the conditions (in s. 7) are eleven in number: and they are all in this deed.] The validity of a patent may be inquired into by scire facias. That cannot be done here: therefore, to hold the registrar to be a judicial officer, would be to place him above the royal prerogative. [Maule, J. In the case of a patent for incorporation, would it be a good plea, that the Queen had been deceived in her grant?] Probably not. But, if the registrar grants a certificate of complete registration, in a case where the act of parliament says that it shall not be granted, what is to be the consequence? To render the certificate available, the company must be one to which the registrar was authorised to grant a certificate. The 7th section expressly provides, "that, unless such deed and other matters be so produced, and such conditions be so performed, it shall not be lawful for him (the registrar) to grant such certificate." [Maule, J. It does not go on to say that the certificate, if granted, **[425]** shall be void.] The 19th section, which, amongst other things, enables the board of trade to appoint an assistant-registrar, tends strongly to shew that the office is not one of a judicial character. If it were so, a mandamus would not lie to compel the registrar to grant a certificate; and such a proceeding is now pending in the court of Queen's Bench, in *The Queen* v. *Whitmarsh, In the Matter of the National Land Company* (since reported, 19 Law Journ., N. S., Q. B. 469). [Maule, J. There seems to be matters which do not appear upon the face of the deed, but which are to be inquired into by extrinsic evidence.] The registrar has no power to take evidence.

Needham, in reply. The certificate of the registrar has the full effect of incorporating the company. The circumstance of a mandamus being granted in the case referred to, proves nothing. In *The King* v. *The Justices of Middlesex* (4 B. & Ald. 298), the court of King's Bench held that they had no jurisdiction to grant a mandamus to magistrates, to make an order of maintenance on a particular parish. And the distinction is well put in *The King* v. *The Churchwardens and Overseers of St. Margaret and St. John, Westminster* (4 M. & S. 250), where the court say: "Although this court will not interfere by mandamus to compel the churchwardens and overseers to make a church-rate, which is properly of ecclesiastical cognisance, the rights and powers of which are saved by the act (10 Ann. c. 11, s. 26), yet they will put in motion their functions in ordine ad, i.e. to assemble in order to inquire and agree whether it be fit that a rate should be made." In *The King* v. *The Mayor and Aldermen of London* (3 B. & Ad. 255), to a mandamus to the lord mayor and aldermen of London, **[426]** to admit and swear in A. B. to the office of alderman, they returned,—that the court of mayor and aldermen had, from time immemorial, the authority of examining and determining whether or not any person returned to them by the court of wardmote as an alderman was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman, that he should be a fit and proper person to support the dignity and discharge the duties of the office; that A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and, having heard witnesses, did adjudge, according to their discretion and sound consciences, that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office: and it was held, that the custom set out in the return was good and valid in law; and that, as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons. Lord Tenterden there says: "It is said, that, allowing the custom to be good, the defendants ought to shew the grounds of their disapproval; but the cases which have been cited are decisive against this objection, and so is all reason; for, if a matter is left to the discretion of any individual, or body of men, who are to decide **[427]** according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient, in common sense, for him to say that he has exercised that power according to the best of his judgment." And Taunton, J., says: "I think that this is one of those cases in which it is probably much better that the grounds should not be disclosed, because the circumstances which regulate the exercise of a discretion like this may be such that it would be extremely inconvenient for a traverse to be taken." Wherever the duty cast upon an officer is such as to impose upon him the necessity of exercising his discretion, his office is judicial. [Maule, J. May it not be, that, with respect to certain classes of matters, the legislature has entitled the company to determine for itself what portion of schedule (A.) is applicable to its nature and business? I should pause a long time, if I found both sides agreeing that the registrar is bound to inquire and decide whether all the matters in schedule (A.) are or are not applicable to the business of the company.] Under the municipal corporation act, 5 & 6 W. 4, c. 76, s. 103, the recorder is empowered to appoint a deputy, being a barrister of five years' standing. That clearly would be a good delegation of authority, even though the party so appointed deputy was not qualified in another respect.

Maule, J. My brother Williams and myself (*a*) being agreed that the pleas are bad in substance, it is unnecessary to consider whether the replications are **[428]** good or not. This is an action for calls, brought by a joint-stock company which has obtained a certificate of complete registration under the statute 8 & 9 Vict. c. 110, by the 25th section of which it is provided "that, on the complete registration of any company being certified by the registrar, such company are thereby incorporated as from the date of such certificate." That the company in question has in fact been registered, there is no doubt. But the pleas, in substance, state that the deed which was presented to the registrar (and upon which the company claims to act as a corpora-

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(*a*) Wilde, C. J., and Talfourd, J., having been absent (the former, at the court of criminal appeal, the latter, at nisi prius), when the greater portion of the argument took place, did not take part in the judgment.

tion), did not contain certain provisions set forth in schedule (A.) to the act annexed, which the nature and business of the company required. It was argued, on the part of the defendant, that the presentation to the registrar of a deed containing such provisions, was a condition precedent to the power of that officer to grant a certificate of complete registration; and that, as that condition was not duly performed, the certificate which has been granted, is void. The question is certainly one of great importance. But, upon the best consideration I have been able to give to the subject, the conclusion I have come to is, that the matters alleged in these pleas do not prevent the company from acting as a corporation. The question turns mainly on the 7th section, which enacts, that it shall not be lawful for any joint-stock company thereafter to be formed, &c., to act otherwise than provisionally in accordance with the act, until such company shall have obtained a certificate of complete registration as thereinafter provided; that no joint-stock company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders therein; and that such deed must set forth in a schedule thereto, in a tabular manner, according to the order thereinafter mentioned, the [429] following particulars,—enumerating eleven separate matters which must be set forth in the order prescribed. The clause then goes on to provide for certain covenants to be contained in the deed; and then comes this provision,—the alleged non-compliance with which gives rise to the objection here,—"and that such deed must also make provision for such of the purposes set forth in schedule (A.) to this act annexed, as the nature and business of the company may require." And the clause further provides, "that, on the production of such deed, setting forth such matters and making such provisions as are thereby required to be provided for, and being so signed and certified, together with a complete abstract or index thereof, to be previously approved by the registrar of joint-stock companies, and also a copy of such deed, for the purpose of registering the same, or as soon after such production as conveniently may be, the registrar of joint-stock companies shall grant a certificate of complete registration, according to the provisions of the act in that behalf; (this provision of the act being complied with, the registrar must grant the certificate); and, unless such deed and other matters be so produced, and such conditions be so performed, it shall not be lawful for him to grant such certificate; and that, after such certificate shall be granted, it shall be taken as evidence of the proper provisions being inserted in such deed, and of the performance of the conditions thereby required previously to the granting such certificate of complete registration; and that any defect or omission as regards the matters hereby required in any deed of settlement, may from time to time be supplied by a supplementary deed or deeds; and that, if any such supplementary deed be not inconsistent with or repugnant to this act, or any act respecting joint-stock companies, and if it be duly registered, then it shall have the same effect as if there were only one deed for the purpose of the act; [430] and that, unless the same be registered, it shall be of no force or effect." Then comes the 8th section, which provides, that, if any deed of settlement, or supplementary deed of settlement, shall appear to the registrar to be insufficient, by reason of the omission or incompleteness of any of the provisions therein contained, for the purposes set forth in schedule (A.), or if the deed contain provisions which appear to the registrar to be inconsistent with or repugnant to the act, the same is to be notified by the registrar, in writing, to the company. The clause does not go on to say what shall follow: but it would be clearly competent to the company to present to the officer a supplementary deed, to supply the defect. Taking these two sections together, there seems to be no room for doubt that the registrar is to make some preliminary inquiry,—to consider and determine something, upon the deed being presented to him for registration. It is only (by s. 7) upon the production "of such deed, setting forth such matters, and making such provisions as are thereby required to be provided for," that the registrar is to grant a certificate: and (by s. 8), if it appears to him that the deed is insufficient for the purposes set forth in schedule (A.),—and it is somewhat remarkable that it says nothing about the particulars referred to in s. 7,—he is to notify the fact. Putting these two sections together, they seem to me to shew, beyond a reasonable possibility of doubt, that the registrar is to look at the face of the deed, and to decide whether or not its provisions are repugnant to that or to any subsequent act, and whether it contains the provisions required by schedule (A.). As to some of these, and probably as to all, the legislature seem to have considered that this was to be discovered by merely looking at the deed itself. It may be that whether or not some of the particulars in schedule (A.) ought to be contained in the deed, may be ascertained **[431]** by an inspection of the deed. I think the inquiry of the registrar is to be limited to what appears on the face of the deed; and that he is not to go into any extrinsic inquiry. Probably these pleas may be open to the objection (though not taken upon these demurrers), that, if the power to grant the certificate is a power to be exercised upon an inspection of the deed, the deed ought to have been set out, in order that the court might see whether or not the registrar came to a right conclusion. But it is not material to consider that now. We may assume that the deed omits provisions which it ought to have contained, and that the registrar came to an erroneous conclusion. The deed, then, being one which is defective in respect of certain of the particulars required by schedule (A.), but the registrar, who by the act is bound to determine, having determined erroneously, and having granted a certificate which he ought not in point of law to have granted: the question is, what is the consequence of his mistake,—whether it will have the effect of disabling the company from suing a shareholder for a call. There is nothing on the face of these pleas to shew that the defendant is not one of those shareholders who concurred in getting the deed registered. I think it must be taken that he is. Looking at the provisions in schedule (A.), it seems to me that they are all matters that are proper for the internal regulation of the company, and that it is not competent to a shareholder to say that the incorporation is avoided for want of their insertion in the deed; the proper remedy for the omission being the production and registration of a supplemental deed, or something of that kind. The defendant's position differs materially from that of a stranger who is complaining of the non-insertion of provisions which are required for the benefit and protection of the public. The act requiring the registrar to grant the certificate, upon his **[432]** being satisfied that certain provisions have been complied with, it does not necessarily follow that his certificate is in every way conclusive and binding upon everybody. But it seems to me that a decision holding the certificate not to be binding on the present occasion, would be pregnant with great mischief, and that we are not called upon so to hold. It is plain that the statute contemplates that a certificate may have been granted upon a defective deed; for, the 7th section makes provision for remedying the defect, by registering a supplemental deed. Now, if the certificate is void by reason of the insufficiency of the first deed, I cannot understand how the defect can be remedied by filing a second, or supplemental deed. Supposing the objection here to prevail, the defect may still be remedied: so that the consequence would be, that the company would have been a corporation for some time, then would cease to be a corporation, and then become a corporation again! This would be absurd. I think it is manifestly more consonant to the spirit of the act, and to the general law upon the subject, to hold, that, although the registrar may have erred in granting a certificate of complete registration, the company is to be considered as an incorporated company until dissolved by a competent authority. A contrary construction would lead to great difficulty, and never could have been intended. I do not think we are called upon to say whether the conclusion of the registrar can be reviewed by any tribunal. It is enough for us to say, that it is not competent to this defendant to take the objection; and that, the registrar having granted a certificate, the plaintiffs are entitled to enforce their claim for calls, notwithstanding the registrar may have come to an erroneous conclusion.

For these reasons, I think the plaintiffs must have judgment on these demurrers.

[433] V. WILLIAMS, J. I am of the same opinion. The statute appears to be defectively drawn, inasmuch as it omits to provide for the consequences of a neglect to comply with its provisions as to the contents of the deed of settlement, where the company has in fact been completely registered, notwithstanding such omission. The question cannot, as it seems to me, be decided either way, without encountering great difficulties. In the choice of evils, I think it best to decide that the grant of a certificate of complete registration is not null and void,—as has been contended by Mr. Peacock,—where the deed presented to the officer is not in strict accordance with the provisions of the act. A contrary decision, as it seems to me, if pursued to all its consequences, would lead to results that would render it altogether impossible to carry the act into operation. I think we are justified in regarding this as one of that class of cases to which the maxim "Quod fieri non debet factum valet," applies. I agree with my brother Maule, in thinking that the pleas are bad, and that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

MASTERS *v.* BARETTO. Nov. 8, 1849.

[S. C. 19 L. J. C. P. 50; 13 Jur. 1124: at Nisi Prius, 2 Car. & K. 715.]

A note payable to the order of the maker, and by him indorsed in blank, may be treated as a note payable to bearer; and that notwithstanding there is a memorandum at the foot of the note, indicating a particular place of payment.

Assumpsit, upon a promissory note in the following form:—

"Three months after date, I promise to pay to my own order the sum of sixty-five pounds, for value received." (Signed) "J. A. BARETTO.

"Payable at Messrs. Walter & Pemberton's."

[434] The note was indorsed generally "J. A. Baretto."

The first count of the declaration, in conformity with recent decisions of this court in *Brown* v. *De Winton* and *Gay* v. *Lander* (ante, vol. vi. p. 336), described the note as payable "to the bearer." There was also a count upon an account stated.

The defendant pleaded, to the first count, that he did not make the note; and, to the second, non assumpsit.

At the trial, before Wilde, C. J., at the sittings in Middlesex after the last term, it was objected, on the part of the defendant, that there was a variance between the note produced in evidence, and the statement of it in the first count.

A verdict was found for the plaintiff, for the amount of the note and interest; and leave was reserved to the defendant to move to enter a verdict for him, if the court should think the objection well founded.

Byles, Serjt., now moved accordingly. The note is not complete, according to the doctrine in the cases above cited, until you come to the indorsement: it is, therefore, a note whereby the maker promises to pay the sum therein mentioned, to the bearer thereof, at Messrs. Walter & Pemberton's, and should have been so described in the declaration. The case differs, therefore, essentially from those in which similar words have been held to constitute a mere memorandum, and to be no part of the note. Besides, in those cases, the form was "At, &c.;" whereas, here, the memorandum begins "Payable at, &c." [Wilde, C. J. "At" always means "payable at." Maule, J. You say the inference is, that the note is payable to the bearer, provided he presents it at the place indicated.] Yes. [Maule, J. The memorandum affects the contract to **[435]** this extent, that a presentment at Messrs. Walter & Pemberton's would have sufficed, in the case of an indorsee. The question is, whether any difference arises from the circumstance of the note being payable to the bearer's own order.] In *Trecothick* v. *Edwin* (1 Stark. N. P. C. 468), the whole of the note was printed, except the names of the parties, the sum, and the date, and at the bottom were the words (also printed) "at Barclay, Tritton, & Co.:" and Lord Ellenborough, C. J., held that it was necessary to prove a special presentment, since the stipulation for payment at a particular place, being printed, was to be considered as part of the note, having been made at the same time.

WILDE, C. J. That case is rather an authority against you, unless the circumstance of this being a note payable to the maker's own order makes any difference. I think it would be dangerous to introduce such a refinement into cases of this sort.

MAULE, J. I think we should be laying traps for the unwary, if we were to grant this rule. This has always been treated as a mere memorandum: and the introduction of the word "payable" makes no difference. Neither do I think the case is at all varied by the circumstance of this being a note payable to the maker's own order. It was partly upon the principle of convenience to commerce that we contrived to get over some little technical difficulties in coming to the conclusion we did in the cases of *Brown* v. *De Winton* and *Gay* v. *Lander*.

The rest of the court concurring,

Rule refused.

[436] EDWARDS AND OTHERS v. MARY JEVONS. Nov. 14, 1849.

[S. C. 19 L. J. C. P. 50; 14 Jur. 131. Approved, *Bainbridge* v. *Wade*, 1850, 16 Q. B. 98.]

"In consideration of E. R. & Co. giving credit to D. J., I hereby engage to be responsible, and to pay any sum, not exceeding 120l., due to the said E. R. & Co., by the said D. J.:"—Held, to be a good and binding guarantie, the words "giving credit" being equally applicable to future as to past credit. In an action upon this guarantie, the declaration stated, that, at the time it was given, D. J. was indebted to the plaintiffs in 46l. for goods sold, and which sum was then payable; that the plaintiffs had sold other goods to D. J., to the amount of 50l., at a credit which had not yet expired; that D. J. had applied to the plaintiffs for an extension of credit in respect of both debts, and also for a further supply of goods on credit,—which the plaintiffs had consented to do on receiving the defendant's guarantie; that the defendant, in consideration of the premises, gave the plaintiffs the guarantie above set out; and that D. J. made default, &c.:—Held, on special demurrer, that the declaration sufficiently shewed that the consideration for the guarantie was future credit, and was therefore good.

Assumpsit on a memorandum of guarantie.

The declaration stated, that, before and at the time of the making of the promise by the defendant thereinafter mentioned, one David Jevons was indebted to the plaintiffs in a large sum of money, to wit, the sum of 46l., for the price and value of goods before then sold and delivered by the plaintiffs to the said D. Jevons, at his request, and which said sum the said D. Jevons was then liable to pay the plaintiffs on request; that also, before and at the time, &c., the plaintiffs had sold and delivered to the said D. Jevons, at his request, certain other goods, of great value, to wit, of the value of 50l., to be paid for by the said D. Jevons to the plaintiffs at one month after the delivery thereof,—which time had not expired at the time of the making of the said promise by the defendant; that also, before the making of the said promise of the defendant thereinafter mentioned, to wit, on the 9th of March, 1848, the said David had applied to and requested the plaintiff to forbear and give him the said David a reasonable time, or credit, for the payment of the said sum so due and payable from him to them as aforesaid, and also for payment of the said other goods so sold and delivered to him as last aforesaid, which time or credit was then agreed upon by and between them the plaintiffs and the [437] said David, to wit, three months' time, or credit, for that purpose, to wit, from the respective times when the said respective moneys were and would be, respectively, so due as aforesaid, and also to supply him with other goods on credit, to wit, on certain reasonable credit then and there agreed upon by and between the plaintiffs and the said David, to wit, three months' credit, which the plaintiffs had consented and agreed to do, upon having the guarantie and promise of the defendant thereinafter mentioned and set forth, but not otherwise,—whereof the defendant then had notice; that thereupon, afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, the instrument in writing thereinafter set forth was made and delivered by the defendant to the plaintiffs, and by them, at the request of the defendant, accepted and taken on the terms aforesaid, and as therein mentioned, the same being subscribed by the defendant, and which said instrument was and is in the words and figures following, that is to say, "In consideration of Messrs. Edwards, Ringer, & Co., tobacco manufacturers, Bristol, giving credit to Mr. David Jevons, grocer, Tipton, I hereby engage to be responsible, and to pay any sum, not exceeding 120l., due to the said Edwards, Ringer, & Co. by the said David Jevons:" Averment, that the David Jevons mentioned in the said instrument was the before-mentioned David, and no other person, and that the said Messrs. Edwards, Ringer, & Co. in the said instrument mentioned, were the plaintiffs, and no other persons, and that the credit in the said instrument mentioned was and is such credit as aforesaid; that the defendant then thereupon, in consideration of the premises, promised the plaintiffs to be responsible to them for, and to pay them, any sum, not exceeding 120l., which might at any time be due to them by the said David, according to the tenor and effect of the said [438] instrument; that, although more than the reasonable time and credit so agreed upon as aforesaid for the payment of the said several sums so at the time of the giving and accepting of the aforesaid instrument due and accruing due as aforesaid, to wit, the said sums of 46l. and 50l., had expired before the commencement of this suit, and the plaintiffs having during all that time, confiding in the said promise of the defendant, forborne and given time to the said David Jevons for the payment of the said several sums, and every part thereof, and although the plaintiffs had at all times since the making of the defendant's promise theretofore been ready and willing, as he the said David during all that time well knew, to supply him with all such goods as aforesaid, on such credit in that behalf as aforesaid,—of all which premises the defendant had at all times had notice, —and although the said David Jevons afterwards, and after the making of the said promise, and before the commencement of this suit, to wit, on, &c., paid to the plaintiffs the sum of 20l., parcel of the said several sums of 46l. and 50l., yet the said David Jevons had not paid the residue of the said several sums of 46l. and 50l., to wit, the sum of 76l., but the same still remained due and owing and unpaid from the said David Jevons to the plaintiffs,—of which the defendant afterwards, and before the commencement of this suit, to wit, on, &c., had due notice, and thereby, and according to the tenor and effect of her said promise, she the defendant became liable to pay the plaintiffs the said sum of 76l. when thereunto afterwards requested; yet the defendant had disregarded her said promise, and had not, although afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, paid the said sum of 76l., or any part thereof, and the said sum of 76l. still remained due, owing, and unpaid to the plaintiffs, &c.

[439] To this declaration, the defendant demurred specially, assigning for causes, amongst others,—that, although it was a part of the consideration for the defendant's promise, that the plaintiffs should give David Jevons credit for the said goods to be supplied as in the declaration mentioned, yet it was not averred in the declaration that the said other goods ever were supplied, or that the last-mentioned credit ever was given, and that it did not appear that the time for supplying the said other goods to David Jevons had arrived or elapsed before the commencement of this suit, and that it was not sufficient to aver that the plaintiffs were ready to supply such goods, if the time agreed upon for such goods to be supplied had not come, and that the declaration should have stated when the said other goods were to be supplied;—that it was not stated in the declaration, except argumentatively and by way of inference, that the said sums for which the action was brought were or had become due before the commencement of this suit, or that the credit in the guarantie mentioned, had been given;—that the promise declared on did not correspond with the instrument set out in the declaration; for that, by the instrument as set out, the promise of the defendant extended only to any sum, not exceeding 120l., due to the plaintiffs by David Jevons; whereas, the promise stated in the declaration extended to any sum, not exceeding 120l., which might at any time be due by David Jevons to the plaintiffs; and that, inasmuch as the instrument as set out extended only to sums then due, and not to sums to become due, the breach ought not to have included the sum in the declaration secondly above mentioned, which was not due at the date of the guarantie; and that the breach was therefore too large; or, if the promise to be inferred from the instrument was as stated in the declaration, and extended to any sum that might at any time **[440]** be due, then the breach ought not to have included the said first-mentioned sum, which was actually due at the date of the said guarantie or instrument, as appeared from the declaration; and that the breach in the declaration mentioned did not therefore correspond with the promise as alleged, or with the instrument or guarantie as set forth, &c.

The plaintiffs joined in demurrer.

Bovill, in support of the demurrer. The extreme uncertainty of the cases renders it difficult to put a construction upon an instrument of this kind. On the present occasion, the main question arises upon the meaning of the words "giving credit." Do they apply to both past and future debts, or only to such as had accrued at the time of giving the guarantie? [Maule, J. The proper mode of construing an instrument of this sort is, to give its words the largest sense of which they are fairly susceptible.] The terms of the instrument are ambiguous in that respect, as well as with regard to the limit of the defendant's responsibility, which is, "to pay any sum, not exceeding 120l., due to the said Edwards, Ringer, & Co. by the said David Jevons." Do those words apply to money then due, or to money thereafter to become due?

To entitle a plaintiff to sue upon a guarantie, there must be a consideration distinctly expressed or necessarily to be implied: *Hawes* v. *Armstrong* (1 N. C. 761, 1 Scott, 661) *Raikes* v. *Todd* (8 Ad. & E. 846, 1 P. & D. 138); *Bentham* v. *Cooper* (5 M. & W. 621), *Price* v. *Richardson* (15 M. & W. 539). In *Hawes* v. *Armstrong*, Tindal, C. J., says: "Undoubtedly, it is extremely probable, from the amount **[441]** of the debt due from Armstrong & Dell agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and, if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant: but there is no written evidence to shew that such was the case; and, after proof of the existence of such debt by parol evidence (which might be admitted), the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, viz. that the forbearance of suing for that debt was the consideration for the particular promise." [V. Williams, J. In *Hawes* v. *Armstrong*, it was necessary to add to, not merely to explain, an ambiguous instrument, to imply a consideration.] In *Cole* v. *Dyer* (1 C. & J. 461), Lord Lyndhurst says: "It appears to me, that, if, in such a written agreement to be answerable for the debt of another person, two distinct considerations may, with equal probability, be inferred as the inducement for that engagement, the writing is not taken out of the operation of the statute of frauds, and consequently can give no right of action." [Wilde, C. J. There are many cases where parol evidence has been admitted to eke out a guarantie.] *Haigh* v. *Brooks* (10 Ad. & E. 309, 2 P. & D. 477) was a case of that sort: there, the guarantie was as follows:—"Messrs. H. In consideration of your being in advance to L. in the sum of 10,000l., for the purchase of cotton, I do hereby give you my guarantie for that amount on their behalf. J. B.:" and it was held by the court of error (10 Ad. & E. 323, 4 P. & D. 288), affirming the judgment of the court below, that the guarantie did not necessarily imply a past **[442]** advance; and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated. [V. Williams, J. The last case on the subject is *Goldshede* v. *Swan* (1 Exch. 154), and that is to the same effect as *Haigh* v. *Brooks*.] Parol evidence, however, is not admissible to explain the meaning of the words "giving credit." It means, ordinarily, creating a debt by giving credit. [Wilde, C. J. May it not also mean, giving an extended time for payment for goods already supplied?] The meaning of the parties must be collected with certainty from the instrument itself.

Karslake, contrà. The consideration is sufficient, and the promise well alleged. In *Newbury* v. *Armstrong* (6 Bingh. 201, 3 Moore & P. 509), the words of the guarantie were,—"I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50l.: and it was held that the consideration for the guarantie sufficiently appeared. "We ought not," says Tindal, C. J., "to be too strict in the construction of these instruments; for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." The same rule is adopted in *Goldeshede* v. *Swan*. Another rule applicable to cases of this sort, is that adverted to by Alderson, B., in *Mayer* v. *Isaac* (6 M. & W. 605), where that learned judge says: "There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision: some laying it down that a liberal construction ought to be **[443]** put upon the instrument, in favour of the person giving the guarantie,—as in *Nicholson* v. *Paget* (1 C. & M. 68, 3 Tyrwh. 164); others, that it ought to be strictly construed,—as in *Mason* v. *Pritchard* (12 East, 227). Undoubtedly, the generally-received principle of law is, that the party who makes any instrument, should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason* v. *Pritchard*, than with the opinion of Bayley, B., in *Nicholson* v. *Paget*." It may be conceded, that, if the instrument shews no consideration upon the face of it, the defect cannot be aided by averment or by evidence. But here, it is submitted that giving credit is a good consideration, and prospective. [Wilde, C. J. The declaration gives as the state of facts to which the guarantie is to apply, an existing debt, and an extended credit. The consideration is limited to a future supply of goods: and none have been supplied.] The question is, whether there is any consideration at all,—whether, upon the whole declaration, the guarantie is good. It has been laid down over and over again that you may resort to extrinsic evidence to explain a guarantie. Such evidence was received in *Shortrede* v. *Cheek*, 1 Ad. & E. 57, 3 N. & M. 866), and *Johnston* v. *Nicholls* (ante, vol. i. p. 251). In **[444]** *Russell* v. *Moseley* (3 B. & B. 211), the guarantie was as follows:—"I hereby guarantie the present account of H. M. due to R. T. S., of 112l. 4s. 4d., and what she may contract from this date to the 30th September next:" and it was held that the consideration sufficiently appeared on the face of the instrument.

Bovill was heard in reply.

Wilde, C. J. It is undoubtedly to be lamented that so much ambiguity has of necessity arisen in cases of this description. But, when it is remembered that these instruments are ordinarily drawn up by persons possessing no legal knowledge, and having no ready means of inquiring as to their formal requisites, little surprise will be felt at the diversity and apparent conflict of the decisions on the subject. Considering, however, the importance in a commercial point of view, that every reasonable facility should be given in the enforcement of guaranties, one is extremely desirous, where parties have acted upon the faith of such engagements, that they should, if possible, be sustained. Bearing this principle in view, let us apply our minds for a moment to the terms of this guarantie, and then see how the authorities that have been cited bear upon it. The words are,—"In consideration of Messrs. Edwards, Ringer, & Co., tobacco manufacturers, Bristol, giving credit to Mr. David Jevons, grocer, Tipton, I hereby engage to be responsible, and to pay, any sum, not exceeding 120l., due to the said Edwards, Ringer, & Co. by the said David Jevons." It is objected that the words "giving credit" are ambiguous and uncertain—they may refer to credit already given, or to future credit,—and therefore the guarantie is bad. The an-**[445]**-swer to this objection is, that there are authorities to shew that such words may embrace both past and future credit, and may be applied to whichever may be found to exist. Thus, in *Haigh* v. *Brooks*, the words "in consideration of your being in advance to L." were held not necessarily to imply a past advance. So, in *Goldshede* v. *Swan*, the words "in consideration of your having this day advanced," &c., were held to be sufficiently ambiguous to admit of evidence to shew that the advance was not a past one, but was made simultaneously with the execution of the guarantie. If only one consideration existed, and that by-gone, the consideration would not be good: but, if there were both a future and a past consideration, it would suffice. *Haigh* v. *Brooks* has not been impugned by any subsequent authority; and it has repeatedly been followed. Applying its doctrine to the present case,—the words "giving credit" are equally capable of embracing a by-gone or a future credit. What does this declaration shew? That there had been antecedent dealings between the plaintiffs and David Jevons, in the course of which the latter had become indebted to the plaintiffs, and that they had been requested, and had agreed, to give him an extended credit, upon the defendant's giving them a guarantie. I thought at first that the words might mean "had been contracted to be given:" but I am satisfied, that, reading the whole together, the result is this,—David Jevons, being indebted to the plaintiffs in two sums, one of which was due, and the other growing due, applied for an extension of credit as to both, and that the guarantie was given as an inducement for such extension of credit. Now, let us see whether the declaration does bear that construction. It begins with stating that David Jevons was indebted to the plaintiffs in the sum of 46l. for goods sold, and which sum was then payable: it then states that they **[446]** had sold other goods to David Jevons, to the amount of 50l., at a credit of one month, which had not yet expired: it then goes on to state, that, before the giving of the guarantie, David Jevons had requested the plaintiffs to forbear and give him a reasonable extension of credit in respect of both these debts, and also to supply him with other goods upon credit,—which the plaintiffs agreed to do, upon having the defendant's guarantie. Does not that in effect say, that there had been a negotiation for further time to pay the two debts, and for a future supply of goods, and that the plaintiffs had agreed to give time and to supply goods, provided the defendant would guarantie the payment, and that the guarantie was given in consideration of the premises? What, then, is the meaning of "giving credit?" The authorities clearly shew that it may mean the forbearance of a past or a future debt: and that the declaration shews it was future. It seems to me that the guarantie is not ambiguous upon the face of it. That which is applicable equally to two states of circumstances, cannot be called ambiguous. I think the guarantie is good, and properly declared on, and therefore that the plaintiffs are entitled to judgment on this demurrer.

The rest of the court concurring,

Judgment for the plaintiffs.

[447] CHINN, a Pauper, *v.* BULLEN. Nov. 24, 1849.

[S. C. 7 D. & L. 297; 19 L. J. C. P. 42; 14 Jur. 201.]

The judge of a county-court has power, under the 9 & 10 Vict. c. 95, s. 78, to allow parties to sue before him in formâ pauperis.—Where, therefore, a plaintiff suing in formâ pauperis in the superior court, recovered less than 20l. in an action of debt, the court ordered a suggestion to be entered, to deprive him of costs.

This was an action of debt, for wages. The plaintiff had pendente lite obtained an order to sue in formâ pauperis; and, at the trial before Talfourd, J., at the first sitting for Middlesex, in this term, he obtained a verdict for 10l.

Skinner, on a former day, obtained a rule calling upon the plaintiff to shew cause why a suggestion should not be entered to deprive him of costs, under the 9 & 10 Vict. c. 95, s. 129, on the ground that the action was brought for a cause for which a plaint might have been entered in the county-court.

G. Atkinson now shewed cause. A plaintiff who is admitted to sue in formâ pauperis, by virtue of the statute 11 H. 7, c. 12, is not within the 9 & 10 Vict. c. 95. The statute 11 H. 7, c. 12, is referable only to proceedings commenced by original writ, and is in express terms confined to the three superior courts of common law: and, though the county-court is to a certain extent a court of record, the language of the statute of Henry is inapplicable to it. The whole scope of the county-courts act shews that it contemplates fees at each step payable by the party suing; s. 37: and no exception is made in favour of paupers.

MAULE, J. I apprehend that the law as to parties suing in formâ pauperis is subordinate to the general law of the land. The 78th section of the 9 & 10 Vict. c. 95, enacts "that five of the judges of the superior **[448]** courts of common law at Westminster, including the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, or one of the said chiefs at the least, shall have power to make and issue all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the clerks of the said courts, and from time to time to alter any such rule or form; and the rules so made, and the forms so framed, shall be observed and used in all the courts holden under this act; and, in any case not expressly provided for herein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts." These latter words, I think, make an end of the objection. The judges of the county-courts may exercise the same discretionary power as to allowing parties to sue in formâ pauperis, which the judges of the superior courts exercise.

WILDE, C. J. Of all others, one would think paupers the fittest suitors for county courts.

The rest of the court concurring,

Rule absolute.

[449] ACRAMAN AND OTHERS, Assignees of Thomas Swift, a Bankrupt, v. MORRICE. Nov. 22, 1849.

[S. C. 19 L. J. C. P. 57; 14 Jur. 69.]

A. contracted with B. to purchase of him the trunks of certain oak trees, then felled, and lying at Hadnock, about twenty miles from Chepstow. The course was, for A.'s agent to select and mark those portions which he intended to purchase, and for B. to sever the tops and sidings, and float the trunks down the river Wye to A.'s wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, B. became bankrupt; whereupon A. sent his men to B.'s premises at Hadnock, and severed and carried away the marked portions of certain trees:—Held, that no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; and that there was no delivery or acceptance to satisfy the statute of frauds: and, consequently, that the assignees of B. were entitled to recover the value, in trover.

Trover, for certain oak timber. The first count alleged a conversion before, and the second after, the bankruptcy of Swift.

The defendant pleaded,—first, to the whole declaration, not guilty,—secondly, to the first count, that Swift was not possessed of the goods and chattels in that count mentioned, &c., as of his own property, in manner and form, &c.,—thirdly, to the second count, that the plaintiffs were not possessed of the goods and chattels in that count mentioned, &c., as of the property of the plaintiffs as such assignees as aforesaid, in manner and form, &c.

The cause was tried before Coleridge, J., at the Bristol summer assises, 1848. The facts which appeared in evidence were as follows:—The bankrupt Swift was a timber-dealer at Monmouth. The defendant was a timber-merchant in London, and was in the habit of contracting largely for the supply of timber to Her Majesty's dock-yards. This action was brought to recover the value of certain oak timber which had been purchased of Swift by the defendant, and marked, measured, and paid for, before the date of the fiat, but **[450]** not actually delivered at the appointed place, and of which the defendant possessed himself after the fiat, under the circumstances hereafter mentioned.

There had been a long course of dealing between the parties, of this kind:—The trees being felled, the defendant sent an agent to inspect them, and to measure and mark such portions of them as were suited for his purpose. It then became the duty of Swift to cut off those parts which the defendant's agent had rejected, and, at his own expense, to convey and deliver the trunks to the defendant at Chepstow.

The timber which was the subject of this action, formed part of a large number of trees which the defendant had, at the close of the year 1847, verbally agreed to purchase of Swift, and which had been measured and marked by the defendant's agent, but the rejected portions of which had not been severed by Swift before the issuing of the fiat. The fiat was dated the 15th of April, 1848. After that day, the defendant sent men to the bankrupt's premises at Hadnock, in the Forest of Monmouth, who severed from the trunks those parts of the trees which the defendant had not agreed to take, and carried away those portions which he had purchased.

On the part of the defendant, it was insisted that the measuring and marking of the timber by his agent, was a sufficient delivery and acceptance within the statute of frauds, and passed the property in it to him.

The learned judge intimated a contrary opinion, and directed the jury to find for the plaintiffs for the agreed value of the timber so taken,—leave being reserved to the defendant to move to enter a verdict for him, if the court should think that the property had, under the circumstances, vested in him.

The jury accordingly returned a verdict for the plaintiff, damages 95l.

[451] Cockburn, in the following Michaelmas term, pursuant to the leave reserved to him, moved for a rule nisi to enter a verdict for the defendant. He submitted, that enough had been done to pass the property in the timber to the defendant, before the issuing of the fiat; and that, the severance of the tops and sidings from the trunks being an obligation imposed upon the vendor for the purchaser's benefit, it was competent to the defendant to do it himself. [Wilde, C. J., referred to *Rugg* v. *Minett*

(11 East, 210). There, turpentine in casks was sold by auction, at so much per cwt., and the casks were to be taken at a certain marked quantity, except the last two, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the last two casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days of the goods being delivered; and the buyers had the option of keeping the goods in the warehouse, at the charge of the sellers, for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the last two, but left the bungs out, in order to enable the custom-house officer to gauge them; but, before he could fill up the rest, a fire consumed the whole in the warehouse, within the thirty days: and it was held that the property passed to the buyers, in all the casks which were filled up, because nothing further remained to be done to them by the seller; for, it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman, in leaving them unbunged after filling them up, which was for the purpose of gauging, must be **[452]** taken to have been done by him as agent for the buyers, whose concern the gauging was: but that the property in the casks which were not filled up, remained in the seller, at whose risk they continued.] According to the principle of that case, the property in the timber had passed to the purchaser; all that remained to be done by the seller being, the severance of the tops and sidings. [Maule, J. This question recently underwent a good deal of discussion before the Privy Council, in a case of *Logan* v. *Le Mesurier* (6 Moore's P. C. Cas. 116). There, A. & Co., of Montreal, entered into a written contract with B. & Co., for the sale of a quantity of red-pine timber, then lying above the rapids, Ottawa River, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off: if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; and, if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by B. & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale; and, when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby a great part of the timber was dispersed and lost. B. & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by B. & Co. against A. & Co., to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference **[453]** between the contract price of 9½d. per foot, and 10½d. per foot, the market price when the timber was to have been delivered, it was held, by the Judicial Committee, affirming the judgment of the court of Appeals in Lower Canada,—first, that the action was maintainable,—secondly, that, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers,—and, thirdly, that the taking possession of a part of the timber by B. & Co., after the day mentioned for the delivery thereof in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission that the property in the timber passed to them before the storm which broke up the raft.] There, something remained to be done to ascertain the quantity of the timber: that case, therefore, does not conclude this.

A rule nisi having been granted,

Butt, Kinglake, Serjt., and M. Smith, shewed cause. The sole question is, whether there was any delivery and acceptance of this timber, prior to the date of the fiat against Swift, to divest the property out of the bankrupt, and to pass it to the defendant. The facts are short and undisputed. Swift had agreed to sell to the defendant certain unsevered portions of certain trees which had been selected, measured, and marked by the defendant's agent, preparatory to their being severed and trimmed. The severing and delivery of the trunks at the defendant's wharf at Chepstow,—which is about twenty miles from Hadnock, where the timber was lying,—were to be done by, and at the expense of, Swift. After the date of the fiat against Swift, and while the messenger was in possession, the **[454]** defendant sent his men to Swift's wharf at Hadnock, to sever and remove those portions of the trees which he had agreed to purchase. Something remaining to be done by the seller, viz. severing the tops and sidings, and floating the timber down the Wye, to the defendant's premises at Chepstow, the case falls precisely within that of *Rugg* v. *Minett*. [Wilde, C. J. Is not the result of all the cases this, that the property does not pass to the vendee, where anything remains to be done to it by the vendor, to sever the part sold from the bulk, or to ascertain the quantity?] That undoubtedly is the principle which pervades all the cases. [Maule, J. Suppose a horse were sold, to be shod by the seller, and afterwards delivered to the purchaser,—would the property in him pass before the operation of shoeing had been performed?] It is probable that it would: that every case is put by way of illustration in the course of the argument of *Rugg* v. *Minett*. In *Bill* v. *Bament* (9 M. & W. 36), the defendant ordered goods of H., the del credere agent of the plaintiff, at a stipulated price, to be paid for on delivery; and, on receiving notice that the goods had arrived at H.'s warehouse, went there, and directed a boy, whom he saw there, to put a certain mark on the goods: on the defendant's refusal to receive the goods, by reason of a dispute about the price, an action was commenced against him by the plaintiff; after which, at H.'s request, the defendant wrote in H.'s ledger, at the bottom of a page containing the statement of the goods in question, and headed with the plaintiff's name, the words "Received the above," which he signed: and it was held, that there was no evidence to go to the jury of a delivery and acceptance sufficient to satisfy the statute of frauds. Parke, B., says: "The direction to mark the goods, was evidence **[455]** to go to the jury, quo animo the defendant took possession of them: so also the receipt was some evidence of an acceptance. But there must also be a delivery; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien." [Maule, J. In that case, any goods of the same sort, would have satisfied the contract. Here, the subject-matter of the contract is ascertained from the first.] In *Laidler* v. *Burlinson* (2 M. & W. 602), where there was an entire contract to purchase when finished, a ship then in course of building, it was held that no property in her passed until she was finished (*b*). In *Baldey* v. *Parker* (2 B. & C. 37, 3 D. & R. 220), A. went to the shop of B. & Co., linen-drapers, and contracted for the purchase of various articles, each of which was under the value of 10l., but the whole amounted to 70l. A separate price for each article was agreed upon; some, A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: it was held,—first, that this was all one contract, and therefore within the 17th section of the 29 Car. 2, c. 3,—secondly, that there was no delivery and acceptance of any of the goods, so as to take the case out of the operation of that section. So, in *Simmons* v. *Swift* (5 B. & C. 857, 8 D. & R. 693), where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him,—it was held that the property in **[456]** the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered,—or (per Littledale, J.) for goods bargained and sold. [Maule, J. The subject of sale was not ascertained at all. Suppose I have 1000 bushels of corn in a heap, and a man agrees to buy one bushel of it,—would it not be preposterous to say that any particular bushel passed?] *Smith* v. *Surman* (9 B. & C. 561, 4 M. & R. 455) is an authority to the same effect: there, the contract was for a sale of growing trees. In *Maberley* v. *Sheppard* (10 Bingh. 99, 3 M. & Scott, 436), the plaintiff built a waggon for the defendant: the latter employed a smith to affix thereon the iron-work, and a tilt-maker, to put on a tilt: but the waggon remained in the possession of the plaintiff: and it was held that the affixing of these articles to it, was not such an acceptance of the waggon by the defendant, as to satisfy the statute of frauds.

Cockburn (with whom was Barstow), in support of the rule. The general doctrine, that, where something remains to be done by the vendor of goods, before their delivery, the property in them does not pass to the vendee, is not controverted. But the

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(*b*) Sed vide *Goss* v. *Quinton*, 3 M. & G. 825, 4 Scott, N. R. 471.

meaning of that proposition is this, —that the thing to be done has reference to the appropriation of the goods to the particular contract. Suppose a sale of twenty sheep out of a flock, selected and marked by the vendee, and it was part of the contract that the vendor should drive them home,—would not the property pass? [Maule, J. Suppose,—as, indeed, is not uncommon,—the score **[457]** of sheep are selected, and remain to be shorn by the vendor?] In that case, if the vendor omitted to shear the sheep, the vendee might do it, and take away the sheep, leaving the fleece. [Maule, J. It is quite clear that some portions of these trees were not the subject of the sale. The unsevered tops and sidings undoubtedly remained the property of the vendor. Can two men be seised of particular parts of an undivided chattel?] It is difficult to see why they may not. It is not unusual for two or more to be jointly interested in a race-horse: [Maule, J. But, in that case, each is seised per my et per tout (vide ante, vol. vii. p. 455, n.), not each of an ascertained part. If the vendee had brought an action for the non-delivery of the timber, could the vendor have said he had delivered it, when the vendee had no right to take it away?] That would depend upon circumstances. If no bankruptcy had intervened here, and the vendor had allowed an unreasonable time to elapse without severing and delivery, would the vendee have been liable in trespass for doing as he has done? [Maule, J. I think he would. The vendor has bound himself to do something, and has failed to do it; that is all. [Wilde, C. J. There has been no appropriation, and no delivery. The case falls precisely within the principle of *Rugg* v. *Minett*.] In that case, there remained something to be done by the vendor, to evidence an appropriation: here, the thing sold, and the price, were ascertained. [Maule, J. But not the quantity —the cubic contents. Wilde, C. J. In *Hanson* v. *Meyer* (6 East, 614, 2 J. P. Smith, 670), by a contract of sale, the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt., by bill at two months: the starch was in papers, but the exact weight was not then ascer-**[458]**-tained, but was to be ascertained afterwards; and fourteen days were to be allowed for the delivery: the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: and it was held, that the absolute property in the starch did not vest in the vendee before the weighing, which was to precede the delivery, and to determine the price; and that, notwithstanding part of the starch had been weighed and delivered by his direction, the vendor, upon the bankruptcy of the vendee, might retain the remainder, which still continued unweighed, in the warehouse, in the name and at the expense of the vendor. Maule, J. It has repeatedly been held,—upon contracts for the sale of corn, —*Swanwick* v. *Sothern* (9 Ad. & E. 895, 1 P. & D. 648),—oil, *White* v. *Wilks* (5 Taunt. 176, 1 Marsh. 2),—sugar, *Rhode* v. *Thwaites* (6 B. & C. 388, 9 D. & R. 293),—hemp, *Shepley* v. *Davis* (1 Marsh. 252, 5 Taunt. 617),—and flax, *Busk* v. *Davis* (2 M. & Selw. 397, 1 Marsh. 258, n., 5 Taunt. 622, n.),—that, although the price per bushel, per ton, or per cwt., and the precise bulk, are ascertained, yet the property does not pass to the vendee, so long as something remains to be done by the vendor, such as measuring or weighing.] In *Whitehouse* v. *Frost* (12 East, 614), A., having forty tuns of oil secured in the same cistern, sold ten tuns to B., and received the price, and B. sold the same to C., and took his acceptance for the price, at four months, and gave him a written order for delivery on A., who wrote and signed his acceptance upon the order; but no actual delivery was made of the ten tuns, which continued mixed with the rest, in A.'s cistern: and it was held that this was a complete sale and delivery in law **[459]** of the ten tuns by B. to C., nothing remaining to be done on the part of the seller,—though, as between him and A. it remained to be measured off; and therefore that the seller could not, upon the bankruptcy of C., the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the ten tuns to the buyer C.; and that the goods were not in transitu, so as to enable the seller to stop them.

Wilde, C. J. The argument urged on the part of the defendant, has not succeeded in raising any doubt in my mind. It appears to me that the case is quite free from difficulty. Upon a contract for the sale of goods, so long as anything remains to be done to them by the seller, the property does not pass, and the seller has a right to retain them. In the present case, several things remained to be done. The buyer having selected and marked the particular parts of the trees which he wished to purchase, it became the seller's duty to sever those parts from the rest, and to convey them to Chepstow, and there deliver them at the purchaser's wharf. Now, that which the buyer does for the purpose of enabling the seller to perform his part of the contract, cannot be considered as an acceptance of the article. The selection and marking must, of necessity, precede the delivery. What I understand by acceptance is, an act done by two parties, one of whom is content to deliver, and the other to receive, the subject-matter of the contract. The evidence here is, that the seller engaged that he would sever the tops and sidings, and, after he had incurred the expense of severing, he would incur the further expense of conveying the trunks to Chepstow; and that the buyer undertook to accept the trunks when severed and delivered to him at Chepstow. That is the contract which was proved. This being the state of things, the seller becomes bankrupt; and the buyer, anxious to get **[460]** possession of the timber,—which it appears he had paid for,—goes to a place where he had no right to go, and takes upon himself to sever and carry away that which does not belong to him. The case distinctly falls within every authority upon the subject which I can remember. The property clearly had not passed to the defendant, and he was guilty of a trespass and a conversion, in possessing himself of it in the way he did. I therefore think the rule to enter a verdict for him, should be discharged.

MAULE, J. I am of the same opinion. This is an action of trover for timber which the plaintiffs claim as assignees of Swift. There is no doubt that the trees remained the property of Swift at the time of his bankruptcy, and consequently vested in his assignees, except in so far as they were divested out of Swift by the contract. The way in which the defendant seeks to shew the plaintiffs to be out of possession, is this,—that the bankrupt had entered into a contract with him, by which it was agreed that certain portions of the trees in question should be severed and floated down to Chepstow by the bankrupt, and there delivered to the defendant, at the bankrupt's expense. Now, the rights of the defendant exist only so far as they are created by the contract. He had at no time a right to deal with the whole tree: it was to be severed by the bankrupt, and the selected portion delivered to him by the bankrupt. Subject to that right, the entire property remained in the bankrupt, and passed to his assignees. How could the qualified right which the defendant had,—a right which was only to be enforced by suit,—justify him in taking the trees out of the possession of the bankrupt? Even according to his own view, the defendant was guilty of a conversion, for his act amounted to a taking of the whole tree.

[461] V. WILLIAMS, J. I am of the same opinion. There was nothing to shew that the property in this timber ever passed to the defendant. There was clearly no delivery to satisfy the statute of frauds.

TALFOURD, J., concurred.

Rule discharged.

PORCHER AND ANOTHER *v.* GARDNER AND OTHERS. Nov. 23, 1849.

[S. C. 19 L. J. C. P. 63; 14 Jur. 43.]

By agreement between the plaintiffs, trustees of a marriage-settlement, and the defendants, three of the committee of management of a projected railway company,—reciting that a bill for the formation of the railway was pending in the House of Commons, that the railway was intended to pass through a certain park which was subject to the settlement,—it was agreed, that, if the bill should pass into a law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the said park and hereditaments, pay the plaintiffs 11,700l.; and that, in consideration of that sum, the company should have conveyed to them nineteen acres of the said land, &c.—the whole of the said agreement to be null and void, unless sanctioned by the court of Chancery in a cause of *Lawrence* v. *Porcher*, and so much of that agreement as the court should require should be inserted in the act:—Held, that the plaintiffs' obtaining the sanction of the court to the agreement within six months of the passing of the bill, was a condition precedent to their right to sue the defendants for the money.

This was an action of assumpsit. The declaration stated, that theretofore, to wit, on the 20th of February, 1847, by a certain agreement then made between the plaintiffs of the one part, and the defendants of the other part,—reciting that a bill was then pending in the House of Commons, intituled "The Cheltenham, Oxford, and Rugby Junction Railway," &c.; and reciting that the said railway was intended to pass through Sandywell Park, and divers other hereditaments in the county of Gloucester, which were subject to the settlements made before the marriage of William Lawrence; and also reciting that the defend-**[462]**-ants were three of the committee of management of the said railway company, and that it had been agreed between the plaintiffs and defendants as follows,—That the plaintiffs, in consideration of 9700l. and 2000l., to be paid to them by the said railway company, and also in consideration of the stipulations thereinafter mentioned, agreed to allow the said railway to pass through the said park and hereditaments, in manner, &c.; that the defendants agreed, that, if the said bill should pass into a law in the then present or the then next session of parliament, the said company should, within six calendar months after the passing of the bill, and before commencing the said railway on any part of the said park and hereditaments, pay to the plaintiffs the said sums of 9700l. and 2000l.; that, in consideration of the said sum of 9700l., the said company should have conveyed to them nineteen acres of the said hereditaments, and that the sum of 2000l. should be accepted by the plaintiffs in satisfaction of all private bridges, rebuilding lodges, &c.; that the said company were to fence off with iron hurdles, and keep the same in good repair, &c.; and the whole of the expenses of making out the title, and of the conveyance, and of all other incidental charges, were to be paid by the company; the whole of the said agreement to be null and void, unless sanctioned by the court of Chancery, in a cause of *Lawrence* v. *Porcher*; and so much of that agreement as the court should require, should be inserted in the act; the whole of the expenses of the plaintiffs in consequence of the said projected railway, including the proceedings in the said cause of *Lawrence* v. *Porcher*, and of the said agreement, were to be paid by the said committee of management, within fourteen days from the obtaining the sanction of the court of Chancery. The declaration then averred, that, the said agreement being so made, in consideration thereof, to wit, on, &c., and **[463]** that the plaintiffs, at the request of the defendants, had then promised to perform all things on their part to be performed, the defendants then promised to perform all things on their part to be performed, and that the said railway company should, within six calendar months after the passing of the said bill, pay to the plaintiffs the said sums of 9700l. and 2000l., and should pay to the plaintiffs the whole of the expenses of making out the title to the land to be taken by the said railway company in pursuance of the said agreement, and all other charges incidental thereto; that, although the plaintiffs had duly performed all things on their part to be performed, &c., and had, from the time of making the agreement, continually, been ready and willing to permit and allow the said railway to pass through the said park and hereditaments, in the manner in the said agreement mentioned; and although the said bill, before the commencement of this suit, to wit, on, &c., being in the then present session of parliament in which the said agreement was made, did pass into a law; and although the plaintiffs afterwards, and before this suit, to wit, on, &c., did deliver to the defendants and the said railway company a good and sufficient abstract of the plaintiffs' title to the said land and hereditaments intended to be taken for the purpose of the said intended railway by the said railway company, and were, after the delivery of the said abstract, and within six calendar months after the passing of the said bill, and before this suit, to wit, on, &c., ready and willing to deduce and shew, and did then shew and make appear, to the defendants and the said railway company, a good and sufficient title to the said land and hereditaments, enabling them to convey to the said railway company the said land and hereditaments, on the terms aforesaid, and the plaintiffs were then, and ever since had been, and still were, ready and willing and able to complete the said **[464]** agreement on their part, and to convey to the said railway company nineteen acres of the said land, in pursuance thereof; and although, after the said agreement, and before this suit, a longer period than six calendar months elapsed after the passing of the said bill; and although the plaintiffs had, from the time the said agreement, continually, been ready and willing to accept and receive the said sum of 9700l., and the said sum of 2000l. in full satisfaction of all private bridges, removal of lodges, &c.; and although, after the said agreement, and before this suit, to wit, on, &c., the said agreement was duly sanctioned by the said court of Chancery, in the said cause of *Lawrence* v. *Porcher*,—of all which said several premises respectively the defendants and the said railway company, after the said agreement, and after the passing the said bill, and before this suit, to wit, on, &c., had notice, and the said railway company was then requested by the plaintiffs to pay them the said sums of 9700l. and 2000l. respectively; yet the said railway company did not pay, nor had the said railway company paid, the said sums, or any part thereof; and although the defendants, afterwards, to wit, on, &c., had notice of the said several premises, and were then requested by the plaintiffs to pay or cause to be paid by the said railway company to the plaintiffs the said sums of 9700l. and 2000l., the defendants had not paid, or caused to be paid, by the said railway company, the said sums of 9700l. and 2000l., and the said sums of 9700l. and 2000l., and every part thereof, were still due to the plaintiffs. The declaration then alleged for special damage, that the plaintiffs had incurred certain expenses in making out the title to the land, in preparing the conveyance, and in incidental expenses, in pursuance of the agreement,—whereof the defendants and the said railway company had notice before this **[465]** suit, and were respectively requested to pay, and which they respectively had omitted to do, &c.

The defendants pleaded,—fifthly, that, although true it was that the said agreement was sanctioned by the court of Chancery, in the said cause of *Lawrence* v. *Porcher*, as in the declaration alleged, nevertheless, for plea in that behalf, the defendants said that the said agreement was not so sanctioned within, nor until after the expiration of, six calendar months after the passing of the bill in the said agreement mentioned,—verification.

Special demurrer, assigning for causes, amongst others,—that the plea was bad, because, according to the true meaning of the contract, it was not necessary that the sanction of the court of Chancery should be obtained within the six months, and that the agreement did not become null and void at the end of the six months, although such sanction had not at that time been obtained.

Joinder in demurrer.

Nov. 16.—Gray, in support of the demurrer. The fifth plea is clearly bad. No particular time being fixed for obtaining the sanction of the court of Chancery to the agreement, the obtaining of such sanction was not a condition precedent: it was sufficient that it should be obtained at any time after the expiration of the six months. The case falls within the principle of *Dicker* v. *Jackson* (ante, vol. vi. p. 103). There, the declaration stated, that, on the 2nd of September, 1844, the plaintiff entered into certain articles of agreement with the defendant, for the sale of a piece of land, whereby the plaintiff agreed that he would, within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of **[466]** his title to the said premises, and deduce a clear title thereto, and that the defendant did thereby agree that he would pay the purchase-money as follows,—the sum of 548l. 18s. 10d. on the signing of the contract, and the residue or sum of 4940l. 10s. on or before the 2nd of September, 1848, together with interest, &c.: the declaration, after stating that the plaintiff did, before the commencement of the suit, and within one month from being required so to do, deliver to the defendant such an abstract of his title to the said premises, and deduce such a clear title thereto, as in and by the said articles in that behalf specified and required,—alleged for breach the non-payment by the defendant of the residue of the purchase-money: and a plea, that the plaintiff did not deliver to the defendant an abstract of title to the said premises, and deduce such clear title thereto, as in and by the said agreement specified and required, modo et formâ, &c., was held bad, inasmuch as the performance by the plaintiff of the contract with respect to delivering an abstract, &c., was not a condition precedent to his right to maintain an action for the non-payment of the purchase-money, and, consequently, that the allegation in the declaration, of such performance, was immaterial, and not traversable. The stipulation as obtaining the sanction of the court of Chancery, is not a condition in favour of the defendants, but is introduced solely for the benefit of the plaintiffs, who, being trustees, might render themselves personally responsible if they acted without such sanction. [V. Williams, J. When would the statute of limitations begin to run here?] In one view, from the end of the six months, the defendants being from that time liable to pay the money: in another, from the time the sanction of the court of Chancery was obtained. In *Wilks* v. *Smith* (10 M. & W. 355), the declaration alleged, that, by an **[467]** agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120l., which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5l. per cent. half-yearly until paid; and it averred that the four years had not expired, that the 120l. had not been paid, and that 12l. had become due for interest: and it was held that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title thereto, or was ready and willing to convey it. Parke, B., there says: "The consideration for the defendant's paying the interest is, the plaintiff's undertaking to sell the land, not the actual sale of it. The plaintiff is not bound to do any thing before the money is paid. The rule as laid down in the notes to *Pordage* v. *Cole* (1 Wms. Saund. 319 l.), applies strictly to this case. No time, then, being fixed by the agreement for the conveyance of the land, it cannot be a condition precedent; nor can we imply that a conveyance was intended to be made before the interest was paid, else we should be supposing that the plaintiff intended to part with his estate before the money was paid, and such an intention certainly cannot be implied from the nature of the contract." The declaration here would have been a perfectly good one, if, after setting out the agreement, it had merely averred that the bill had passed, and the six months elapsed,—without saying anything about the sanction of the court of Chancery having been obtained.

Cowling, contrà. According to the terms of the agreement, as set out in the declaration, the payment of the money was conditional on the sanction of the court **[468]** of Chancery to the conveyance being obtained. If so,—whether it be a condition precedent or a condition subsequent, the plaintiffs must fail: in the former case, the declaration is bad; in the latter, the plea is a good answer. The defendants are three of the committee of management of a projected railway company: the plaintiffs are the trustees of a marriage settlement. The defendants, at the time of entering into this agreement, were endeavouring to obtain an act of parliament to regulate their undertaking. The defendants, at the most, were only bargaining for an equity. The land was not to be conveyed until the money was paid. Under ordinary circumstances, the plaintiffs would recover upon this state of things: but the fact of the plaintiffs being trustees, makes a material difference. [Maule, J. Is not the payment to be made absolutely on the days stipulated; the money being recoverable back, on the plaintiffs' failure to make a title? In the event of no title being made, the contract would necessarily be void: that is an implied condition in every contract of sale.] If the vendors have no title, the vendees clearly are not bound to pay the money. Undoubtedly, if the one party agrees to pay the money at a particular time, without any stipulation for title, he must pay the money at the day, and rely on his doubtful remedy by a cross-action. The decision of *Wilks* v. *Smith* is expressly put by the court upon that ground. Here, the language of the agreement is as plain as it can be: the whole of the agreement is to be null and void, unless sanctioned by the court of Chancery. And the obvious meaning of the agreement is, that the sanction of the court of Chancery shall be obtained before the passing of the bill.

Gray, in reply. A purchaser who has engaged to pay money on a given day, is bound to perform his promise, **[469]** although the vendor may not be prepared at that time to make a good title. If the plaintiffs had no title to convey, the defendants would be not worse off than if the agreement had contained no stipulation for the obtaining the sanction of the court of Chancery. [Wilde, C. J. By the agreement, it is expressly stipulated that the money shall be paid before the railway is commenced. That being so, if the defendants are to pay the money before a title is made, the stipulation to that effect should be clear and unambiguous. In *Dicker* v. *Jackson*, possession was given. Here, there is a naked stipulation for the payment of 11,700l., not simply at the hazard of the title, but also at the hazard of the sanction of the court of Chancery to the agreement, being obtained.] There is no hardship on the defendants: for, an action for money had and received would lie against the plaintiffs to recover back the money, upon a failure to make a title, and to obtain the sanction of the court of Chancery: *Wright* v. *Colls* (ante, p. 150).

Cur. adv. vult.

Wilde, C. J., on a subsequent day (Nov. 17), said it had occurred to the court that certain questions, which had not been fully discussed on the former occasion, were very fit to be considered: and he proposed a second argument upon the following points:—

"1. Is the true construction of the agreement, that the company contracted to pay the specified amount within six months after the act of parliament should have passed, provided the court of Chancery should within that time have affirmed the agreement,

—and, if the court should not have affirmed the agreement within the six months, then to pay the amount so soon after the expiration of the six months as the con-**[470]**-firmation of the court should be obtained, provided such confirmation should be obtained within a reasonable time afterwards?" or

"2. Is the true construction of the agreement, that the company contracted to pay the amount mentioned within six months after the act should be obtained, provided within that time the confirmation of the court of Chancery should be obtained,—otherwise, the contract to be wholly void?"

Gray, for the plaintiffs. The true meaning of the agreement is, that the plaintiffs are to have a reasonable time for obtaining the sanction of the court of Chancery, notwithstanding the previous passing of the bill. Some proceeding in court would be necessary, in order to obtain the assent of the court of Chancery to the agreement: and it is impossible to define precisely the time those proceedings would take. There is nothing on the face of this declaration, to shew the lapse of time between the making of the agreement and the passing of the bill. In Com. Dig. Defeazance (A.), it is said, "A defeasance is an instrument which defeats the force or operation of some other deed, or estate. And that which in the same deed is called a condition, in another deed is a defeasance." If, therefore, the stipulation as to the obtaining the sanction of the court of Chancery had been contained in another contract, it might have operated as a defeasance; here, it can only operate as a condition. [Maule, J. Have not the parties, in effect, though not in express terms, said that the whole agreement shall be void, unless the sanction of the court of Chancery shall be obtained before the money is to become payable?] It is submitted that they have not. [Wilde, C. J. Their act of parliament would be perfectly useless to the company, unless the sanction of the court of Chancery were obtained. That, therefore, makes **[471]** it probable that the parties contemplated that the sanction should be obtained before the payment of the money.] It might be of such importance to the company to obtain immediate possession of the land, that they were content to pay the money, and take the risk of the trustees afterwards failing to obtain the sanction of the court. If such sanction were not obtained within a reasonable time, the agreement would then become null and void, and the defendants might recover back the money, as upon a failure of consideration. It is a clear rule of law, that, where no time is expressly stipulated for the doing of an act, it must be done within a reasonable time. Thus, in the case of a hand-bill offering a reward for the apprehension and conviction of a criminal, the information which is to entitle a party to the reward, must be given within a reasonable time, and must not be delayed until a prosecution is fruitless. If the time be unreasonable, it lies upon the defendant to shew it. This is laid down in *Hotham* v. *The East India Company* (1 T. R. 638). There, a covenant in a charter-party, "that no claim should be admitted, or allowance made, for short tonnage, unless such short tonnage should be found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," was held not to be a condition precedent to the plaintiff's right to recover for short tonnage; but to be a matter of defence, to be taken advantage of by the defendants. Ashhurst, J., there says: "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent: neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant: for, the same words have been construed **[472]** to operate as either the one or the other, according to the nature of the transaction. The right of action, once vested, was only capable of being divested by a subsequent non-feasance, viz. by not taking the proper steps to procure a survey after the arrival of the ship in the river Thames. This, therefore, being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by the name of a proviso by way of defeasance, or a condition subsequent, it must in its nature be a matter of defence, and ought to be shewn by the defendants."

Cowling, contrà. The construction suggested by the second question proposed by the court is the correct one, with an exception that does not apply to this case, viz. the obtaining the sanction of the court of Chancery within six months. The 9700l. and 2000l. are payable the moment the bill passes: the six months are given as mere days of grace. Possibly the parties may have thought that similar days of grace were allowed for obtaining the sanction of the court of Chancery: if they did, it is safer to say, quod voluerunt non dixerunt. It appears, upon the face of the declaration and the plea, that such sanction of the court of Chancery was not obtained until after the lapse of six months. [Maule, J. The agreement, by the terms of it, was to be null and void, if the sanction of the court of Chancery was not obtained within six months after the passing of the act. To make it so, you must deprive it of all operation: and yet it may have had the operation of compelling the company to pay the money before such sanction was obtained.] In *Thicknesse* v. *The Lancaster Canal Company* (4 M. & W. 472), a company was impowered by an act of parliament to make a canal within certain limits, without specifying any time within which it was to be com-**[473]**-pleted: and it was held that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a reasonable time, and consequently that the works might be resumed at any period. Time, when specified, and of the essence of a contract, is not to be extended to a reasonable time: *Stowell* v. *Robinson* (a). [Maule, J. The reasonable time is sought to be applied here, upon the supposition that no time is mentioned, either in express terms, or by implication.] The question, then, is, whether the parties have, in substance, though not in express terms, said that the sanction of the court of Chancery is to be obtained within a reasonable time. In *Worsley* v. *Wood* (6 T. R. 710), by the proposals of the Phœnix Insurance Company, it was stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they knew the character, &c. of the assured, and believed that he really had sustained the loss, and without fraud:" and it was held,—reversing the judgment of this court (*Wood* v. *Worsley*, 2 H. Blac. 574; 3 Wentw. Plead. 387),—that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c. wrongfully refused to sign the certificate. Lord Kenyon there says: "If there be a condition precedent to do an impossible thing, the obligation becomes single: but, however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed, does not vest. If the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. **[474]** will not receive livery of seisin, yet, from the time of Lord Coke to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition, did not arise." [Wilde, C. J. This question often arises upon certificates of surveyors under building contracts.] *Morgan* v. *Birnie* (9 Bingh. 672, 3 M. & Scott, 76) was a case of that sort. There, the defendant was to pay for a certain building, upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to the defendant: and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. Whether the obtaining the sanction of the court of Chancery was a condition precedent or subsequent, depends upon the language of the instrument. And here, the language is much more clear to shew that a condition precedent was contemplated, than it was in *Worsley* v. *Wood*. There is no averment that a reasonable time had elapsed; and therefore, even if the argument on the other side be correct, the declaration would be clearly bad: *Stavart* v. *Eastwood* (11 M. & W. 197). In *Hotham* v. *The East India Company*, the making a claim for short tonnage, was a condition subsequent, and therefore it was not necessary to aver performance in the declaration.

Gray, in reply. In *Worsley* v. *Wood*, the certificate was, in express terms, required to be obtained. There would be no absurdity in holding that the company were bound to pay the money before the sanction of the court of Chancery was obtained. It might have **[475]** been of great advantage to them to obtain immediate possession of the land, even though such possession should have been but temporary.

Wilde, C. J. The declaration in this case states, that, by an agreement made on the 20th of February, 1847, between the plaintiffs and the defendants,—reciting, that a bill was then pending in the House of Commons, intituled "The Cheltenham, Oxford, and Rugby Junction Railway," that the railway was intended to pass through Sandywell Park and other hereditaments in the county of Gloucester, which were subject to certain settlements made before the marriage of William Lawrence, that the defendants were three of the committee of management of the said railway company, and that it had been agreed between the parties, that, in consideration of 9700l. and 2000l. to be paid to the plaintiffs by the company, and also in consideration of the stipulations thereinafter mentioned, the said railway should be allowed to pass through the said park and hereditaments,—the defendants agreed, that, if the said bill should pass into a law in the then present or the then next session of parliament, the company should, within six calendar months after the passing of the bill, and before commencing the said railway on any part of the said park and hereditaments, pay to the plaintiffs the said sums of 9700l. and 2000l.: and, after setting forth certain other stipulations which it is unnecessary further to advert to, it was provided, that "the whole of the said agreement should be null and void, unless sanctioned by the court of Chancery in a cause of *Lawrence* v. *Porcher*; and that so much of that agreement as the court should require, should be inserted in the act:" and then follow certain provisions with regard to the expenses incurred in that cause, and the expenses of the agreement. The declaration then, after averring mutual **[476]** promises, &c., alleged for breach, that, although the plaintiffs had always been ready and willing to permit the railway to pass through the said park and hereditaments, and although the said bill did in the then present session of parliament pass into a law, and although the plaintiffs did deliver a good and sufficient abstract of their title to the said land and hereditaments intended to be taken for the purpose of the said intended railway, and were, after the delivery of the said abstract, and within six calendar months after the passing of the said bill, ready and willing to deduce, and did deduce, a good and sufficient title, &c. and were ready to convey the land, and although the said agreement was duly sanctioned by the court of Chancery in the said cause of *Lawrence* v. *Porcher*, &c., yet the company did not pay the 9700l. and 2000l., or any part thereof, &c.

(a) 3 N. C. 928, 5 Scott, 196. And see *Duncan* v. *Topham*, ante, p. 225.

In answer to this declaration, the defendants have pleaded, that, although true it was that the said agreement was sanctioned by the said court of Chancery in the said cause of *Lawrence* v. *Porcher*, as in the declaration alleged, yet that the said agreement was not so sanctioned within, nor until after the expiration of, six calendar months after the passing of the said bill in the said agreement mentioned.

To that plea the plaintiffs have demurred specially: and, upon the argument before us, the questions which were mooted, were,—whether the obtaining of the sanction of the court of Chancery to the agreement, was a condition precedent to the right of the plaintiffs to maintain an action to recover the two sums of 9700l. and 2000l.,—or, if a condition precedent, within what time,—or whether it was a condition subsequent.

The principles which govern the courts in construing agreements of this sort, are well known, and are not now disputed. The question is, taking the whole instrument together, what is fairly to be inferred from its **[477]** language to have been the intention of the parties,—whether it was, that the sanction of the court of Chancery should be obtained before the money should be due and payable,—and whether or not such sanction was to be obtained within a limited time. It seems to me that the true construction of the agreement is, that the obtaining the sanction of the court was a condition precedent, and that such sanction should be obtained before any right of action should arise to the plaintiffs, and at least within six months; and therefore that the defendants are entitled to the judgment of the court upon this demurrer.

Looking at the whole of the agreement, it appears that the vendors (the plaintiffs) are trustees. The company would require a good equitable as well as a legal title to the land that was to be conveyed to them. There is a material distinction between this and most of the cases where the purchase-money has been held to be payable before the title is shewn or the conveyance executed. I think wherever it is contended that the true construction of the agreement is that the purchase-money is to be paid before the title can be ascertained, the terms of the instrument should be so plain and express as to leave no doubt that such was the intention of the parties,—that the purchaser contemplated parting with his money at the risk of being able to recover it back upon the vendor's failing to make out a good title. Here, the agreement, upon the face of it, shews that the vendors had not a title to convey,—that something was necessary to enable them to make a title, viz. the sanction of the court of Chancery. When a party enters into a contract of purchase with trustees, with notice that they are so, he buys subject to all the trusts, and may be deprived in equity of all benefit from the agreement. This, therefore, is a case in which it not only appears upon the face of the agreement that [478] the vendors have no title, but also that they are about to proceed to acquire a title; and that, whether they will ultimately have a title to convey or not, depends upon the discretion of the court of Chancery,—a discretion which will be governed by circumstances which may be wholly beyond the power or control of the parties or either of them. Looking at the object of the purchasers,—who represent a railway company,—it is impossible to shut one's eyes to the inconveniences attending the construction which has been contended for on the part of the plaintiffs. The failure to obtain a good title to the nineteen acres which are the subject of this agreement, might be destructive of the whole undertaking. The company could not venture to work upon this part of the line: neither could they, in this state of uncertainty as to their being able to obtain a conveyance of the nineteen acres in question, with any advantage proceed with the construction of any other part of the railway. The parties agree, that, in order to carry into effect their contract, it is necessary to have the sanction of the court of Chancery: and they expressly provide that the whole agreement shall be null and void unless such sanction is obtained,—using terms as strong as could be used, to shew the object they had in view. Then, the 11,700l. is stipulated to be paid within six months after the passing of the bill; and it is further stipulated that so much of the agreement as the court of Chancery should require, should be inserted in the act. This latter stipulation could not be complied with if the bill passed before the sanction of the court could be obtained. It is plain that the parties contemplate no longer a period for the payment of the money, than six months after the passing of the act. That being so, at what time is it reasonable to suppose they contemplated that it should be ascertained whether it was a bargain or not? At all events, before the money was [479] paid; and that is, as I have before observed, within six months after the passing of the bill. I cannot imagine any inducement on the part of the purchasers to pay the money before the sanction of the court of Chancery should be obtained. It is suggested that it might have been important for the company to do something upon the agreement, before such sanction was obtained: but I can see no advantage that could possibly acquire under the agreement before the vendors were in a situation to convey the land; and the terms are express, that the purchasers should have no right under the agreement, unless it was sanctioned by the court of Chancery. I therefore think the fifth plea sets up a good matter of bar,—the non-performance of a condition precedent to the right of the plaintiffs to sue for the money; and that the defendants are entitled to judgment upon this demurrer.

Maule, J. I also am of opinion that the defendants are entitled to judgment on the demurrer to the fifth plea. The true construction of the agreement declared upon, regard being had to the subject-matter, and to the relative position of the respective parties,—the plaintiffs being trustees under a marriage-settlement, and the defendants representing a projected railway company,—appears to me to be this:—The parties are aware, that, although they have agreed as to the terms on which the land is to be sold, it may be that the contract is one which they will be unable to complete. They therefore contract, as it were, de bene esse, for the payment of the purchase-money on the one side, and the conveyance of the land on the other side, in the event of the court of Chancery lending its sanction to the agreement,—both parties being well aware that they cannot otherwise carry into effect the objects they have in view. What they say is, in substance [480] this,—"If the sanction of the court of Chancery to the present agreement is not obtained, no part of it shall bind us." If they had said so in terms, there could have been no doubt at all about it. Looking at the whole of the agreement, and the surrounding circumstances, as disclosed on the face of the declaration, it appears as clearly to my mind that such was the agreement of the parties, as if they had said it in the most plain and direct terms. It has been suggested by Mr. Gray that the company might be content to pay the money at once, in consideration of obtaining immediate possession of the land, even though they might ultimately fail to obtain a title. I cannot conceive that that could have been the contemplation of the parties: but I think the true construction of the agreement is, as I have already stated, that, until the sanction of the court of Chancery is obtained, neither party shall have any right to enforce its provisions against the other. If we were to hold the plaintiffs to be in a condition to call upon the company to pay the 11,700l.,—the six months after the passing of the bill having elapsed,—before the sanction of the court of Chancery to the sale of the land had been obtained, it might turn out, after judgment recovered, and execution executed, that that had taken place upon the happening of which the parties had expressly agreed that the contract should have no operation at all. That would be to decide, that, in an event in which the parties have provided that the agreement shall be nudum pactum, it shall be operative in a most important particular, and to the entire extent of what is provided to be done on one side, viz. the payment of a large sum of money. It is true that there are cases where a stipulation that a contract shall, in a given event, be altogether null and void, means, not that it shall be wholly null and void, but only that it shall be null and void from the time of **[481]** the happening of the event contemplated: as, for instance, in the case of a lease, where there is a proviso that it shall be null and void in case of any breach of covenant; the lease there cannot be wholly null and void; it must operate as a valid lease, creating the relation of landlord and tenant between the parties, until the happening of the event which is to make it void. In that case, the real meaning of the expression is, that, upon the happening of the contingency provided for, the term shall cease and determine. That is putting a construction upon words contrary to their natural and ordinary meaning, in order to give effect to the manifest intention of the parties. Here, no difficulty of that sort presents itself. The clear and unambiguous intention of the parties was, that neither should be bound by the contract, unless it should receive the sanction of the court of Chancery. The whole substance of the contract on the one side is, the payment of the money: and, in the event of the sanction of the court of Chancery not being obtained, there is no kind of consideration on the other side. I think, therefore, it is abundantly clear that this is an agreement which was to take effect only upon the happening of an event which has not happened; and therefore that the declaration discloses no cause of action.

V. WILLIAMS, J. I am of the same opinion. The contract provides that all shall go for nothing, unless the sanction of the court of Chancery is obtained; but it is altogether silent as to the time at which such sanction is to be obtained. It is obvious that there must be some limit; and the question is what that limit is to be implied to be. For the purpose of the present case, it is, in my opinion, enough to say that it cannot exceed the time within which the defendants might, by the terms of the agreement, be called upon by the plaintiffs **[482]** to pay the money, viz. six months after the passing of the bill. The event contemplated by the parties not having taken place, it seems to me that the agreement cannot be made the subject of an action, and consequently that our judgment must be for the defendants.

TALFOURD, J. I am of the same opinion. It appears to me that the whole consideration for the payment of the large sum of money which the plaintiffs seek to recover in this action, is nothing of value, unless the sanction of the court of Chancery should have been obtained. That was perfectly well known to both parties at the time of entering into the agreement. When, therefore, the six months from the time of the passing of the act had passed by without the sanction of the court of Chancery being obtained, the plaintiffs' right to demand the 11,700l. was gone. The parties must necessarily have intended that the sanction of the court of Chancery should be obtained within the period stipulated for the payment of the money, inasmuch as, without it, there would be a total failure of consideration. We are, therefore, justified in reading the agreement as if those words had been actually introduced into it: and, so reading the agreement, no right of action has arisen upon it.

Judgment for the defendants.

[483] GIBBONS *v.* VOUILLON. Nov. 16, 1849.

[S. C. 7 D. & L. 266; 19 L. J. C. P. 74; 14 Jur. 66. Applied, *Corner* v. *Sweet*, 1866, L. R. 1 C. P. 463; *Emptage* v. *M'Culloch*, 1867, 17 L. T. 68. Referred to, *Newington* v. *Levy*, 1870, L. R. 5 C. P. 612; L. R. 6 C. P. 180.]

A., a trader, entered into an arrangement, by deed, with his creditors, by which it was agreed that he should have a letter of licence for five years, during which period he should carry on the trade under the inspection of certain persons therein named; and it was provided, that, if any creditor should, during the continuance of the licence, molest or interfere with A., contrary to the true intent and meaning of the indenture, A. should thenceforth be relieved, exonerated, acquitted, and discharged of and from all debts and demands of the creditor by whom the letter of licence should be so contravened, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly:—Held, that the bringing of an action by a creditor, party to the deed, within the five years, was a "molestation or interference" with A., within the meaning of the proviso; and that the indenture operated as a defeasance, and was pleadable in bar as such.

Debt, for interest, and for money due upon an account stated.

The defendant pleaded, that, after the contracting of the said debts, and before the commencement of this suit, to wit, on the 17th of May, 1843, by indenture then made between the defendant of the first part, A. B., C. D., and E. F., of the second part, and the plaintiff and divers other persons, therein described as creditors of the defendant, of the third part,—reciting, that the defendant had for some time past carried on the business of a silk-mercer; that the several debts due unto the parties thereto of the second and third parts, which were set opposite to their respective names, had accrued due; that the defendant was unable immediately to satisfy the said debts; and that it was considered, that, with a view to the gradual realization of his effects, it would be more advantageous to all parties interested, that the defendant should, for the period of five years, be permitted to carry on the said business under the inspection of the said A. B., C. D., and E. F.,—it was agreed that the business which had been so carried on by the defendant should thenceforth be carried on under the superintendence of inspectors on behalf of the said creditors, for the term of five years from the day of the [484] date of the said indenture, or until the inspectors should deem it expedient to wind up the said business under the provision in such behalf thereinafter contained, or until the letter of licence thereinafter granted, should be revoked: That, in pursuance of the said recited agreement, the said several persons parties thereto of the second and third parts, did, by the said indenture, give and grant unto the said defendant, until the 17th of May, 1848, or until the licence by the said indenture granted should have been determined under the provisions thereinafter contained, full and free licence and authority to pass and repass to and from, and reside in, any place where the nature of the business might require, and to carry on the said business, and to collect and dispose of the estate and effects of the defendant under the superintendence of the inspectors for the time being; and, further, that, if any of the said persons parties thereto of the second and third parts, or the co-partners, executors, administrators, or assigns of any of them, should, at any time thereafter during the continuance of the licence thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, then and in that case, and thenceforth, the defendant, and his heirs, executors, administrators, and assigns, should be relieved, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of licence therein-before contained, should in any such respect be contravened, and of and from all manner of actions, suits, damages, costs, charges, expenses, and claims, by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly,—as by the [485] said indenture would appear: That, after the contracting of the said debts, and before the commencement of this suit, to wit, on, &c., the plaintiff signed, sealed, and as his act and deed delivered the said indenture to the defendant as, and then became and was, a party thereto of the third part; and, at the time of the plaintiff's so executing and delivering, and becoming a party to, the said indenture, the plaintiff was a creditor of the defendant for and in respect of the said debt in the declaration mentioned, and not otherwise; and the plaintiff so executed and delivered, and became a party to, the said indenture, as a creditor for and in respect of the said debt, and for and in respect of the causes of action in the declaration mentioned, and not otherwise,—profert of the indenture: Averment, that the said term of five years in the said indenture mentioned, had not expired at the time of the commencement of this suit, and that the defendant had performed all things in the said indenture contained on his part to be performed; and that, after the making of the said indenture, and during the continuance of the licence thereby granted, and whilst the debts in the declaration mentioned were due to the plaintiff, to wit, on, &c.,

the plaintiff did molest and interfere with the defendant, contrary to the true intent and meaning of the said indenture, by then instituting and commencing this suit against the defendant, and, by means of the premises, then released exonerated, acquitted, and for ever discharged the defendant of and from the debt, damages, and causes of action in the declaration mentioned, and of and from all actions, suits, damages, costs, charges, expenses, and claims, by reason, on account, or in consequence of the said debt, according to the true intent and meaning of the said indenture,—verification.

General demurrer, and joinder.

[486] Willes, in support of the demurrer (*a*). 1. The suing out of a writ within the stipulated period, is not a molestation within the terms of the covenant. The plea, therefore, is bad. The averment that the plaintiff "did molest and interfere with the defendant, contrary to the true intent and meaning of the indenture, by instituting and commencing this suit against the defendant," would be proved by shewing that a writ was issued, and nothing more: *Harris* v. *Mantle* (3 T. R. 307). The plea should have gone on to allege in what manner the defendant was molested or interfered with. The writ may have been issued merely for the purpose of saving the statute of limitations; or, a nulle prosequi may have been entered. [Maule, J. Must we not assume that the suit was commenced for the purpose of molesting and interfering with the defendant? An action is usually brought for the purpose of obtaining judgment and execution.]

2. The molestation and interference set up by the **[487]** plea, being the suing out a writ, the defence, if it be one, arose after action brought, and therefore should have been pleaded to the further maintenance of the action.

3. The proviso in question being contrary to a rule of law, it cannot operate as a release. Assuming,—as, indeed, was expressly held in *Ford* v. *Beech* (11 Q. B. 852, in error),—that a covenant not to sue for a given time, cannot be pleaded in bar; the question here will be, whether, the general intention of the parties being to keep alive the debt, any form of words, the practical effect of which will be to prevent the creditor from suing within the time, can be regarded. The foundation of the decision in *Ford* v. *Beech* was this, that, if the deed barred or suspended the creditor's remedy for any period, however short, the effect would be a total release of the debt; and therefore the court construed the agreement as giving the defendant merely a right of action for breach thereof if the plaintiff sued while the payments were continued. [Maule, J. Is there anything to prevent a release from being made to operate in futuro, if the parties so intended? If that may be done, can more correct words be framed for the purpose than those here used?] It may be that this is good as a defeasance. [Maule, J. If it destroys the debt, it is a good answer to the action, by whatever name it may be called. V. Williams, J. Is there any difference between a defeasance and a condition, except that the one is in the same, and the other in a different instrument? (*b*) Wilde, C. J. A covenant not to sue does not operate as a

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(*a*) The points marked for argument on the part of the plaintiff, were as follows:—"That it is not shewn, except by way of inference, that the bringing of an action by the plaintiff against the defendant, is a molesting or interference, within the provisions of the covenant; that the molesting against which the covenant provides, must mean such molesting as would prevent the defendant from doing that which the plaintiff by the deed licences the defendant to do; that the plea does not shew with certainty how the bringing of the action so molested the defendant; that, if the bringing of the action is a molesting within the covenant, then the covenant (as, by the deed, a debt is declared to be due to the plaintiff, while, by the covenant, the recovery of the debt is declared to be suspended for five years,) amounts to a covenant not to sue during that period, which cannot be the case, as the deed is clearly intended to provide means for the satisfaction of the debt, which it clearly would not do, if it suspended the debt, and thereby caused a release by operation of law; and that the covenant, supposing it to amount to a covenant not to sue for the debt for five years, cannot be pleaded in bar, but, if available to the defendant, is available only in an action to recover damages for breach of the covenant."

(*b*) In T. 21 H. 7, fo. 24, pl. 15, Fineux, C. J., points out the different operation of a condition and a defeasance, viz. that a condition which is repugnant to the obligation to which it is annexed, is merely void, and the obligation stands; but that, where release. But here you have agreed, that, if you do sue, a release shall come [488] into operation. The mere addition of something as a consequence, does not alter the legal operation of the instrument.] The effect of this deed, if it operates at all as a release, is, to make it operate as an immediate release. [Maule, J. May there not be an effective stipulation to put an end to a debt?] That would be a defeasance: and it is not so pleaded. Either this must be taken to be an immediate discharge of the debt, or the court must say that the parties have attempted to do what cannot be done, viz. to suspend the debt for five years, and then revive it. [Maule, J. You are seeking to enforce a construction of the deed which is manifestly contrary to the intention of the parties. Is there any inconsistency in an agreement to suspend a present debt for a given period? Wilde, C. J., referred to *Kearslake* v. *Morgan* (5 T. R. 513), and *Stracey* v. *The Bank of England* (6 Bingh. 754, 4 M. & P. 639).] The case of a negotiable security is an exceptional case: *James* v. *Williams* (13 M. & W. 828, 833). It would be unjust to the debtor to allow his creditor to sue him whilst the bill was outstanding. [Wilde, C. J. Suppose the bill is not negotiable?] In that case, it clearly operates no suspension. [Maule, J. If the thing which the parties agree to do here, may be done for one consideration, why may it not for another?] The principle upon which the cases proceed, is referable to the law-merchant. [Maule, J. The case of a bill of exchange is complicated with some difficulties. But, is there anything unlawful in giving an extended credit for five years?] It is adding a new incident to a chose in action. A creditor cannot bind himself not to sue for a debt for a limited period, except by taking a negotiable security. In *Stracey* v. *The Bank of England* there was no suspension of the right of action. When once a right of action has accrued, there is no mode by [489] which the creditor's right can be got rid of, but accord and satisfaction, and release. [V. Williams, J. Is it inconsistent with the character of a chose in action, that, on the happening of a given event five years hence, the debt shall be discharged?] In that case, there would be no suspension of the debt until the happening of the event contemplated. [V. Williams, J. A legacy is in the nature of a chose in action. Suppose a legacy, with a condition that it should be void if the legatee filed a bill for it,—would that be bad?] Possibly not. [V. Williams, J. In *Cooke* v. *Turner* (15 M. & W. 727), such a condition in a devise of real estate, was held to be valid.] A prospective right of action may be waived; as in *King* v. *Gillett* (7 M. & W. 55), where, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it was held to be a good plea, that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. *Stracey* v. *The Bank of England* is expressly overruled by *Ford* v. *Beech*. [Wilde, C. J. It was not so intended: I wrote the judgment in *Ford* v. *Beech;* and I remember I had a very long discussion with one of my learned brothers upon it.] The plaintiff there clearly could have had no right of action until he called for a transfer of the stock. In *Thimbleby* v. *Barron* (3 M. & W. 210), it was held that a covenant not to sue upon a simple contract debt for a limited time, is not pleadable in bar of an action for such debt,—the learned counsel who there sought to uphold the plea, being told by the court that the books were full of authorities against him. [Talfourd, J. The court of error, in *Ford* v. *Beech*, seem expressly to contemplate this case. Parke, B., in delivering the judgment, says (11 Q. B. 872): "In 1 Roll. Abr. [490] 939, tit. Extinguishment (L.), pl. 2 (translated, 11 Vin. Abr. 461), it is said, that, 'if the obligee grants to the obligor that he shall not be sued or vexed upon the said obligation before such a day, and, if he is, then that he shall plead the said grant as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release.' It must be observed, that, in that case, it was expressly covenanted, that, in the event of the covenantor suing upon the obligation, contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release: the covenant in that case, therefore, went much beyond a mere covenant not to sue."] On referring to the passages in the Year Books, upon which Rolle founds himself (*b*), it will be found that the debt

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there is a defeasance which is repugnant to an antecedent obligation, the defeasance stands, and the obligation is avoided.

(*b*) T. 21 H. 7, fo. 23, pl. 15, in B. R.: and see post, 494 (*a*).

there is held to be gone at once (*c*)[1]. [Talfourd, J. *Ayloffe* v. *Scrimpshire* (*d*) is an authority against you.] That case presents different aspects, according to the book in which it is reported. In the reports in Holt and in Shower, the deed is stated to have had the very same provision that is found here. [V. Williams, J. Shower states as the principal case, what Comberbach states as an illustration.] In Carthew it is somewhat differently reported: and the note at the end of the case,—upon which, no doubt, reliance will be placed on the other side,—is evidently a mistake. [Wilde, C. J. Carthew professes to be setting out the terms of the covenant; which the other reporters do not. Maule, J. Littleton, **[491]** § 467, and the commentary thereon (Co Litt. 274 a., 274 b.), shew that a man may release upon condition; though not for a limited period.] Littleton and Coke are there treating of rights other than rights of action. In *Caricil* v. *Edwards* (1 Show. 330, S. C. (per nom. *Carvell* v. *Edwards*) Carth. 210, Rep. temp. Holt, 546), it was held, that, to debt on bond, by an executor, the defendant cannot plead in bar, that the testator and other creditors of the defendant entered into a letter of licence with him, in which they covenanted and agreed not to sue him within such a time, on pain of forfeiture; for, it does not amount to a release of their debts.

Hugh Hill, contrà (*c*)[2]. 1. It is said that the suing out a writ within the five years, is not a molestation within the meaning of the covenant set out in the plea. This is, it is to be observed, a deed not entered into between the plaintiff and the defendant only; but a deed to which several other persons, creditors of the defendant, are parties, and executed by each creditor upon the faith of all the others being assenting parties, and bound thereby. The object and intention of the deed plainly appear from the recital,—that the defendant was unable immediately to satisfy his debts, and that it was considered, that, with a view to the gradual realization of his effects, it would be more advantageous to all parties interested, that the defendant should, for the period of five years, be permitted to carry on his business under the inspection of certain persons therein named: and, accordingly, it was agreed that the defendant should have a letter of licence for that period; and then comes the proviso, that, if any of the creditors should, at any time thereafter during the continuance of **[492]** the licence thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, then, and in that case, and thenceforth, the defendant, his heirs, &c., should be relieved, exonerated, acquitted, and for ever discharged, of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of licence thereinbefore contained, should in any such respect be contravened, &c. It is difficult to conceive what that means, unless it means a molestation or interference by bringing an action.

2. With respect to the form of the plea, it is to be observed that there is no special demurrer on the ground that the commencement is improper: and, if there were any thing in the objection, it is answered by the case of *Le Bret* v. *Papillon* (4 East, 502). There, one who was an alien amy at the time of the action brought, became an alien enemy before plea pleaded: the defendant pleaded, that the plaintiff ought not to have or maintain his action, because he was, before and at the time of exhibiting his bill, and now is, an alien enemy, &c., concluding that therefore the plaintiff ought to be barred from having or maintaining his action, &c.: to this plea the plaintiff replied, that, at the time of exhibiting his bill, he was an alien amy, wherefore he prayed judgment and his damages: it was held, on demurrer, that the plea was ill pleaded: but

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(*c*)[1] The obligation was held, by Fineux, C. J., and Tremaile, J., the only judges mentioned, to be avoided by the defeasance, upon the happening of the event contemplated by the defeasance, namely, the putting of the obligation in suit before the feast of St. Michael.

(*d*) Carth. 63. Also reported, as *Ayliff* v. *Scrimsheire*, 1 Show. 46, *Anon.* Comb. 123, *Ayloff* v. *Scrimshaw*, 2 Salk. 573, *Ayliff* v. *Scrimshire*, Rep. temp. Holt, 619, 3 Danv. Abr. 437.

(*c*)[2] The points marked for argument on the part of the defendant, were as follows:—"That the covenant set forth in the plea is a good defence to the action; for, on the molestation taking place, the covenant became absolute, and operated as a release; and that the bringing of this action is a molestation within the meaning of the terms of the covenant."

yet, as the court were ex officio bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and, as it appeared upon the whole that the plaintiff was now an alien enemy, and therefore incapable of maintaining further his suit, judgment was given, that he be barred from further having or maintaining his action.

[493] 3. It is then said that the covenant in question is not pleadable in bar to an action for one of the debts mentioned in the deed; but, at most, only gives ground for a cross-action, or for a bill in equity. The bringing of this action is not merely a violation of the covenant which the plaintiff has entered into with the defendant; but it is also a breach of faith with every one of the other creditors who were parties to the arrangement. It clearly, therefore, cannot be the subject of a cross-action, the damages in which would not be commensurate with the injury. A covenant between A. and B., not to sue for a limited time, is not the proper subject of a plea in bar: but, if the deed declares the debt to be forfeited if sued for within the time, and enables the debtor to plead it, it does operate as a bar. This is distinctly laid down in 1 Roll. Abr. 939, tit. Extinguishment (L.), pl. 1, 2 (translated, 11 Vin. Abr. 461, and ante, p. 490):—"Si l'obligee covenant ove l'obligor que est lie a performer covenants, nemy a luy molester ou suer luy devant tiel jour, ceo nest ascun suspension del dett, car le proper sense del paroll est d'aver covenant sur ceo sil luy sue devant le jour, et nemy a fair ceo un reles (*b*). Si l'obligee grant al obligor quil ne serra sue nec vex sur le dit obligation devant tiel jour, et, sil soit, que donque il pledera le dit grant come un acquittance, et que le dit obligation serra void et de nul effect, **[494]** ceo est un suspension del obligation, et issint per consequens un reles,—car ceo est un grant,—et que il ceo pledera come un acquittance" (*a*).

There is a singular diversity in the reports of *Ayliffe* v. *Scrimshire*. In the reports in Carthew and in Salkeld, it is stated simply as a covenant not to sue for a limited time. In the former, the very case now before the court is put in the most pointed manner:—"Nota. In the argument of this case, it was allowed by all, that a letter of licence containing the words following, viz. that, if the creditor sue, &c., within such a time, that his debt shall be forfeited, such licence is pleadable in bar: therefore, in the principal case, the covenant being temporary, and limited to a certain time, and there being no words in the deed of defeasance to make the debt forfeited, upon a suit commenced, &c., the court was clear in opinion it was not pleadable in bar, but that an action of covenant was his proper remedy." In Comberbach the report runs thus:—The defendant pleaded that the plaintiff, after the money was due on the bond, covenanted and granted, by indenture, not to sue the defendant in ninety-nine years; to which the plaintiff demurred. And Holt, C. J., said, "that the suspension of this action will not destroy the bond, for, every defeasance is quodammodo a suspension: that a covenant not to sue at all is an acquittance, but a covenant not to sue a bond within such a time, goes only in covenant: that the rule that a personal action once suspended is for ever extinct, doth not hold in all cases." And Dolben agreed. Shower, in his report of *Cariril* v. *Edwards* (1 Show. 330), concludes with an adjournatur: **[495]** and he does not, in his argument, cite *Ayliffe* v. *Scrimshire;* which occurred but two years before, and which, as reported by himself, was, if correct, a distinct authority

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(*b*) Citing *Dowse* v. *Jeffreys*. The case of *Deux* v. *Jefferies*, Cro. Eliz. 352, is as follows:—"Debt, upon an obligation. The defendant pleads that the plaintiff, by indenture, did covenant that he would not sue the bond before Michaelmas, and thereupon demanded judgment, si actio, &c., intending that the action, being suspended for that time, was gone for ever. It was thereupon demurred, and argued by Fleming for the plaintiff, and by Drew for the defendant, and 21 H. 7, fo. 24, and 4 H. 7, fo. 6, were cited. But the court, without further argument, resolved for the plaintiff; for, it is only a covenant, and shall not enure as a release: and it is not to be pleaded in bar, but the party is put to his writ of covenant, if he sued before the time. But, if it had been a covenant that he would not sue it at all, then peradventure it might enure as a release, and to be pleaded in bar, but not here; for, it never was the intent of the parties to make it a release. And it was adjudged for the plaintiff." S. C. Anderson, 307.

(*a*) Citing the Year Book, 21 H. 7, fo. 23 b.: which case is also abridged, Bro. Abr. titles Barre, pl. 52, Defeasance, pl. 15, 16, Grants, pl. 58.

in his favour. *Tatlock* v. *Smith* (6 Bingh. 339, 3 M. & P. 676) is a very strong authority in favour of the defendant. There, by an agreement between the defendants and their creditors, all the defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estate,—in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business, and paid the creditors 10s. in the pound: they then tendered for execution by the defendants, a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute, was adjourned, in order that the signature of every creditor might be obtained: and it was held that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least until the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. *Richardson* v. *Rickman* (B. R., M. 16 G. 3) is cited in *Kearslake* v. *Morgan* (5 T. R. 517) as the first case in which it was held that the giving a negotiable instrument was pleadable in bar. In 2 Wms. Saund. 103 b., it is said—"It has been established by modern authorities, that the acceptance of a negotiable note or bill 'for and on account' of a debt, must be taken primâ facie to be in satisfaction of that debt, until it appears that the note or bill remains unpaid in the possession of the creditor, without any laches by him: *Kearslake* v. *Morgan*; *Burden* v. *Hal*-**[496]**-*ton* (4 Bingh. 454, 1 M. & P. 223); *Kendrick* v. *Lomax* (2 C. & J. 405); *Mercer* v. *Cheese* (4 M. & G. 804, 5 Scott, N. R. 664). It is usually said that the taking of the note or bill suspends the creditor's remedy for the time it has to run; for, that it amounts to an agreement by him not to sue for that time, in consideration of the debtor's giving the note or bill: see *Simon* v. *Lloyd* (2 C. M. & R. 187, 189, 3 Dowl. P. C. 813). It may be observed, however, that, where the obligee of a bond even expressly covenants not to sue for a certain time, this cannot be pleaded in bar of an action on the bond, but is a covenant only, for a breach of which the obligor may bring his action: *Ayloffe* v. *Scrimpshire* (Carth. 63, 1 Show. 46, Comb. 123, 2 Salk. 573). And the reason seems to be, that, if such covenant were allowed to operate in suspension of the action, the right of action would be altogether lost; inasmuch as it is a rule, that, where a personal action is once suspended by the voluntary act of the party, it is for ever gone, and discharged: *Fryer* v. *Gildridge* (Hobart, 10); *Dorchester* v. *Webb* (Cro. Car. 372); *Wankford* v. *Wankford* (1 Salk. 302, 303, per Powell, J.). In truth, then, this abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as part of the law-merchant, in respect of mercantile securities: *Owen* v. *Griffiths* (Exch. T. T. 1844). The difficulty of reconciling the doctrine with any principle, is increased by the courts' having declined to apply it to the case of a debt due for rent,—*Davis* v. *Gyde* (2 Ad. & E. 623, 4 N. & M. 462),—or on a specialty: *Worthington* v. *Wigley* (3 N. C. 454, 3 Scott, 558)"(*n*). [V. Williams, J. Is not the plea an answer, as setting up a new agreement, as in *Good* v. *Cheeseman* (2 B. & Ad. 328)? That gets over **[497]** the difficulty as to accord and satisfaction.] It is submitted that the plea may be upheld in that view also. [V. Williams, J. Can there, in strictness, be a reservation of liberty to plead a thing in bar, which is not a release? In *Dean* v. *Newhall* (8 T. R. 168), it was held, that, if the obligee of a bond covenant not to sue one of two joint and several obligors, and, if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. Maule, J. Here, the proviso, that, in the event of molestation, the covenant may be pleaded in bar, seems designed merely to expound the former part,—shewing that it was intended in the sense in which it would furnish a bar.]

Willes, in reply. *Good* v. *Cheeseman* is altogether inapplicable to the view presented on the other side: this is not the simple case of a composition-deed. The passages cited from Rolle's Abridgment, as explained by a reference to the Year Books (vide supra, 494 (*a*)), shew that the deed there supposed, operated as an immediate release. Here, however, the plain and obvious intention of the parties was, merely to suspend the remedy.

Wilde, C. J. This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees,

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(*n*) And see *Price* v. *Edmunds*, 10 B. & C. 578, as explained in 5 Mann. & Ryl. 287, 4 M. & G. 476 (*a*), 623 (*b*).

of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part: and the plea, which is pleaded either as a bar to the action generally, or, in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercer; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued; **[498]** that the defendant was unable immediately to satisfy those debts; that, for the purpose of realising his effects, it had been deemed advantageous to all the parties interested, that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes on to state, that, in pursuance of the agreement, the several persons parties thereto of the second and third parts, by that indenture gave and granted unto the defendant until the 17th of May, 1848 (the indenture bearing date the 17th of May, 1843), full and free licence and authority to pass and repass, &c.; and that it was further provided, that, if any of the said persons parties thereto of the second and third parts, should, at any time thereafter during the continuance of the licence thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of licence thereinbefore contained, should in any such respect be contravened, and of and from all manner of actions, suits, &c., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference here mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor. The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of licence, with a covenant on **[499]** the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar: but it is said, upon the supposed authority of *Ford* v. *Beech*, that the only remedy of the covenantee is, by a cross action for damages. Nothing, however, fell from the court in *Ford* v. *Beech*, to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar? By reason of the rule that the right to a personal action once vested, and suspended, by the voluntary act of the party, for however short a time, is precluded and gone for ever. It could only be pleaded in bar; for, that is its legal operation. To have allowed the agreement in *Ford* v. *Beech* to be pleaded in bar as a release, would have been obviously contrary to the intention of the parties: and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But, how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated. Here, we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not **[500]** to sue for a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here, is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action,—which in the ordinary course would go on to judgment and execution,—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity, that, if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of the parties. To extinguish the debt, would manifestly be to defeat the whole intention of the deed. But, upon what assumption is that ground taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The **[501]** passage in Co. Litt. referred to by my brother Maule (*a*), seems to shew that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, viz. the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties, that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.

MAULE, J., concurred.

V. WILLIAMS, J. I am of the same opinion. The bringing an action is a molestation, and a breach of the covenant, and is properly pleaded as such. I further think that there is no objection to parties contracting by deed, that, if a given event shall happen, the deed shall operate as a defeasance of a debt. The passages in Rolle's Abridgment, and the case of *Ayliffe* v. *Scrimshire*, as reported by Carthew, seem to me to be good law, as far as is necessary to sustain this plea.

TALFOURD, J., concurred.

Judgment for the defendant.

[502] IN THE MATTER OF THE ARBITRATION BETWEEN JAMES STROUD AND THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY. Nov. 13, 1849.

[S. C. 19 L. J. C. P. 117.]

A. agreed to let, and B. agreed to hire, a piece of land containing about 15 acres, at an annual surface-rent,—B. to use the land for the purpose of making bricks, and to pay to A., his executors, &c., 3s. per 1000 on the quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing.—A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration, under the provisions of the lands clauses consolidation act, 1845,—8 & 9 Vict. c. 18. The umpire, by his award, found that the interest of B. under the above agreement was that of merely a tenant from year to year; and he assessed the compensation upon that basis:—Held, that the construction put by the umpire upon the agreement was correct; and that evidence tending to shew that by the custom of the brickmaking trade, brick land is never hired from year to year, was properly rejected.—Quære, as to the power of the court to interfere, even if the decision of the umpire had been wrong.

The following submission to arbitration was entered into between the East and West India Docks and Birmingham Junction Railway Company and one James Stroud, on the 10th of January, 1849:—

"Whereas the East and West India Docks and Birmingham Junction Railway Company, established and incorporated by the East and West India Docks and

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(*a*) With which agrees the judgment of Fineux, C. J., in T. 21 H. 7, fo. 24.

Birmingham Junction Railway Act, 1846, have given to James Stroud, of Islington, in the county of Middlesex, brick-maker, a notice in writing, under the hand of Harry Chubb, their secretary, bearing date the 29th of May, 1848, setting forth that they required, under the powers, and for the purposes, of their act, to purchase a piece or parcel of land in which the said James Stroud was, or claimed to be, interested, and on which he had for some time past carried on the trade of a brick-maker, situate in the parish of St. Mary, [503] Islington, in the county of Middlesex, being part of the hereditaments numbered 19 on the deposited plan of the said railway, in such parish, and which said land and hereditaments were more particularly specified in the said notice, and delineated on the plan attached thereto; and the said company thereby demanded from the said James Stroud the particulars of his estate and interest in the said land and hereditaments so required to be purchased, and of the claims made by him in respect thereof: And whereas the said James Stroud is, or claims to be, interested in the same lands and hereditaments (with others), for brick-making purposes, for a term of years from the 10th of April, 1844, but he has not given to the said company any statement of the amount of compensation claimed by him in respect of such his estate and interest in the said land and hereditaments, which he is entitled to assign or convey to the said company under the powers of the lands clauses consolidation act, 1845 (8 & 9 Vict. c. 18), nor of the deterioration in value of the residue of the same hereditaments which are not required by the said company, or of the loss in trade to be sustained by him by reason of such land and hereditaments being taken by the said company: And whereas the said James Stroud hath, in pursuance of the power for that purpose given him by the lands clauses consolidation act, 1845, incorporated with and forming part of the said first-mentioned act, elected to have the value of his estate and interest of and in the said land and hereditaments, and the amount of compensation for damage by severance thereof, and for the loss (if any) in his trade as a brick-maker, occasioned by the said land and hereditaments being so required and taken as aforesaid, and by the making of the said railway, referred to arbitration [504] under the provisions of the said lands clauses consolidation act: And whereas a map or plan shewing the land to be sold by the said James Stroud to the said company is hereunto annexed, and in such map or plan the same land is coloured red, and the quantity required is figured thereon as 4 a. 3 r. 13 p.: Now, therefore, in pursuance of the provisions of the said lands clauses consolidation act, 1845, the said company do, by this writing, under the hand of Harry Chubb, their secretary, appoint Francis Fuller, of, &c., surveyor, to be the arbitrator on their behalf in the said matter, and the said James Stroud doth, by this writing, under his hand, appoint Charles Lee, of, &c., surveyor, to be the arbitrator on behalf of him the said James Stroud in the said matter; and the said arbitrators, or the umpire to be appointed by them, or under the said lands clauses consolidation act, 1845, are to ascertain and award the amount of compensation to be made and paid by the said company to the said James Stroud, or to be paid into the court of Chancery, as the case may require, for and in respect of the injury and damage (if any) to be sustained by him by the interference with his said business of a brick-maker, and by the depriving him of a portion of his brick-earth, and for and in respect of the estate and interest so claimed by the said James Stroud, or which, under the provisions of the said acts, or either of them, he may be enabled to sell, assign, and convey, of and in the part of the said piece or parcel of land and hereditaments numbered 19 on the said plan annexed to the said notice, and therein coloured red, containing 4 a. 3 r. 13 p., and for all damage, by severance (if any) or otherwise, consequent upon such compulsory sale or purchase, or upon the making of the said intended railway, as directed by the provisions of the said lands clauses consolidation act, 1845, relating to arbitrations and awards, in cases of disputed [505] compensation,—which provisions (inclusive of those relating to the costs of and incident to the arbitration hereby agreed upon) are to extend to there presents, and be applicable thereto in all respects and to all intents and purposes as if the same had been herein repeated: And it is hereby mutually agreed by and between the parties hereto, that all expenses incidental to or arising out of this agreement, and of the reference hereby made, shall be borne and paid by the said company; the amount thereof to be settled, in case of difference, by the said arbitrators, or their umpire. Dated, &c."

The arbitrators, before proceeding with the reference, appointed one John George Hammock to be umpire.

It appeared that the land in question was held by James Stroud under the following agreement:—

"Memorandum of agreement between Robert Fellowes, of, &c., clerk, doctor of laws, of the one part, and James Stroud, of, &c., of the other part: The said Robert Fellowes agrees to let, and the said James Stroud agrees to hire, all that piece or parcel of land called Virginia Field, in the parish of Islington, containing fifteen acres, more or less, late in the occupation of Thomas Souter, and now of Samuel Bennett, with the cottage and garden at the south-eastern extremity of the same, paying for the land an annual surface-rent of 5l. an acre, and 10l. a year for the cottage and garden belonging to the same. The said James Stroud is to use the land for the purpose of making bricks, and to pay to the said Robert Fellowes, his executors, administrators, or assigns, 3s. per thousand on the quantity of bricks so made, and that quantity to be certified by the Excise payments for the same: but the said James Stroud agrees to make at least 4,000,000 of bricks annually, or pay a rent equal thereto. The payment of the said brick-rent shall be made annually, at Christmas; **[506]** and the reserved, or surface-rent of 5l. an acre, shall be paid half-yearly, at Christmas and Midsummer. The aforesaid James Stroud, his executors, administrators, or assigns, shall preserve all hedges, fences, walls, water-courses, drains, and gates belonging to the within-mentioned land, in good order and repair. And it is hereby further agreed, that all gravel, chalk, sand, or other materials, found in working the brick-earth, shall be the sole property of the said Robert Fellowes, his executors or assigns; but the said James Stroud shall be allowed to take therefrom, and without paying for the same, whatever chalk, gravel, or sand he may require in the manufacturing of the bricks upon the premises. The said James Stroud, for himself, his executors, administrators, and assigns, undertakes to preserve the top soil, and to level the ground as the brick-earth is progressively cleared. The said James Stroud agrees not to excavate the ground beyond the depth of eight feet, without the special permission in writing of the said Robert Fellowes, his executors, administrators, or assigns. It is further agreed that the said James Stroud, his executors, administrators, or assigns, shall pay all rates, taxes, and outgoings whatsoever which are or shall in any way or form be chargeable upon the land herein agreed to be demised. In witness, &c."

A claim was made, on behalf of Stroud, before the umpire, of 3838l. 2s., as and for a compensation to be made and paid by the company to him, "for and in respect of the injury and damage to be sustained by him by the interference in his business of a brick-maker, and by depriving him of a portion of his brick-earth, and for and in respect of the estate and interest to which he claimed to be entitled under or by virtue of the agreement of the 10th of April, 1844." And in support of his claim he proposed to call witnesses before the umpire, to prove that it was contrary to the custom of **[507]** the trade of brick-making, that land should be hired under a yearly tenancy. But the umpire refused to receive evidence of that character.

The umpire, on the 19th of April last, made his award, as follows:—

"To all to whom these presents shall come, &c.: Whereas, by a certain agreement or instrument in writing, bearing date, &c. (reciting the submission): And whereas the said F. Fuller and C. Lee, the arbitrators so appointed as aforesaid, did, on the 20th of January, 1849, in pursuance of the power for that purpose given them by the lands clauses consolidation act, 1845, before entering upon the matters so referred to them as aforesaid (and having previously made and subscribed the declaration by the same act required in that behalf), by writing under their hands, appoint me, the said J. G. Hammack, to be the umpire to decide between them on the matters so referred to them as aforesaid: And whereas the said arbitrators did afterwards enter upon the matters so referred to them as aforesaid; but they the said arbitrators failed to make any award upon the said matters within twenty-one days after the day on which they were so appointed as aforesaid; and the time for their making their said award not having been extended: Now know ye that I, the said J. G. Hammack, so appointed umpire as aforesaid, having taken upon me the burthen of the umpirage, and having, before entering upon the consideration of the matters so referred to me as aforesaid, duly made and subscribed the declaration required in that behalf by the lands clauses consolidation act, 1845, and having been requested by both the said parties to the said reference to state on the face of this my umpirage, the nature and extent of the term and interest which I find and adjudge the said James Stroud to have had in the before mentioned land and hereditaments, and in respect of which he so claims [508] to be entitled to compensation as aforesaid, and having deliberately and at large heard, examined, and considered the several allegations, witnesses, and evidences of both the said parties concerning the said premises, do thereupon make this my umpirage and final determination in writing between the said parties of and concerning the premises, in manner and form following, that is to say,—I do find, adjudge, and determine that the said land was and is part and parcel of a certain field called Virginia Field, in the parish, &c., and that the said James Stroud was entitled to, and held and occupied, the said land, and hereditaments under and by virtue of a certain instrument in writing, bearing date the 10th of April, 1844, and made and entered into by and between him the said James Stroud and one Robert Fellowes, and which said instrument was and is in the words and figures following, that is to say, &c. (setting out the agreement): And I do further find, adjudge, and determine, that the term and interest which the said James Stroud had in the said land and hereditaments, was that of a tenant from year to year, and that he was entitled to compensation from the said company, in respect thereof, as tenant from year to year only: And I do further find, award, adjudge, and determine that the compensation to which the said James Stroud is entitled, and which is to be made and paid by the said company to the said James Stroud, or to be paid into the court of Chancery, as the case may require, for and in respect of the injury and damage which he the said James Stroud will sustain by the interference with his said business of a brick-maker, and by the depriving him of a portion of his brick-earth, and for and in respect of the estate and interest so claimed by the said James Stroud, and which, under the provisions of the said acts, he is enabled to sell, assign, and convey, of and in the said part of the said piece or parcel of [509] land and hereditaments numbered 19 on the said plan annexed to the said notice, and therein coloured red, containing 4 a. 3 r. 13 p., and for all damage, by severance or otherwise, consequent upon such compulsory sale or purchase, or upon the making of the said intended railway, amounts to the sum of 150l.: And, lastly, I do find, award, and determine, that the costs of and incident to the said arbitration amount to the sum of 148l. In witness, &c."

Byles, Serjt., in Trinity term last, obtained a rule to shew cause why the award should not be set aside, on the grounds, that the umpire had assessed the compensation due to Stroud upon a wrong principle; that the memorandum of the 10th of April, 1844, set forth in the award, created a greater interest, legal or equitable, than a mere tenancy from year to year; that Stroud was entitled to a larger sum than the umpire had awarded to him; that the umpire had not given compensation for the full loss sustained by Stroud; and that the umpire refused to receive evidence that a mere tenancy from year to year was contrary to the custom of the brick-trade in taking land for brick-making purposes. He submitted that the agreement of the 10th of April 1844, operated, in law, as a lease for so long a period as should be necessary to enable Stroud to excavate the brick-earth to the depth of eight feet, or, at all events, gave him an equitable interest in the land: and he referred to Co. Litt. 42 a., *Rosse's case* (F. Moore, 556), *Sir W. Cordell's case* (*b*), *Doe d. Player* v. *Nicholls* (1 B. & C. 336, 2 D. & R. 480), *Doe d. White* v. *Simpson* (5 East, 162), and the 8 & 9 Vict. c. 18, s. 6, and ss. 25 to 37.

[510] Malins and J. Brown, on a former day in this term, shewed cause. The decision of the umpire upon the question of value, is by the statute (8 & 9 Vict. c. 18, s. 27), declared to be final: the matter, therefore, is not open to the consideration of the court. [Maule, J. Does it appear on the face of the award that the value was assessed upon an erroneous principle?] The principle of assessment does appear: the award shews that the amount of compensation was assessed upon the footing of the interest created by the agreement of the 10th of April, 1844, being that of a tenancy from year to year only. The party has selected his own tribunal, and from its decision there is no appeal. This is no hardship on the land-owner; for, though the company cannot enforce an arbitration, the land-owner has power to compel them to go to arbitration, or he may appeal to a jury. [Maule, J. Do you insist that the award is conclusive, although it is shewn upon the face of it that the arbitrator has adopted a wrong principle?] [V. Williams, J. Suppose the award recites that the claimant has an estate in fee, and then goes on to find that the value of a life-estate is so much,

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(*b*) Cited in 8 Co. Rep. 96 and (per nom. *Cordal's case*) Cro. Eliz. 316.

and the arbitrator directs that sum to be paid,—would such an award be conclusive?] In that case, perhaps it might be said that the arbitrator was dealing with a matter which was not within the submission. [Talfourd, J. If, instead of an arbitration, this had been an assessment before a sheriff's jury, under the subsequent clauses of the act (§§ 38 to 50), and the sheriff had misdirected the jury that the interest of the claimant was that of a tenant from year to year, when in truth he was entitled to the fee,—would the court interfere in that case?] That involves a totally different inquiry: there is no provision making the finding of a jury conclusive. [Wilde, C. J. Parties **[511]** refer matters in difference, by agreement; and a statute (8 & 9 W. 3, c. 11), authorises the agreement to be made a rule of court. Under the land clauses consolidation act, a similar tribunal is created; and s. 36 impowers either party to make the submission a rule of court. What is the object of that provision, if not to give the court some control in the matter?] The statute gives the court power to regulate the conduct of arbitrators to be appointed under it, as in other cases. But this is an attempt to induce the court to control the arbitrator's discretion; whereas, the act says that his decision shall be final. [V. Williams, J. Does that provision of the act amount to anything more than the ordinary clause in every agreement of reference, that the determination of the arbitrator shall be final? Maule, J. Has the umpire here assessed the value of the thing he was called upon to assess?] The nature of the interest, as well as the value, was referred. [Maule, J. You say, that, notwithstanding the umpire has manifestly made a mistake in ascertaining the nature of the interest, the court has no control over the award?] The award is final and conclusive. [Warren referred to *Jones* v. *Corry* (5 N. C. 187, 7 Scott, 106), where an arbitrator, with a view of enabling one of the parties litigant, to make an application to the court, after the publication of his award, stated matters which shewed that he had put a mistaken construction on the rule of reference, and had misdecided accordingly,—the court received affidavits of these facts, and set aside the award, notwithstanding there was no objection on the face of it. Wilde, C. J., referred to *Home* v. *Earl Camden* (2 H. Blac. 533).] In *Wright* and *The Cromford Canal Company* (1 Q. B. 98, 4 P. & D. 730), on a submission to arbitration, **[512]** not giving power to raise questions of law for the opinion of the court, the arbitrators awarded 82l. as compensation for damages; and, in a subsequent part of their award, they stated, "for the purpose of raising the question for the determination of the court, in case it should be pleased to entertain the same," that they awarded the 82l. on a certain principle, which they explained; but, if the court should think that the damage ought to be estimated on another principle, which they likewise stated, then they awarded a compensation of 102l.: and it was held, that the award was sufficiently final; for, that, as the sum of 82l. was positively awarded, the hypothetical adjudication which followed might be rejected as surplusage. So, in *Barton* v. *Ranson* (3 M. & W. 322), a cause and all matters in difference having been referred to arbitration, the arbitrator set out all the facts upon the face of his award, and then awarded that the plaintiff had no cause of action against the defendant; and stated that he determined the action in favour of the defendant: he then, after awarding by whom the costs of the reference should be paid, concluded as follows:—"But, if the court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of one shilling, and also pay to the plaintiff the costs of the reference:" and it was held (*b*), that the arbitrator having come to a positive finding, and expressly declared his own opinion, the award was sufficiently final, and the latter clause might be rejected. This is, in effect, an attempt to review the arbitrator's decision upon a matter of fact; which cannot be done: *Barrett* v. *Wilson* (1 C. M. & R. 586, 5 Tyrwh. 218, 3 Dowl. P. C. 220). Parke, B., in **[513]** that case says: "The parties have agreed to be bound by the arbitrator's opinion of the facts, not by ours. The court have a control over juries as to matter of fact, which they exercise where the conclusion is manifestly wrong. They have no such control over an arbitrator as to matter of fact. Whether I should have come to the same conclusion as the arbitrator has done, is a different question; but, the parties being bound to abide by his decision of the facts, we cannot interfere, if there were any evidence to support his conclusion." In *Phillips* v. *Evans* (12 M. & W. 309, S. C.,

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(*b*) Dissentiente Bolland, B.

per nom. *Phillips* v. *Edwards*, 1 D. & L. 463),—which overrules *Jones* v. *Corry*,—the court of Exchequer refused to set aside an award, although it was sworn that the arbitrator had admitted that he had made a mistake in figures. [Wilde, C. J. This court, in *Hall and Hinds, In re* (2 M. & G. 847, 3 Scott, N. R. 250), took rather a different view of a similar question. There, certain disputes and differences between A. and B. were referred to the arbitrament of three merchants: before the arbitrators, A. admitted that a sum of 143l. 15s. 11d. was due from him to B., but the latter claimed a larger sum; and the arbitrators found that in reality a further sum of 75l. 4s. 11d. was due from A. to B.: instead, however, of adding these two sums together, and directing A. to pay the aggregate amount to B., the arbitrators by mistake deducted the latter sum from the former, and, by a further mistake, directed that B. should pay the difference to A. Upon an affidavit of the facts, by two of the arbitrators (the third declining to join in the affidavit), the court set aside the award, —on the ground that the arbitrators had failed to express in the award the intention of their own minds, and the mistake and act of carelessness being so gross as to amount, in the judicial sense of the term, to misconduct **[514]** on the part of the arbitrators.] That case is observed upon with evident disapprobation in *Phillips* v. *Evans*. *Doe d. Oxenden* v. *Cropper* (10 Ad. & E. 197, 2 P. & D. 490) is also directly at variance with *Jones* v. *Corry*. There, an ejectment brought for close A. and close B., was referred at nisi prius to an arbitrator, together with an action for a trespass upon close B., brought by the lessor of the plaintiff against the same defendant. In the action of trespass, there were special pleas justifying on the ground of title to close B. in the defendant. The arbitrator ordered a verdict on all the issues in the action of trespass for the defendant, except one issue on a plea of not guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.: and, notwithstanding this manifest repugnancy, it was held, that the postea in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict. [Talfourd, J. This question was very much discussed in a case in the Queen's Bench during the last term, when the court did interfere to set aside the award, on the ground of a mistake of the arbitrator (*b*).]

(*b*) *Hutchinson* v. *Shepperson*, reported in the 13 Jurist, 1098, and 14 Law Times, 127. It was a motion to set aside an award, on the ground that the arbitrator had, by mistake, omitted to give the plaintiff credit for a sum to which the defendant had admitted him to be entitled. The affidavit upon which the rule was obtained, stated, that, at the commencement of the proceedings before the arbitrator, he was told by both parties that there was no dispute between them as to that particular sum, and that therefore he need not trouble himself about it. In making his award, however, the arbitrator omitted to give the plaintiff the benefit of that admission, and threw that sum altogether out of the calculation.

Lord Denman, in delivering the judgment of the court, after time for deliberation, said:—"This was a rule to set aside an award, on account of an error committed by the arbitrator. He omitted to give the plaintiff credit for a sum of money to which he seems to be distinctly admitted to be entitled. At the commencement of the proceedings, when the parties met, this acknowledgment was made, and the arbitrator was desired to take no trouble as to this sum, since the plaintiff's right to it was not disputed. The arbitrator rejected what was said, although that sum was said to be no matter in difference between them; and so has deprived the plaintiff of what is confessedly his due. The defendant has thought proper to take advantage of this error, and even to appear against the rule obtained. His learned counsel relied on some strong expressions used by Mr. Baron Parke in *Phillips* v. *Evans*, 12 M. & W. 309, which seemed to indicate that no mistake of an arbitrator can ever be a sufficient ground for setting aside an award. We are fully satisfied of the propriety of observing the greatest caution with regard to this subject, to avoid inquiries which would unravel by-gone transactions, and keep alive a litigation which the parties have agreed to determine by reference; but we cannot think the rule applies to a case where arbitrators have exercised no judgment on the particular facts, but have forborne to do so in consequence of direct instructions from both parties to exclude it from their consideration. The rule, at most, is one for guiding our discretion, which cannot be

[515] Warren, contrà. The argument on the other side must go this length, that, in the case of a reference [516] under this statute, however obvious and however gross the miscarriage on the part of the arbitrators or umpire has been, the party aggrieved is absolutely without remedy, because the legislature has used words which are found in every agreement or order of reference. The only meaning of the word "final" in this act, and in every submission, is, that the arbitrator shall not decide conditionally. The object of every reference is, to stop litigation: that object is not attained, if the award is not final. The root of the umpire's authority is found in the 23rd section of the lands clauses consolidation act, which enacts, that, "if the compensation claimed or offered in any such case shall exceed 50l., and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly." The 25th section enacts, that, "when any question of disputed compensation by this or the special act, or any act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made, on the part of the promoters of the undertaking, under the hands of the said promoters, or any two of them, or of their secretary or clerk, and, on the part of any other party, under the hand of such party, or, if such party be a corporation aggregate, under the common seal of such [517] corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and, after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party, to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then, upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and, in such case, the award or determination of such single arbitrator shall be final." The 27th section enacts, that, "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and, if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final." The 36th section provides that "the

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so absolutely fettered and rendered powerless. We are aware, that, if awards are allowed to be questioned under any circumstances, it must be difficult to draw a line: but a line must be drawn somewhere; and this case appears to fall within it, wherever that line can be drawn. The court might have refused a rule to shew cause, on account of the inexpediency of the practice, and the danger of altering accounts in matters referred; but, the rule having been once granted, upon affidavits clearly setting forth, and without contradiction, a case of great injustice, which the court has power to remedy, we think we ought not to sanction that injustice. We would further observe, with respect to the case of *Re Hall and Hinds*, 2 M. & G. 847, 3 Scott, N. R. 250, which is a clear precedent for such decision, this case is not overruled by the court of Exchequer in *Phillips* v. *Evans*, 12 M. & W. 309, where the facts were withheld by the arbitrator, which were brought satisfactorily before the court here. The case of *Re Hall and Hinds* is expressly recognised in *Hagger* v. *Baker*, 14 M. & W. 9, 2 D. & L. 856, where the court refused to interfere; and we approve of the excellent observations there made by the lord chief baron."

submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties." Why is that, but to give the court jurisdiction over the arbitrators and over the subject-matter of the reference, as in cases of ordinary [518] submissions to arbitration? And the 37th section provides that "no award made with respect to any question referred to arbitration under the provisions of this or the special act, shall be set aside for irregularity, or error in matter of form." This latter provision would be idle, if the court had no jurisdiction at all. [Maule, J. It is conceded that the court may interfere where the arbitrator has exceeded, or fallen short of, the authority conferred upon him.] The courts will always interfere where it is apparent on the face of the award, that the arbitrator has made a substantial mistake. This principle is distinctly recognised by this court in *Fuller* v. *Fenwick* (ante, vol. iii. p. 705), where many of the authorities are collected. *Jones* v. *Corry* is not, in terms, overruled by any case: and *Re Hall and Hinds* is expressly recognised in *Hagger* v. *Baker* (14 M. & W. 9, 2 D. & L. 856). In *Broadhurst* v. *Darlington* (2 Dowl. P. C. 38), where an action was brought by an attorney, on a bill not taxable, and a verdict was taken, subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum, it was held that it was competent for the court to examine whether the arbitrator had adopted the right rule. And Lord Lyndhurst said: "If the arbitrator intended to adopt the proper rule, and has not done so, this is not his award." Here, the award assumes to have been made in conformity with the 6th section of the statute, which enacts, that, "subject to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorised to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the abso-[519]-lute purchase, for a consideration in money, of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands, of what kind soever." Under this act, the court has even a larger equitable jurisdiction than at common law. The point was expressly stated by the arbitrator, at the request of both parties, for the purpose of obtaining the opinion of the court.

Wilde, C. J. This point is one which is deserving of consideration. Should it become necessary to decide it, we will take time to look into it. At present, we wish to hear the rest of the argument.

Malins and J. Brown resumed their argument. Upon the construction of the agreement of the 10th of April, 1844, the arbitrator clearly came to a correct conclusion. By the express words of the statute 8 & 9 Vict. c. 106, that agreement would create only a tenancy at will, which, by the subsequent payment of rent, would be turned into a tenancy from year to year. It will be necessary to consider, first, what is the legal operation of the instrument; secondly, what is its effect and operation in equity. In a court of law, it clearly operates only to create a tenancy from year to year; *Clayton* v. *Blakey* (8 T. R. 3), as explained by Lord Ellenborough, in *Thunder d. Weaver* v. *Belcher* (3 East, 451). Suppose this court to be sitting as a court of equity, and a bill filed for a specific performance,—what is the effect of the contract? It is a contract for the working out of the brick-earth: and it will probably be said on the other side, that it is to enure until the brick-earth is exhausted. [Maule, J. It is rather in the nature of a licence to commit the waste of digging the brick-earth.] [520] The intention of the parties must be gathered from the face of the instrument. No obligation is imposed on the tenant to make bricks. A court of equity will not enforce a specific performance of an agreement for mere tenancy at will: *Browne* v. *Warren* (14 Ves. 156). If the parties here had intended this to operate as a licence to dig all the brick-earth, they might have said so. It is essential to the creation of a lease, that it should have a certain commencement and a certain ending. [Wilde, C. J., referred to *Doe d. Hanley* v. *Wood* (2 B. & Ald. 724). There, the owner of the fee granted to A., his partners, fellow-adventurers, &c., free liberty to dig for tin, and all other metals, throughout certain lands described in the indenture, and to raise, make merchantable, and dispose of the same to their own use, and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any watercourse over the premises granted; habendum for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: and it was held that this deed did not amount to a lease, but contained a mere licence to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. [Maule, J. In *Doe d. White* v. *Simpson* (5 East, 162) a term determinable on payment of certain debts and annuities, was upheld. That was the case of a will: and, though **[521]** the decision might be justified by the anxiety of the court to carry into effect the intention of the testator, and to provide for the payment of debts, it has never been very much approved.] This matter was much discussed in *Haigh* v. *Jaggar* (*a*)[1]. There, a term of twelve years was created for the purpose of enabling the lessees to get the coal out of six acres of land,—with a proviso, that, if, at the end of the term, all the coal in the six acres should not have been got, the lessees were to be at liberty to get the remainder: and it was held to be a lease for twelve years only. In the argument in that case, *Doe d. Simpson* v. *White*, Co. Litt. 42 a., and the note 7 thereto, and *Rosse's case*, were cited on the part of the defendants. [Wilde, C. J. *Rosse's case* is observed upon in *Thompson* v. *Mackworth* (Sir O. Bridgman, 513, 514), and said by the court not to be law.] The court of Exchequer declined to act upon it in *Haigh* v. *Jaggar*. [Wilde, C. J. There is no way of bringing about a determination of the term here: there is no proviso for re-entry; and there could be no distress for the rent.] It lies on the other side to make out clearly, and without doubt or ambiguity, that it was the intention of the parties to create, by this agreement, an interest of a more extended nature than a tenancy from year to year. In Bac. Abr. Leases (L.) 3, it is said: "As to the certainty of leases for years, as to their continuance, this ought to be ascertained, either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act which may, with equal certainty, measure the continuance thereof, otherwise they will be void (*c*). If a woman be enceint with a son, and a lease **[522]** be made till such issue in venter sa mere shall come to full age, this is a lease only at will, and cannot be any lease for years; because it is uncertain when, or whether ever, the son will be born, and, consequently, the beginning, continuance, and ending of this lease is uncertain; and therefore it cannot be said any lease for years, since it is to begin presently as a lease: and yet nothing appears in the deed itself, nor is there such a reference to any collateral circumstance, as may then measure the continuance thereof" (*a*)[2].

The umpire's rejection of evidence as to the supposed custom of the brick-making trade, upon the hiring of land, clearly is no ground for impeaching the award. An arbitrator's, or umpire's, conclusion is final. He is made the judge of the law, as well as of the facts: and from his decision there is no appeal: see the cases collected in Watson on Awards (page 120, et seq.), and Archbold's Practice (10th edit., by Chitty, vol. ii. p. 1498, 9). In *Perryman* v. *Steggall* (9 Bingh. 679, 3 M. & Scott, 93), this court refused to set aside the award of a barrister, on a suggestion that he had admitted an incompetent witness. So, in *Ashton* v. *Poynter* (3 Dowl. P. C. 201, 1 C. M. & R. 738) and *Huntig* v. *Ralling* (8 Dowl. P. C. 879), it was held that parties referring a matter to arbitration, are equally bound by the arbitrator's decision, whether he is a professional man or not. The same doctrine was, still more recently, laid down by this court in *Fuller* v. *Fenwick* (ante, vol. iii. p. 705). At all events, the evidence here offered was properly ejected. [Wilde, C. J. There is nothing in this objection. The question before the arbitrator was, not what was the custom of the brick-making **[523]** trade, but what was the agreement into which these parties had entered?]

Byles, Serjt., and Warren, in support of the rule. The plain intention of the parties to this agreement was, that Stroud should have an interest in the land,—either legal or equitable,—of sufficient duration to enable him to work out all the brick-earth to the depth of eight feet: and, although the court will not take judicial notice of the custom of the particular trade, yet, in construing an instrument of this

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(*a*)[1] 16 M. & W. 525. And see 17 Law Journ., N. S., Exch. 110, 18 Law Journ., N. S., Exch. 125, and 2 Coll. C. C. 231.

(*c*) Citing *Say* v. *Smith*, in C. B., Plowd. 271.

(*a*)[2] *The Bishop of Bath's case*, 6 Co. Rep. 34 b.

sort, they are bound to look at all the surrounding circumstances from which they may be aided in ascertaining the real intention of the contracting parties. This principle was recently acted upon by the court of Queen's Bench in two cases of *The Queen* v. *Westbrook* and *The Queen* v. *Everist* (10 Q. B. 178), where a question arose as to the proper mode of rating the occupiers of brick fields to the relief of the poor: and where Lord Denman, in delivering the judgment of the court, says: "The material facts found in both cases are nearly the same. In both it is stated that much expense, and the introduction of foreign matters, are necessary, in order to make the occupation productive and profitable; and the result is liable to much risk: it is understood, therefore,—if not made legally certain,—that the tenancy shall be of some years' duration, and the rent is in part only fixed, in part made to depend, in the nature of a royalty, on the number of bricks made; the material, the brick-earth, is not in its nature renewable, and in both cases will be consumed, according to reasonable calculation, within no great number of years." The instrument in question is, in truth, a licence (coupled with an interest, and therefore irrevocable,) to enable Stroud to retain pos-[524]-session of the land for so long a period as may be necessary to get out the brick-earth to the stipulated depth. The distinction between executory and executed trusts is accurately pointed out by Lord Chancellor Talbot, in the case of *Lord Glenorchy* v. *Bosville* (Cas. temp. Talbot, 3, 19), where his lordship says: "I repeat it, I think in cases of trusts executed, or immediate devisees, the construction of the courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made: but, in executory trusts, he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner." In *Doe d. Warner* v. *Browne* (8 East, 165), by a memorandum of agreement made between A. and B., the former in consideration of 40l., agreed to let, and the latter agreed to take, a messuage, &c., at 40l. per annum clear rent, to be paid quarterly, &c.: and it was further agreed that A. should not raise the rent, nor turn out B. so long as the rent was duly paid quarterly, and he did not expose to sale or sell any article that might be injurious to A. in his business. The court of Queen's Bench held this memorandum to create a tenancy from year to year only. The defendant then filed a bill for a specific performance (*c*), a demurrer to which was overruled, the Lord Chancellor (Lord Eldon) observing,—"Without laying stress upon the title, 'Memorandum of an agreement,' an expression to which some, perhaps not much, consideration is due, it proceeds to state, that 'W. Warner, in consideration of 40l., doth agree to let, and J. Browne doth agree to take, &c.' That phrase will not exclude the idea of an actual demise in some cases: but, if the whole imports rather an intention to do a future act, than a thing that is done, those words may be construed [525] as not amounting to actually letting and taking. If the opinion of the court of King's Bench was, that the subsequent words meant, that the tenant was to have the option of remaining for life, and the former words may mean either actually letting and taking, or a contract for actually letting and taking, it is fair to consider it as an agreement, rather than an actual lease; as the latter construction would defeat the intention of the parties, which, upon the former construction, may be carried into effect by a future instrument." And afterwards, on continuing the injunction, his lordship said (14 Ves. 409, 413): "I admit that the court must find, in the paper before it, sufficient evidence of the term and interest intended to be granted: but, even if the bill should be dismissed upon that ground, relief of a more limited kind must be given upon another ground, with reference to the terms in which the agreement is conceived. According to the old doctrine, an agreement to let was not understood to make a lease. Afterwards, the courts held, that, if a person said he agreed to let, it was the same as doing the thing: but it was never denied, that, if the terms of that instrument indicate that he was looking forward to something executory, before the contract would be complete, that would not be held a lease." The words "herein agreed to be demised," in the last clause of this agreement, would be senseless, if only a tenancy from year to year were contemplated. [Maule, J. Those words mean no more than "the land hereinbefore spoken of." What is there here which shews that something future was contemplated?] The tenant was to be at liberty to exhaust the whole of the brick-earth. [Maule, J. If he could do it within the term.] The absence of a proviso for re-entry, shews that a more formal

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(*c*) *Browne* v. *Warner*, 14 Ves. 156.

instrument was intended to be drawn up between **[526]** the parties. [Wilde, C. J. Or that a tenancy from year to year only was meant to be created. Which is the more probable?] That this is something more than a mere licence, is clear from the judgment of Vaughan, C. J., in *Thomas* v. *Sorrell*, where his lordship says (Vaughan, 351): "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it, had been unlawful. As, a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use,—to cut down a tree in a man's ground, and to carry it away the next day after to his own use,—are licences as to the acts of hunting and cutting down the tree, but, as to the carrying away of the deer killed, and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licences; but it is consequent necessarily to those actions, that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent, and not directly and as its effect, a dispensation or licence may destroy and alter property." It is no objection to this instrument, that it mentions no specific term for which a lease is to be granted: id certum est, quod certum reddi potest: and it may be shewn, by calculation, that the brick-earth demised, would, at the rate mentioned in the agreement, viz. 4,000,000 annually, be exhausted in fifteen years. Every stipulation in the agreement points irresistibly to the conclusion that the tenant's occupation of the land was intended to be co-extensive with its capacity **[527]** for yielding materials for his trade. The maxim "verba chartarum fortius accipiuntur contra proferentem," applies especially to contracts between landlord and tenant. In Broom's Maxims (2nd edit. p. 456), it is said: "It is a general rule, that the words in a deed are to be construed most strongly contra proferentem,—regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument (*b*)[1]; for, as observed by Mr. Justice Blackstone, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for, men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them (*c*). Moreover, the adoption of this rule puts an end to many questions and doubts which would otherwise arise as to the meaning and intention of the parties, which, in the absence of it, might be differently construed by different judges; and it tends to quiet possession, by taking acts and conveyances executed beneficially for the grantees and possessors" (Bac. Max. r. 3, which treats of the general rule). So strictly is this principle adhered to, that, if a lease be granted "for seven, fourteen, or twenty-one years," the lessee alone has the option of determining it at the end of the first seven or fourteen years: *Dann* v. *Spurrier* (3 B. & P. 399, 442: and see 7 Ves. 231); *Doe d. Webb* v. *Dixon* (9 East, 15). Lord Eldon, in the latter **[528]** case, says: "All doubts which might at one time have existed on the subject, are concluded by the decision in the Common Pleas (*a*), which was made upon full consideration of the case in this court (*b*)[2] and the antecedent authorities, and which proceeded upon the application to leases, of the general principle, that, where the words of a grant are doubtful, they are to be construed in favour of the grantee: and that was certified to the lord chancellor, who must be taken to have been satisfied with the decision." It is rather insinuated than asserted, that the cases of *Doe d. White* v. *Simpson* and *Doe d. Player* v. *Nicholls* are disapproved of by conveyancers. But the latter case is cited and acted upon in *Doe d. Davies* v. *Davies* (1 Q. B. 430, 1 Gale & D. 33), where Lord Denman says: "Holroyd, J., said rightly (in *Doe d.*

(*b*)[1] Per Lord Kenyon, *Barrett* v. *Duke of Bedford*, 8 T. R. 605; per Lord Eldon, *Browning* v. *Wright*, 2 B. & P. 22; per Bayley, J., 15 East, 546; per Park, J., 1 B. & B. 335; *Miller* v. *Mainwaring*, Cro. Car. 400; 3 Ves. jun. 48; Co. Litt. 183 a.; Noy's Maxims, 9th edit. p. 48.

(*c*) 2 Bla. Comm. 380. See *Saunderson* v. *Piper*, 5 N. C. 425, 7 Scott, 408; *Reynolds* v. *Barford*, 8 Scott, N. R. 238, 239.

(*a*) *Dann* v. *Spurrier*.

(*b*)[2] *Goodright d. Hall* v. *Richardson*, 3 T. R. 462.

Player v. *Nicholls*), that, where there are no words in the will which give the trustees any estate beyond the time during which the trust is to be performed, there the case falls within the general rule, that a trust estate is not to continue beyond the period required by the purposes of the trust. And that must mean a restricted period, and not any length of time during which it may be said that the trusts are in a course of performance. In *Doe d. Shelley* v. *Edlin* (4 Ad. & E. 582, 589), and *Doe d. Cadogan* v. *Ewart* (7 Ad. & E. 636, 666, 3 N. & P. 197), this court narrowed the rule of holding the trust estate to determine after the time for performance of the trusts, in the manner which I now suggest as the proper one, namely, to the case in which that restriction is consistent with the words of the instrument, and the apparent intention of the maker." In *Fenner* v. *Hepburn* (2 You. & C., Chan. Cas. 159), it was held, that, although an agreement between an intended lessor and lessee may **[529]** possibly amount at law to a present demise or assignment, yet, if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution, a court of equity will decree specific performance of the agreement in that particular. In the case of a bargain and sale, insufficient for want of inrolment, it is every day's experience to go to equity to cure the defect, and so carry out the intention of the parties. Some principles applicable to the present case will be found in *The Marquess of Bute* v. *Thompson* (13 M. & W. 487), and *Doe d. The Marquess of Bute* v. *Guest* (15 M. & W. 160).

Wilde, C. J. Upon the best consideration which the court can give to the question which the parties desire to have decided in this case, the conclusion they have come to is, that the rule cannot be made absolute. We give no opinion upon the first point which was argued, viz. whether it is competent to the court to entertain the question whether the umpire had come to a correct conclusion, under the statute. For the present, we pass that wholly by: when it becomes necessary to deal with that question, we shall be prepared to decide it. The principle of construction which has been so strenuously contended for, viz. that the terms of a grant are to be construed as favourably as possible for the grantee, the court is not disposed to controvert. Nor will it be denied that the whole of an instrument must be looked at together, when we are endeavouring to arrive at the intentions of the parties. In the conclusion at which we have arrived, we fully adopt both these principles. By the instrument in question, Dr. Fellowes professes to let, and Stroud to hire, the land, no mention being made of any term. Passing over the clause as to **[530]** the taking of the brick-earth, it has not been contended, nor could it be, that the agreement does more than create a tenancy at will, or from year to year. Nor can I discover anything to lead me to conclude that the parties contemplated any future instrument. If, then, the agreement, so looked at, enures only to the extent which I have stated, what is the effect of the clause as to the taking of the brick-earth? The tenant, it is said, agrees to hire the land for the purposes of his trade of a brick-maker. I do not know enough of the trade to form an opinion as to whether it would be prudent for a brick-maker to agree to pay a large rent for an extended term. But I should incline to think it would be more prudent to take it determinable by a notice. But we cannot speculate upon this. It seems to me that the parties did not contemplate a more extended interest than that of a tenancy from year to year; otherwise, the tenant being under no obligation to work out the brick-earth, he might, so long as he chose to pay a rent equal to 3s. per thousand for four millions of bricks, hold on for ever. That would be making the agreement equal to a grant of the fee-simple. No premium seems to have been paid; if there had been, it might have tended to shew that a larger interest was intended to pass than a tenancy from year to year. There is no power of distress: nor is the tenant under any obligation to work out the brick-earth: neither is there any reservation of a right on the part of the landlord to re-enter, if the rent is not paid, or in any other event. How, then, can it be supposed that the landlord ever intended to part with a permanent interest in the land? The cases referred to, where courts of equity have been dealing with executory agreements, appear to me to be wholly beside this. The argument that has been urged on the part of Mr. Stroud, resolves itself into this,—that the agreement is ambiguous, and therefore the **[531]** court is at liberty to consider what was the probable intention of the parties. I do not, however, find any ambiguity upon the face of the agreement: nor do I see any reason for giving it any effect beyond what is warranted by its language.

One ground upon which it has been urged that the rule should be made absolute is, that the arbitrator rejected evidence of the custom of the brick-making trade with respect to the hiring of land. I cannot, however, see upon what principle evidence of that sort could be held to be admissible: it is much too uncertain, and it is by no means applicable where there has been a distinct agreement.

Upon the whole, I do not think that the case is attended with any very great difficulty. The umpire has put the proper construction upon the agreement.

The rest of the court concurring,

Rule discharged.

J. Brown, on behalf of the company, asked that the rule might be discharged with costs: but

Wilde, C. J., observed, that, inasmuch as both parties seemed to have desired the umpire to raise the question upon the face of his award, it was not a case for costs.

Rule discharged, without costs.

[532] Berry v. Irwin. Nov. 20, 1849.

The adjudication of the commissioner under the insolvent debtors act, 1 & 2 Vict. c. 110, s. 90, discharges the insolvent from all debts due or growing due at the time of the petition, to creditors, or to persons claiming to be creditors.—An insolvent inserted in his schedule the name of A., in whose hands he had placed two bills of exchange for the purpose of their being discounted. After the schedule was filed, he discovered that A. had indorsed the bills to B, and accordingly obtained leave to amend the schedule by inserting B.'s name therein, stating the circumstances under which the bills came to B.'s hands. B. sued the insolvent on the bills, and obtained a verdict at the assizes against him on the morning of the day on which the order of adjudication was made, and proceeded thereon to judgment and execution:—Held, that the insolvent was entitled to be discharged as to the action, both in respect of debt and costs,—although the costs were incurred after the filing of the petition.

The defendant was arrested in the month of April last, on a writ of capias ad satisfaciendum, and on the 24th of May filed his petition in the insolvent debtors court, for relief under the 1 & 2 Vict. c. 110, and obtained a vesting order thereon. On the 18th of June, he duly filed his schedule, inserting therein one H. Melton as a creditor for 250l., as drawer and payee of two bills of exchange, one for 150l., the other for 100l., dated respectively the 10th and 12th of April last, and accepted by the defendant. On the 4th of July, the defendant was served with a writ of summons, at the suit of the plaintiff, in an action brought by him as indorsee of these two bills. The defendant's petition came on for hearing before the insolvent debtors court on the 13th of July, when the further hearing was adjourned till the 31st. The defendant thereupon amended his schedule, by inserting therein the name of Berry (the plaintiff) as a creditor for the amount of the two bills and the costs of the action,—and stating that the bills were indorsed to him without consideration, and after they had arrived at maturity; and, on the 31st of July, Berry, who had been served with notice, attended to oppose the defendant's discharge. The hearing of the defendant's petition was again adjourned until the 7th [533] of August,—on which day it was adjudged and ordered by the court, that the defendant should be discharged from custody, and entitled to the benefit of the act forthwith, as to the debt or claim of the said H. Melton and of the plaintiff, in respect of the said two bills of exchange, and from all other debts and claims inserted in his schedule, with the exception of two.

The plaintiff proceeded with the action, and the cause was tried as an undefended cause, at the last Surrey assizes, on the 7th of August,—a few hours before the defendant's discharge was pronounced,—when a verdict was found for the plaintiff for the amount of the bills and interest, and an order for speedy execution obtained. And on the 1st of September, the plaintiff lodged with the keeper of the Queen's Prison a writ of habeas corpus for the purpose of charging the defendant in execution upon that verdict.

Miller, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged from the custody of the keeper of the Queen's Prison, as to this action, and why the plaintiff should not pay the costs of the application. He referred to the 79th section of the act, which enacts "that the discharge of any prisoner so adjudicated as aforesaid (s. 75) shall and may extend to all process issuing from any court for any contempt of any court, ecclesiastical or civil, for non-payment of money, or of costs or expenses, in any court, ecclesiastical or civil; and that, in such case, the said discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence, or by reason, of such contempt, or on purging the same; and that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such **[534]** creditor before the filing of such prisoner's schedule, in any action or suit brought by such creditor against such prisoner for the recovery of the same: and that all persons as to whose demands for any such costs, money, or expenses as aforesaid any such person shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this act, subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such insolvent's estate and effects."

Lush now shewed cause. This is not a case in which the statute operates to discharge the insolvent from the plaintiff's claim. By the 69th section, the insolvent is required to file a schedule containing, amongst other things, "a full and true description of all debts due or growing due from such prisoner at the time of making such order [the vesting order], and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." By s. 75 the adjudication of the commissioner enures as a discharge "as to the several debts and sums of money due, or claimed to be due, at the time of making such vesting order as aforesaid, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other per-**[535]**-sons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid" (*a*). And the 90th section enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time hereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act (under s. 87), or for or by reason of any debt or sum of money or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money, or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to, or acknowledged by, the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under this act, or otherwise." The demand of this plaintiff was not a debt "due or growing due at the date of the vesting order." [V. Williams, J. The birth of the debt is, in one sense, the drawing of the bills.]

Assuming that this was a debt due, or growing due, at the time of the making of the vesting order, the discharge of the insolvent did not enure as a discharge **[536]** from the costs of the action. The action was not commenced until after the date of the petition: and the 79th section,—the only one which applies to costs,—speaks only of costs incurred prior to the filing of the petition. The costs, from which the party has no discharge, forming part of this judgment, the court cannot, without unwarrantably extending the provisions of the statute, make this rule absolute. Besides, the court will not relieve an insolvent, upon a summary application, where he neglects to

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(*a*) Vide *Lambert* v. *Smith*, post, T. T. 1851.

avail himself of an opportunity of pleading his discharge puis darrein continuance: *Sharp* v. *D'Almaine* (8 Dowl. P. C. 664). [Wilde, C. J. What opportunity had the defendant here to plead? The matter of defence did not exist at the time the cause was tried.]

Miller, in support of his rule. The defendant is clearly entitled to his discharge, both in respect of the debt and the costs of the action. [Maule, J. To whom was there a debt due at the date of the vesting order?] There was an inchoate debt, growing due to the party who might ultimately turn out to be the holder of the bills. It is not necessary, upon the fair construction of the statute, that the debt should be due or growing due to a person named in the schedule: the insolvent has no means of knowing who is the holder of the bills. In *Reeves* v. *Lambert* (4 B. & C. 214), the defendant, being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October, 1823: before that time, the defendant became insolvent, and presented his petition to be discharged, under the 1 G. 4, c. 119, and, in his schedule delivered into the insolvent debtors court, he stated that he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October, 1823. A. had indorsed the bill to B., but the insolvent was ignorant of that **[537]** fact: B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the insolvent debtors act; and it was held that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of s. 6,—which required that the insolvent should, within a certain time after presenting his petition, "deliver into the court a schedule containing a full and true description of every person to whom such prisoner shall be then indebted, or who to his or her knowledge or belief shall claim to be his or her creditor." And the court there say: "This act of parliament must receive a reasonable construction. The law forces no man to do impossible things; and there may be many cases where it would be impossible for a prisoner to insert in his schedule the name of the particular holder of a bill. The prisoner in his schedule has given notice to the real creditor; for, he has described the security of which she was the holder. He has, therefore, described the original debt, the original creditor, and the security for that debt. If we were to hold that this schedule did not contain a sufficient description of the persons to whom the prisoner was indebted, there might, in many instances, be an insuperable difficulty in the way of a prisoner's obtaining his discharge. Suppose he had made inquiry of Mrs. Reynolds to whom she had indorsed the bill, and she had refused to tell him; or, suppose that she had told him, and the indorsee had indorsed it over to another, and refused to tell him to whom, it would have been impossible to describe the real holder of the bill." [Wilde, C. J. Does it appear by the affidavits when the bills were first handed to Melton?] Not very distinctly. They were in his hands at the date of the vesting order: that appears from the schedule. The defendant is clearly within the 90th section of the statute.

[538] Then, being entitled to his discharge from the debt, he is, by force of the 79th section, discharged from the costs also. The judgment is entire: if the defendant is improperly detained in respect of part, he is entitled to be discharged altogether. In *Tilby* v. *Best* (16 East, 163) it was held, that, if judgment be entered up for the penalty of a bond given to secure an annuity, and the defendant is taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorised the taking out of execution for the arrears, the court will set aside the execution in toto, and not merely discharge the defendant pro tanto. [Wilde, C. J. In *Vansandon* v. *Corsbie* (*b*), Bayley, B., says: "It is quite clear, that, if you sue for a debt which carries interest, and obtain judgment, and the party afterwards becomes a bankrupt (the original debt being provable under the commission), and he obtains his certificate, the interest and subsequent costs are not severable from the original debt, but the whole is barred by the certificate." So, in *Holding* v. *Impey* (7 J. B. Moore, 614, S. C.), where a commission of bankruptcy having been sued out against the plaintiff, he brought an action of trespass against the commissioners for false imprisonment, and was nonsuited, and they entered up judgment accordingly, and the commission was afterwards superseded, on which another commission was sued out, founded on the same act of bankruptcy as the first, under which second

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(*b*) 1 Chitt. Rep. 16, per nom. *Van Sandau* v. *Corsbie*, 3 B. & Ald. 13. And see *Van Sandau* v. *Corsbie*, in C. P., 2 J. B. Moore, 602.

commission the plaintiff obtained his certificate, and the defendants afterwards charged him in execution for the costs of the nonsuit,—it was held that he was entitled to be discharged out of custody, such costs being prov-[539]-able under the second commission.] It is quite clear that the costs must follow the fate of the original debt, even without the aid of the 79th section.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court (*a*).

The court is of opinion that the defendant is entitled to his discharge from custody as to this action. It appears from the 69th section of the statute 1 & 2 Vict. c. 110,—which prescribes what shall appear in the insolvent's schedule,—that it is the duty of the party to state therein, not only the names of those persons who are creditors, but also the names of those who claim to be creditors, or whom he believes to claim to be creditors, but whose claims he does not admit. Here, it was stated in the schedule, as originally filed by the defendant, that one Melton claimed to be a creditor in respect of two bills of exchange which had been delivered to him by the insolvent for the purpose of getting discounted, and the proceeds of which Melton had applied to his own use,—thereby importing that Melton had negotiated the bills. It does not appear when the bills were given to Melton; but, looking at the dates of the bills, it is probable that they were negotiated before the 24th of May, the day on which the defendant filed his petition in the insolvent debtors court, and the vesting order was obtained. The defendant afterwards amended his schedule, and stated therein that the present plaintiff claimed to be a creditor in respect of the same two bills, and also stated that the bills were, as the defendant believed, indorsed by Melton to the plaintiff after maturity, and without [540] consideration. Now, the 75th section, which speaks of the adjudication, impowers the insolvent debtors court to discharge the party from the several debts due, or claimed to be due, at the time of the vesting order, to the persons mentioned in the schedule, and to any other persons not known to the petitioner, who may be the indorsees or holders of any negotiable security set forth in such schedule. In this case, as soon as the defendant discovered that the plaintiff claimed to be indorsee of the bills in question, he, by leave of the insolvent court, amended his schedule, and inserted his name therein as a person claiming to be a creditor. The order of adjudication afterwards made, was made with reference to the schedule so amended. It appears to us, threfore, that the insolvent did all he could be required to do. There is nothing to induce us to believe that he knew the plaintiff to be the holder of the bills at the time he filed his petition, or that he has withheld from us any information he could have given. On the other hand, the plaintiff gives us no information whatever, though it appears he was in attendance at the time the order of adjudication was made.

With respect to the costs—the defendant clearly is discharged from the judgment. The 79th section, which provides for costs, after referring to attachments of contempt, proceeds to enact "that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor before the filing of such prisoner's schedule, in any action or suit brought by such prisoner for the recovery of the same." The statute makes no mention of costs incurred subsequently to the filing of the petition; and for this reason,—that, if the plaintiff proceeds after the filing of the petition, he is not entitled to any costs. When a plaintiff proceeds to judgment, the debt or damages, and the costs, [541] together form one entire demand. We consider the defendant discharged from both by virtue of the 90th section.

As to the costs of this application,—the case stands thus:—The defendant has obtained his discharge under the insolvent debtors act; and the plaintiff has, notwithstanding, proceeded to judgment, and lodged a detainer against him. The defendant, under the circumstances, could not do otherwise than come to the court for relief: and therefore we think he is entitled to have the rule made absolute, in the terms in which it was moved.

Rule absolute, with costs.

(*a*) The judges who were present at the argument, were, Wilde, C. J., Maule, J., V. Williams, J., and Talfourd, J.

Lewis *v.* Campbell. Nov. 21, 1849.

[S. C. 19 L. J. C. P. 130: 14 Jur. 396. Applied, *Pettman* v. *Keble*, 1850, 9 C. B. 710. Referred to, *Bonner* v. *Tottenham and Edmonton Building Society*, [1899] 1 Q. B. 176.]

A. being indebted to B., gave him an order upon C., his agent, who, upon its being presented, declined to pay it, but said he would set it off against a larger debt due from B. to one D., for whom C. was authorised to collect debts. C. accordingly credited B. with the amount mentioned in the order, and debited the account of D. with that amount; and D. afterwards gave A. a letter of indemnity against any proceedings B. might take against him in respect of his debt. B. having subsequently sued A., and obtained judgment against him (the action being defended in A.'s name by D.), A. paid the amount, to avoid an execution:—Held, that the circumstances raised an implied request by D. to A. to pay the money; and that the sum so paid, was recoverable against D. in an action for money paid by A. to D.'s use.

This was an action of debt, for money paid, money had and received, and on an account stated. The defendant pleaded that she was never indebted.

The cause was tried before Wilde, C. J., at the London sittings after Hilary term, 1848, when the material facts appeared to be, that the plaintiff, John William Lewis, being indebted to Richard Duke in 112l. 16s. 6d., gave him an order for payment of that sum, on Macdonald & M'Queen, who were agents to the plaintiff. When Duke presented the order for payment, Mac-**[542]**-donald & M'Queen, refused to pay the money, but told Duke that they would pay the amount to Mrs. Campbell, the defendant, for whom they were authorised to collect debts, in part payment of a debt of 350l., which the defendant claimed as due to her from Duke. Macdonald & M'Queen accordingly debited the plaintiff, and credited the defendant, with the amount of the order, and gave the plaintiff, on behalf, and in the name of, the defendant, on the 29th of August, 1843, a letter stating that the sum of 112l. 16s. 6d., owing by the plaintiff to Duke, being attached by her in the hands of the plaintiff's agents, she undertook to exonerate and bear him harmless against any steps which Duke might take against him in respect of that sum. These transactions were communicated to the defendant, who approved of what her agents had done, and claimed the amount mentioned in the order, as a debt due to her from Macdonald & M'Queen, and received a dividend on it, when they became bankrupts. Afterwards, in 1846, an action was brought by Duke against the present plaintiff, which was defended, in his name, and by his permission, by Mrs. Campbell, the present defendant,—pleading, amongst other things, that the debt due from the plaintiff to Duke had been paid, by his consent, to the present defendant. This defence, however, was unsuccessful: and the present plaintiff was compelled to pay 160l. 13s. 6d., the amount for which Duke obtained judgment, in order to avoid being taken under a capias ad satisfaciendum.

Upon this state of facts, a verdict was taken for the plaintiff for 160l. 13s. 6d., with liberty to the defendant to move to enter a nonsuit, or to reduce the verdict to 112l. 16s. 6d.

Byles, Serjt., in Easter term, 1848, obtained a rule nisi accordingly. He submitted that the action for **[543]** money paid, or money had and received, would not lie, under the circumstances, the order given by Lewis to Duke never having in fact produced money: and he referred to *Stephens* v. *Badcock* (3 B. & Ad. 354), *Spencer* v. *Parry* (3 Ad. & E. 331, 4 N. & M. 770), and *Lubbock* v. *Tribe* (3 M. & W. 607).

Talfourd, Serjt., and Montague Smith, in Trinity term last, shewed cause. An action for money paid will lie wherever one man has paid money at the request, either express or implied, of another. In *Howes* v. *Martin* (1 Esp. N. P. C. 162), it was held, that, where a party desires an action brought against another person to be defended, in which action he is concerned, and by the event of which he may be benefited, and the action is defended accordingly, and the defence fails, the party at whose request such defence was undertaken is liable to pay the expenses. An opinion to the same effect was intimated by this court in *Williamson* v. *Henley* (6 Bingh. 299, 3 M. & P. 731). The principle is well stated by Pollock, C. B., in delivering the judgment of the court in *Brittain* v. *Lloyd* (14 M. & W. 762). "If," says his lordship, "one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money paid: and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan, or gift, to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and, whether the request be direct, as, where the party is expressly desired by the **[544]** defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume the character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it. In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." [Maule, J. *Spencer* v. *Parry*, if good law, reduces you to the necessity of shewing some other ground than release of liability.] Patteson, J., in that case, says: "If a man pays a debt for another, at his request, no doubt he may recover the amount as money paid." There was ample evidence of request here. The amount would be recoverable also under the count for money had and received: *Andrew* v. *Robinson* (3 Campb. 199); *Glyn* v. *Baker* (13 East, 509). [Wilde, C. J., referred to *Howell* v. *Batt* (5 B. & Ad. 504, 2 N. & M. 381).]

Byles, Serjt., and A. Pollock, in support of the rule. Money paid lies only where there has been a distinct request by the party to pay the money, and the payment is made in consequence, or where the payment is made in discharge of a legal liability contracted by the **[545]** party paying it, at the request, express or implied, of the defendant. [Maule, J. Where money is received under circumstances which make it right and equitable that it should be returned, it may be recovered back on a count for money had and received. May it not also be said, that, where money has been paid under circumstances which make it just and equitable that it should be repaid, it may be recovered back on a count for money paid?] It is submitted that it cannot. There clearly was no express request on the part of the defendant to pay the money: and none can be implied from the circumstances. *Spencer* v. *Parry* is directly in point. There, a tenant, by a written agreement under which he took premises, engaged to pay taxes which, by statute, were due from the landlord: he made default; and the landlord, having been obliged to pay, sued him for the amount as money paid to his use: and it was held, that, as the landlord was originally liable for the taxes, and was exempted from them only by agreement with the tenant, he should have declared specially on such agreement, and could not recover on the indebitatus count. In delivering the judgment of the court, Lord Denman says: "The plaintiff's payment relieved the defendant from no liability but what arose from the contract between them. The tax remained due by his default, which would give a remedy on the agreement: but it was paid to one who had no claim upon him, and therefore not to his use." Mr. Baron Parke, in *Lubbock* v. *Tribe*, treats that case as laying down the correct principle. [Maule, J. The principle which my brother Parke there means to refer to is, that, where there is no other ground upon which to rest the right to recover the money, than the release from a liability, you must, in order to sustain the action, shew that there has been a release from liability.] In *Cumming* v. *Bedborough* (15 M. & W. 438), **[546]** it was held, that, where a tenant pays property-tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord.

The plaintiff clearly is not entitled to recover on the count for money had and received. If received to the use of any one, it was received to the use of Duke. There was no assent on the part of the defendant to make it money had and received to the use of the plaintiff: *Williams* v. *Everett* (14 East, 582); *Wharton* v. *Walker* (4 B. & C. 163, 6 D. & R. 288); *Shaw* v. *Picton* (4 B. & C. 715, 7 D. & R. 201); *Lee* v. *Merrett* (8 Q. B. 820).

At all events, the defendant cannot be held liable for the costs of the former action.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court [after stating the facts, ut ante]:—

The argument turned mainly upon the question, whether the count for money paid, was sustained by the facts in evidence. And, in the view we take of the case, it will not be necessary to discuss any other question. It appears to us, that the defendant, being bound by her guarantee to indemnify the plaintiff against Duke's action, and the plaintiff having, at the request of the defendant, taken upon himself the character of defendant in that action, and having permitted the defendant to conduct the defence, and the defendant having acted on that permission, an implied contract was raised on the part of the defendant, to pay any thing which might be necessary, in the event of a judgment being obtained against the defendant, for the protection of the plaintiff against the consequences of that judgment; and, in the event of the defendant's failure to make such payment, **[547]** that an authority from her was to be implied, authorising the plaintiff to make the payment for her, so as to make it money paid to her use.

Thus it was, that, in the case of *Howes* v. *Martin* (1 Esp. N. P. C. 162), where the plaintiff had accepted a bill for the defendant, and had, at his request, defended an action brought on the bill, and had paid the debt and costs recovered in that action, Lord Kenyon held that the amount was money paid by the plaintiff to the use of the defendant, on the ground that, as the defendant was personally interested, and had directed the defence to be made, by which he might have been benefited, the money must be considered to have been laid out by the plaintiff on his account and to his use.

In the case of *Brittain* v. *Lloyd* (14 M. & W. 762), the plaintiff, an auctioneer employed by the defendant to sell some property, had incurred a liability to pay the auction-duty, and had been compelled to pay it; and the court held that he might recover the amount as money paid to the defendant's use. The reason of that decision appears to us to comprehend the present case. "It is clear," the court says, in its judgment, "that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he **[548]** is placed by him under a liability to pay, and does pay, makes no difference. If one asks another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay; and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it."

The case mainly relied on by the defendant, on the argument of the present case, was that of *Spencer* v. *Parry* (3 Ad. & E. 331, 4 N. & M. 770), where the plaintiff had let a house to the defendant, at a rent of 42l., "free and clear of all land-tax and parochial taxes:" the defendant left the premises without paying the taxes, which the plaintiff, under certain local acts, was compelled to pay: the court held that this money could not be recovered under a count for money paid to the defendant's use; but that the plaintiff ought to have sued on the express agreement to pay 42l., clear of all land-tax, &c., remarking (with reference to certain cases in which money paid to relieve a defendant from a liability under which he lay to a third person for payment of money, was recovered under the count for money paid) that "here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them; the tax remained due by his default, which would give a remedy on the agreement, but it was paid to one who had no claim upon him, and therefore not to his use."

If the court of Queen's Bench in that case are to be considered as deciding, generally, that an action for money paid would lie in no case where the defendant **[549]** was not relieved from a liability to a third person, the decision would apply to the present case, but certainly could not be maintained, inasmuch as there are many cases, as observed by the court in the case of *Brittain* v. *Lloyd*, in which the action can be maintained, though the defendant has not been relieved from a liability; i.e. all the cases in which, though no such relief from liability occurs, a request to pay, and a promise to repay, are expressed or implied.

But the court of Queen's Bench is not, as we understand the case of *Spencer* v. *Parry*, to be taken to have decided any such general proposition in that case; the remark above cited being intended only to shew that the ground for an inference of a request to pay and a promise to repay, which is afforded by a compulsory payment to a third person, by the plaintiff, of a debt due to that third person by the defendant, as in *Exall* v. *Partridge* (8 T. R. 308), where the plaintiff's goods had been distrained for rent due from the defendants, could not exist in the case of *Spencer* v. *Parry*. That case was decided for the defendant, not in the absence of that ground only, but because the court were of opinion that neither that ground nor any other on which an inference of a request to pay, and promise to repay, could be sustained, was to be found in that case.

In that case, the liability of the plaintiff to pay the taxes was not incurred at the request of the defendant, but was antecedent to, and was not affected by, the transaction between the plaintiff and defendant: and the court by no means decided that, if the plaintiff incurs a liability at the request of the defendant, though for a payment to which the defendant was not previously liable, money paid would not lie. In the argument of that case, a case having been referred to, where [550] an action had been defended by the plaintiff at the request of the defendant, in which the plaintiff had been obliged to pay the costs, Patteson, J., observed, that, in that case, the action had been defended at Hemley's (the defendant's) request; adding, if a man pays a debt for another, at his request, no doubt he may recover the amount as money paid.

We do not think that the present case is open to the objection, that the defendant, having expressly agreed to indemnify the plaintiff, can be sued only on the special contract, and that no implied contract to support a count for money paid is to be inferred from that agreement; for, even if it were to be conceded that such a count could not be supported by the evidence of a contract to indemnify, in the terms of the letter of August, 1843, and the payment by the plaintiff, alone, we think there is good ground for such an inference in the present case, where, after the special agreement, the plaintiff permitted the defendant to defend the action in his name. From such permission, and from the conduct of the defendant in acting upon it, we think an authority to pay on account of the defendant such sum as the plaintiff might be compelled to pay Duke, to relieve himself from a capias ad satisfaciendum, and a promise to repay it, are to be inferred, supposing them not to be included in the special contract to indemnify.

For these reasons, we think the rule must be discharged.

Rule discharged (*a*).

[551] READ *v.* BLAYNEY. Nov. 20, 1849.

The plaintiff, on the 7th of June, recovered a verdict for 9l. 2s. 1d. in an action of contract, before the undersheriff. The writ of trial was returnable on the 8th:—Held, that the defendant was in time on the 11th of June, to move to enter a suggestion, under the 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs; and that it was not necessary first to move to set aside the judgment, if any.—The plaintiff, having signed judgment and issued a fi. fa. for the damages and costs on the 11th of June, and the defendant having paid the amount under protest,—the court afterwards made absolute a rule calling upon the plaintiff to refund the costs.

At the trial, before the undersheriff of Middlesex, on the 7th of June last, the plaintiff recovered a verdict for 9l. 2s. 1d., the action being on contract. Application was made to the undersheriff to stay the proceedings, in order to enable the defendant to apply to this court for leave to enter a suggestion to deprive the plaintiff of costs,

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(*a*) And see F. N. B. 103 B., 122 K., 135 A., 162 C., 234 H.; *Winckworth* v. *Mills*, 2 Esp. N. P. C. 484.

under the 9 & 10 Vict. c. 95, s. 129 That application was refused. The writ of trial was returnable on the 8th of June; judgment was signed on the 11th.

Corrie, on the 11th of June, obtained a rule calling upon the plaintiff to shew cause why, upon payment by the defendant of the 9l. 2s. 1d., the damages recovered on the trial of this cause, without costs, all further proceedings should not be stayed; or why the plaintiff should not forthwith carry in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs, the verdict on the trial being for a less sum than 20l., and for the recovery of which a plaint might have been entered in a county-court pursuant to the statute 9 & 10 Vict. c. 95.

Joyce now shewed cause. He submitted, upon the authority of *Soames* v. *Cooper* (3 Exch. 38), *Smith* v. *Roberts* (3 Exch. 39 (*a*), 13 Jurist, 40), and *Vicars* v. *Mould* (13 Jurist, 85), that it is not competent to a **[552]** defendant to move to enter a suggestion under this statute, without also moving to set aside the judgment, in case judgment has been signed. He also objected that the rule was improperly drawn up "upon reading the writ of trial;" for that the writ of trial was not in court until it was returned, that is, when judgment is signed.

Corrie, in support of his rule. The defendant made this application within four days after the return of the writ of trial. He was therefore clearly in time: and the rule is correct in point of form. In *King* v. *Erle* (5 Dowl. P. C. 595), the court of Exchequer permitted a suggestion to be entered to deprive the plaintiff of costs, after final judgment and writ of execution issued, where it appeared that the defendant could not apply sooner. So, in *Johnson* v. *Beale* (5 M. & W. 276), it was held, that, where a cause is tried before the sheriff under a writ of trial, and judgment is signed thereon in vacation, the defendant may apply to the court in the following term, to enter a suggestion on the roll for the purpose of obtaining costs, under a court of requests act, although no application was made to the sheriff for a certificate to stay the judgment and execution, under the 3 & 4 W. 4, c. 42, s. 18, the court saying—"It is clear that, if this had been a case at nisi prius, the defendant would not have been too late to enter a suggestion on the roll; and writs of trial must stand in this respect on the same footing as causes tried at nisi prius. *Baddley* v. *Oliver* (1 C. & M. 219, 1 Dowl. P. C. 598) shews that the suggestion may be made even after judgment has been signed and execution issued on a judge's order."

Wilde, C. J. I think this rule must be made absolute to enter a suggestion in the terms prayed, the affidavit **[553]** bringing the case within the statute. And I am of opinion that the motion is made in time, having been made within four days after the return of the writ of trial. I also think there is no incongruity in the rule being drawn up "upon reading the writ of trial." It was returnable on the 8th of June, and was open to the view of the court on that day.

The rest of the court concurring,
Rule absolute.

Corrie, on a subsequent day (Nov. 26th),—upon an affidavit that the costs were taxed at 13l. 3s. 6d., and execution issued for that amount, together with the debt, 9l. 2s. 1d., and that those sums had been paid to the sheriff, under protest, and with notice of the rule of the 11th of June,—obtained a rule calling upon the plaintiff to shew cause why the 13l. 3s. 6d. should not be refunded, together with the costs of the application.

In the following Hilary term, that rule was made absolute.

Slater *v.* Mackay. Nov. 26, 1849.

[S. C. 7 D. & L. 255; 19 L. J. C. P. 88; 13 Jur. 1081. Doubted, *Adams* v. *Ready*, 1861, 6 H. & N. 264.]

It is no answer to a motion, under the 43 G. 3, c. 46, s. 4, for the costs of an action upon a judgment, that the original cause of action (in which the defendant had suffered judgment by default) was one for which the plaintiff might have levied a plaint in the county-court, under the 9 & 10 Vict. c. 96.

The plaintiff having obtained a judgment by default against the defendant in an action in this court for 15l. 3s. 6d. debt, and 5l. 12s. 6d. costs, brought an action of debt against him upon that judgment, to which the [554] defendant pleaded nul tiel record. Issue being joined on that plea, and a day given to produce the record, the plaintiff had judgment.

Needham, on a subsequent day, obtained a rule calling upon the defendant to shew cause why he should not pay to the plaintiff the costs of the last-mentioned action, under the statute 43 G. 3, c. 46, s. 4 (*a*)[1]. The motion was founded upon an affidavit which stated, amongst other things, that the defendant held an appointment in one of the public offices at a salary sufficient to enable him to pay the plaintiff his demand; that he was residing in ready-furnished apartments; and that the only probable mode of compelling speedy payment of the debt was by proceeding to judgment, on which a ca. sa. might be issued. *Mason* v. *Nicholls* (14 M. & W. 118) was referred to.

H. Mills now shewed cause, upon an affidavit of the defendant, which stated, amongst other things, that the defendant was a clerk in the Ordnance-Office in the Tower of London, and was so on the 10th of July last, when the writ of summons in the first-mentioned action was issued; that the residence and dwelling-place of the deponent, at the time of the issuing of the said writ of summons, and thence hitherto, and at which he had thence hitherto continually dwelt and resided, was at No. 10 Robert Street, King's Road, Chelsea, in the county of Middlesex, and was so for nearly two months [555] previously; that, before and at the time of the issuing and service of the said writ, and thence hitherto, the deponent was in the habit of attending at the Ordnance-Office in the discharge of his duty as a clerk in such office, and did then carry on his business as such clerk, and was in the daily habit of proceeding to and from his residence in Robert Street aforesaid to the Ordnance-Office aforesaid; that the plaintiff and his attorney were during all that time well aware that the deponent was such clerk as aforesaid, and was in the habit of attending at such office as aforesaid; that the deponent was described as of the Ordnance-Office, Tower, in the writ of summons; that the residence and dwelling-place of the deponent at the time of the issuing of the writ was, and still is, within the jurisdiction of the Brompton County-Court of Middlesex; that the Ordnance-Office at the Tower was and is within the jurisdiction of the Whitechapel County-Court of Middlesex; that the debt claimed in the first-mentioned action amounted only to 15l. 3s. 6d., and that the deponent was liable and ought to have been sued in respect of the said debt in one or the other of the above-mentioned county-courts, and not in this court, or in any other of the courts at Westminster; that No. 10 Robert Street, Chelsea, and also the Ordnance-Office in the Tower of London, are both within the distance of twenty miles from Kensington, the place of business and residence of the plaintiff, that is to say, No. 10 Robert Street being within the distance of three miles, or thereabouts, and the Ordnance-Office in the Tower being within seven miles from Kensington aforesaid; that the (original) cause of action arose wholly within the jurisdiction of the Brompton County-Court of Middlesex; and that the plaintiff's motive in bringing the action in this court, and not in the county-court, was, to increase expense, in order that the plaintiff might found an action for more than 20l. on the judgment.

[556] Where the plaintiff has in any way acted oppressively or with bad faith, the court will not allow him the costs of his action upon the judgment. In *Mason* v. *Nicholls*, Parke, B., said: "The creditor clearly had a right, notwithstanding the act, to bring an action on the judgment in the former action,—taking his risk of losing his costs of the second action,—which the court were not in the practice of giving" (*a*)[2]. In *Hanmer* v. *White* (12 M. & W. 519, 1 D. & L. 653), the plaintiff having brought an action of debt in the court of Exchequer, on a judgment recovered in an inferior court, instead of removing it to the superior court and issuing execution, the defendant pleaded nul tiel record: the plaintiff produced the record, and applied for his costs under the 43 G. 3, c. 46, s. 4; but the court refused the application, notwithstanding the defendant had pleaded a false plea. The plaintiff, says Parke, B., "has

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(*a*)[1] Which enacts, that, "in all actions which shall be brought upon any judgment recovered, or which shall be recovered, in any court in England, &c., the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order."

(*a*)[2] And see *Hopkins* v. *Freeman*, 13 M. & W. 372, 2 D. & L. 447.

brought the expense upon himself, and he must pay for the pleasure of bringing the action on the judgment." So, in *Hall* v. *Pierce* (5 Dowl. P. C. 603), where the defendant had been superseded through the neglect of the plaintiff, the court of Exchequer refused to allow him the costs of an action on the judgment, although the defendant had caused delay and expense by pleading a false plea. The only authority opposed to these, is *Garnwell* v. *Barker* (5 Taunt. 264). These cases shew that misconduct on the part of the defendant in offering a false or dilatory defence, is not regarded by the court, where the plaintiff has misconducted himself. [Maule, J. What misconduct was the plaintiff guilty of?] Bringing an action in the superior court, for a matter which ought to have been disposed **[557]** of in the county-court. [Maule, J. If the cause had been tried in the superior court, there might have been a certificate under the 129th section of the 9 & 10 Vict. c. 95, that the cause was fit to be tried in the superior court. We cannot assume that it was not. The defendant pleads nul tiel record merely for delay. And now, when his means are in issue, he omits to tell us what they are. Wise, for the plaintiff, referred to *Reed* v. *Shrubsole* (ante, vol. vii. p. 630, 6 D. & L. 707), where it was held that the county-court act does not apply to cases of judgment by default.] In *Reed* v. *Shrubsole*, one member of the court dissented from the judgment. In *Newton* v. *Banks* (17 Law Journ., N. S., Q. B. 137), by a court of requests act (46 G. 3, c. lxxxviii. s. 14), it was provided that a plaintiff, suing in any of the courts at Westminster, for a cause of action recoverable in the court of requests, should not be entitled to any costs if he succeeded: and it was held, on error brought on a judgment in the court of Queen's Bench for debt and costs, the fact of the defendant's being resident within the jurisdiction of, and liable to be sued in, the court of requests, being assigned as error, and the plea being in nullo est erratum, that the judgment, so far as regarded the costs, was erroneous. Here, the defendant's affidavit shews, that, at the time the original action was brought, he was resident within the jurisdiction of, and liable to be sued in, the Brompton County-Court of Middlesex.

Wilde, C. J. The statute 7 & 8 Vict. c. 96, s. 57, has abolished process against the person, where the debt is under 20l. The plaintiff in the present case having sued the defendant, in this court, for a debt of 15l. 3s. 6d., obtained judgment against him by default. The de-**[558]**-fendant, it appears, holds a situation under government, but possesses no available property; and, from a circumstance mentioned in his affidavit (*a*), we may fairly infer that process against his person might be productive of advantage to the plaintiff. The plaintiff has, therefore, brought an action of debt upon the judgment. Now, the law says, that, in an action upon a judgment, the plaintiff shall not recover, or be entitled to, any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order. What is to govern the discretion of the court in the matter? Can we have any better ground than that the plaintiff has no other probable means of recovering his debt? The plaintiff, then, adopting the only available means of enforcing his judgment, he is met, not by a plea to the merits, but by a plea of nul tiel record. Thus the costs are aggravated by a plea that is false to the defendant's knowledge. By whom, then, ought those additional costs to be sustained? The point is not a new one: the matter has already been discussed in this court, when three of the judges expressed a strong opinion, though one very learned judge entertained doubt. What is the case of *Hall* v. *Pierce*? The defendant, being sued on a promissory note, put in a plea, and afterwards obtained a summons to stay proceedings, upon payment of debt and costs within a limited time, or the plaintiff to be at liberty to sign final judgment. The costs not being paid, the plaintiff signed final judgment, and sued out a ca. sa. for the purpose of fixing the bail. The defendant rendered in discharge of his bail, and was afterwards superseded. The plaintiff then brought an action on the judgment; to which the defendant, after obtaining time **[559]** to plead, pleaded nul tiel record. And the court say: "The plaintiff is seeking to rectify his blunder in not having charged the defendant in execution. The question, then, is, whether the defendant ought to pay, or the plaintiff to suffer the consequences of his own negligence. If the costs could be separated, the defendant ought to bear the expenses of his false plea; but the act gives no power for us to award part of the

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(*a*) That he had called his creditors together, and offered to set apart 60l. per annum out of his salary, to liquidate his debts.

costs." Apply that here: the defendant has pleaded a false plea; but the plaintiff has been guilty of no default. The case is, therefore, a distinct authority against the defendant. It seems to me, that, in the present case, it was absolutely necessary for the plaintiff so to proceed as to be enabled to sue out process against the person of his debtor, and that, under the circumstances, it would be a denial of justice to withhold from him the costs of this action.

MAULE, J. I also think the plaintiff, in bringing an action upon the judgment in this case, adopted the only course that was reasonably open to him to enforce his rights. The defendant sought to stop his proceedings by a plea which was false to his own knowledge; and the plaintiff has been necessarily put to 4l. or 5l. expense to remove the impediment. The plaintiff has been quite blameless, and I see no reason why he should not have his costs.

[V. WILLIAMS, J. I am of the same opinion. In dealing with this statute, the courts must be guided by the particular circumstances of each case, and not by any general practice.

TALFOURD, J., concurred.

Rule absolute.

[560] NEWNHAM *v.* BEVER AND ANOTHER. Nov. 24, 1849.

The owner of a rent-charge in lieu of tithes, distraining under the 81st section of the 6 & 7 W. 4, c. 71, and afterwards obtaining judgment in an action of replevin, is not entitled to double costs under the 11 G. 2, c. 19, s. 22; neither, consequently, is he entitled to the "full and reasonable indemnity as to costs," substituted for double costs, by the 5 & 6 Vict. c. 97, s. 2.

Certain goods of Henry Newnham having been distrained for arrears of a rent-charge in lieu of tithes on the lands of Newnham, in Mortimer West, in the county of Hants, he bought replevin, for the purpose of trying the right of the defendants, who claimed such rent-charge as the lessees of Eton College, who claimed to be the impropriate rectors of the parish of Strathfield Mortimer, and, as such, to be entitled to the great tithes of Mortimer West, which was alleged to be a tithing of Strathfield Mortimer. The action being at issue, the proceedings were stayed by a judge's order, on the 29th of June last, whereby it was ordered, "that, upon payment of 19l. 15s. 5d. rent-charge due from the plaintiff to the defendants, together with costs, to be taxed, and paid in two days after taxation, all further proceedings in this cause be stayed," &c.

Upon the taxation of the costs, it was insisted on the part of the defendants, that inasmuch as this was an action of replevin, the defendants would, prior to the passing of the 5 & 6 Vict. c. 97, s. 2 (*a*), have been [561] entitled to double costs, and that, consequently, they were now entitled, under that statute, to a full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action, and not merely to costs as between party and party.

On the other hand, it was submitted, that, this being an action of replevin upon a distress, not for rent reserved by demise, but for a rent-charge under the tithe-commutation act, 6 & 7 W. 4, c. 71, s. 81, it was not an action in which, but for the statute of Victoria, double costs would be allowed under the 11 G. 2, c. 19; and, consequently, that the plaintiff was only entitled to costs as between party and party: and the master's attention was called to *The Leominster Canal Company* v. *Norris* (7 T. R. 500), and *The Leominster Canal Company* v. *Cowell* (1 B. & P. 213).

(*a*) Which enacts, "that so much of any clause, enactment, or provision in any public act, or acts not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be, and the same are, hereby repealed: provided always, that, instead of such costs, the party or parties heretofore entitled, under such last-mentioned acts, to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

The master, however, taxed the costs upon the principle of the statute 5 & 6 Vict. c. 97, s. 2. The plaintiff thereupon took out a summons to review the master's taxation; and the judge before whom it was returnable, referred the matter to the court. Accordingly, on a former day,

Byles, Serjt., moved for a rule calling upon the defendants to shew cause why the master's taxation should not be reviewed. The 11 G. 2, c. 19, s. 22 (*c*), does **[562]** not apply to a rent-charge, but only to rent-service, as between landlord and tenant. In *The Leominster Canal Company* v. *Cowell*, Eyre, C. J., says: "The distress intended to be protected by the 11 G. 2, c. 19, is, a distress for a certain rent directly reserved by a landlord on his grant or demise of land theretofore made. In that case the landlord may avow generally, and is entitled to double costs. But this is a distress for rent by the canal act (31 G. 3, c. lxix.), charged on the rates; it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 G. 2." The like was held in *The Leominster Canal Company* v. *Norris*. So, in *Bulpit* v. *Clarke* (1 N. R. 56), this court held that the 11 G. 2, c. 19, s. 22, does not extend to an avowry for a rent-charge. *Lindon* v. *Collins* (Willes, 429) is to the same effect. And in *Lloyd* v. *Winton* (2 Wilson, 28), it was held that an avowry for heriot-custom is not within the statute, though an avowry for heriot-service is. [Maule, J. The words of the statute clearly do not apply.] The statute relied on as entitling the defendants to double costs is, the 6 & 7 W. 4, c. 71, s. 81, which enacts, "that, in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the **[563]** person entitled to the same, after having given or left ten days' notice in writing, at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto, as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress." In a case which occurred before Mr. Justice Coltman some time since (not reported), the owner of a tithe-rent-charge had distrained growing crops, relying upon the 11 G. 2, c. 19, s. 8, which authorises growing crops to be distrained for rent-service; but it was answered, that the 6 & 7 W. 4, c. 71, s. 81, does not say that the owner of a rent-charge under that act, may distrain what a landlord might lawfully distrain, but only, that, having lawfully taken a distress, he may dispose thereof, and otherwise act and demean himself in relation thereto, as any landlord may, for arrears of rent reserved on a common lease for years.

A rule nisi having been granted,

Atherton now shewed cause. If all the benefits of the statute 11 G. 2, c. 19, are to attach in a case of this sort, one of them, of course, is, the right "to a full and reasonable indemnity as to costs." The decisions in *The Leominster Canal Company* v. *Norris*, and *The Leominster Canal Company* v. *Cowell*, turned upon the particular language of the local act. The short report of *Lindon* v. *Collins* gives no reasons for the decision. [Maule, J. *Loyd* v. *Winton* is a clear authority that **[564]** a rent-charge

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(*c*) Which recites, "that great difficulties often arise in making avowries or conuzances upon distresses for rent, quit-rents, relief, heriots, and other services," and enacts, "that, from and after the 24th of June, 1738, it shall and may be lawful to and for all defendants in replevin to avow or make conuzance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken, was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for was, at the time of such distress, and still remains, due, —without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor; any law or usage to the contrary notwithstanding: and, if the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit."

is not within the 11 G. 2, c. 19, s. 22.] Some meaning must be attached to the words of the 6 & 7 W. 4, c. 71, s. 81, by which it is provided that the owner of the tithe-rent-charge may "act and demean himself in relation to the distress, as any landlord may for arrears of rent reserved on a common lease for years." [Wilde, C. J. He may conduct the distress, when taken, as a landlord may. Maule, J. He may impound the distress upon the premises; and he may sell, as the landlord may.] The fair meaning of the language is, that he shall have all the rights which the landlord has, and, incidentally, the right to double costs.

Wilde, C. J. I see no reasonable ground for doubt that the words of the statute 6 & 7 W. 4, c. 71, s. 81, are abundantly satisfied by holding that the owner of the tithe rent-charge is to be allowed, on distraining for it, all the privileges which are conferred upon landlords by the 11 G. 2, c. 19, in cases of distress for rent in arrear. That does not include a right to double costs in the action of replevin. Costs result from no act of the party, but from the adjudication of the court. The 11 G. 2, c. 19, was passed for the benefit of landlords of a certain class, and not of owners of rents-charge. The cases cited, and particularly that of *Lindon* v. *Collins*, seem to me to be quite decisive; for, though the note of this latter case in the text of Willes, does not shew how the case was determined, it appears (Willes, 429 (*b*)) from Mr. Justice Abney's MS. that the rule calling on the prothonotary to review his taxation of (single) costs, was afterwards discharged; "the court being of opinion, that, though this statute was in some clauses remedial, in others it was penal; and that the clause in question, s. 22, which was a substantive clause, did not, in terms, [565] include rents-charge, and that, as it was a penal clause, it ought not to be extended by construction."

Maule, J. This clearly is not a case for double costs. The owner of the rent-charge, in distraining for it, may act and demean himself in relation to the distress, as any landlord may for arrears of rent reserved on a common lease for years; that is, he may, without becoming a trespasser ab initio, conduct himself in a manner not strictly conformable with the proper mode of managing a distress.

V. Williams, J., and Talfourd, J., concurred.

Rule absolute.

Thomas Smith v. William Pritchard, Robert Beaver, William Tarn Pritchard, and David Jones. Nov. 21, 1849.

[S. C. 19 L. J. C. P. 53; 14 Jur. 224.]

Where a warrant issues upon a judgment of a county-court against a party resident within another jurisdiction, and is sealed by the clerk of the court there, under the 104th section of the 9 & 10 Vict. c. 95, the high-bailiff of the court out of which the warrant originally issued, is not responsible for any irregularities in its execution by the under-bailiff of the foreign jurisdiction, even though his own under-bailiff assists therein.—Under a warrant so issued by one court, and sealed by the clerk of another court, the officers broke and entered the premises of a third person, under a mistaken impression that the party against whom the warrant was directed, was there; and, upon the owner of the premises resisting their entry, the bailiffs, under colour of the 114th section of the statute, took him into custody, and carried him before a magistrate:—Held, that the high-bailiff of the court from which the warrant was re-issued, was liable with the under-bailiffs for the breaking and entering, which was an act done by the latter under the supposed authority of the writ; but not for the assault, which was committed in the assertion of a power given by the statute to the individual officer obstructed.

This was an action of trespass. The first count of the declaration stated that the defendants, on the 11th of January, 1848, and on divers other days and [566] times between that day and the commencement of this suit, with force and arms broke and entered a certain factory, and a certain factory-yard thereto belonging, of the plaintiff, situate, &c., and called and known as the Fountain Mills, and then made a great noise and disturbance therein, and continued therein making such noise and disturbance for a long time, to wit, for the space of six hours, and then forced and broke open, broke to pieces, and damaged divers, to wit, ten windows of the plaintiff of and belonging to the said factory and premises, and broke to pieces, damaged, and spoiled divers, to wit, fifty panes of glass, and fifty iron bars, of and belonging to the said windows respectively, and of great value, to wit, 10l., and then cast and threw about the goods and chattels, to wit, fifty bales of wool, of the plaintiff, and also then and there pulled down, prostrated, and destroyed, and tore away, severed, detached, and removed certain paling and fences of the plaintiff of and belonging to the said factory and factory-yard of the plaintiff: By means of which several premises, the plaintiff and his servants and workmen were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said factory and premises, but the plaintiff was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business.

The second count stated that the defendants, on, &c., with force and arms assaulted the plaintiff, and then seized and laid hold of and beat the plaintiff, and with great force and violence pulled and dragged him about, and then forced and compelled the plaintiff to go, and caused him to be forcibly conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long **[567]** space of time, to wit, three hours, at the expiration whereof the defendants forced the plaintiff to go, and caused him to be forcibly conveyed, in custody, to a certain police-office, and there again imprisoned the plaintiff for a long time, to wit, two hours, and there also then took him the plaintiff before a certain police-magistrate, and there again imprisoned the plaintiff for a long time, to wit, two hours, contrary to law, and under a false and unreasonable assertion, colour, and charge that the plaintiff had committed an offence punishable by law, to wit, a misdemeanour; whereby the plaintiff was then not only greatly injured, and suffered great anguish and pain of mind and body, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation, and circumstances, and was subjected to and put to divers expenses, to wit, to the amount of 5l., in order to obtain his liberation from the said imprisonment; and other wrongs, &c.

The defendants pleaded,—first, not guilty,—secondly, as to the alleged trespasses in the first count mentioned, except as to casting and throwing about the goods and chattels of the plaintiff in that count mentioned, that, at the said times when, &c., and at each and every of them, the said factory and factory-yard and premises in the said first count mentioned, were not, nor was any or either of them, the factory, factory-yard, or premises of the plaintiff, in manner and form, &c.

Thirdly,—as to the said alleged trespasses in the first count mentioned, so far as relates to the breaking and entering the said factory and factory-yard thereto belonging, of the plaintiff, in that count mentioned, and making a noise and disturbance therein, and continuing therein making such noise and disturbance for the said space of time in that count in that behalf mentioned, and then and there pulling down, prostrating, destroy-**[568]**-ing, tearing away, and removing the said paling and fences of the plaintiff in the said first count mentioned,—the defendant William Pritchard said, that, theretofore and before the commencement of this suit, and before the committing of the said alleged grievances in the said count mentioned, to wit, on the 23rd of August, 1847, one Thomas Smith the younger levied his plaint in the Lambeth County-Court of Surrey, the same being a court constituted and holden under and by virtue of a certain act of parliament made and passed in the session of parliament held in the 9th and 10th years of the reign of Her Majesty Queen Victoria, intituled "An act for the more easy recovery of small debts and demands in England," at the court-house of the said court at Denmark-Hill, in the parish of Camberwell, in the said county of Surrey, within the jurisdiction of the said court, against one Benjamin Trump, for a certain cause of action wherein the said court had jurisdiction; that thereupon, to wit, afterwards, on the day and year last aforesaid, the said B. Trump was duly summoned to appear at the said county-court at Denmark-Hill aforesaid, in the parish and county aforesaid, on the 22nd of September, 1847, to answer the said Thomas Smith the younger in the matter of the said plaint; that thereupon, afterwards, to wit, on the day and year last aforesaid, the said B. Trump duly appeared in the said court, at the day and place appointed, to answer the said Thomas Smith the younger in the matter of the said plaint; that thereupon such proceedings were then and there had in the matter of the said plaint, that afterwards, on the 22nd of September, 1847, at the court then holden at Denmark-Hill aforesaid, in the parish and county aforesaid, within the jurisdiction of the said court, before George Chilton, Esq., who then, and thence continually and at the time of the issuing of the warrant of commitment thereinafter mentioned, was the judge of the said court, it was by the considera-[569]-tion and judgment of the said court adjudged that judgment in the matter of the said plaint and action should pass against the said Thomas Smith the younger, and that the said Thomas Smith the younger should pay the sum of 2l. 11s. to the said B. Trump for his costs and charges by him about his suit in that behalf expended; and thereupon it was then and there ordered by the said court, that the said T. Smith the younger should so pay the said sum of 2l. 11s. forthwith,—as by the said record and proceedings thereof remaining in the said court fully appears: that the said T. Smith the younger did not pay the said sum of 2l. 11s. pursuant to the order, or at any time: that thereupon, afterwards, and after a reasonable time for the payment by the said T. Smith the younger of the said sum of 2l. 11s., pursuant to the said order, had elapsed, to wit, on the 1st of October, 1847, and upon the application of the said B. Trump, a summons was then and there duly issued, according to the practice of the said court, against the said T. Smith the younger, by which last-mentioned summons the said T. Smith the younger was required to appear at the said county-court, to be holden at Denmark-Hill aforesaid, in the parish and county aforesaid, on, &c., at the hour, &c., to be then and there examined touching his estate and effects, and as to the property and means he still had of discharging the said costs, and as to the disposal he might have made of any property; and notice was thereby given to the said T. Smith the younger, that, if he did not appear, in obedience to the said summons, he might be committed to the common gaol of the said county: that it was duly proved, upon oath, to the said court, at the court holden on the 7th of December, 1847, that the said T. Smith the younger was personally served with the said summons, and the said T. Smith the younger did not attend at the said court, pursuant to the said summons, [570] by reason of his illness; and thereupon it was then and there ordered by the said court, that the hearing of the said cause and matters should be adjourned to the 21st of December, 1847, at the court, &c.; and it was duly proved, upon oath, to the said court, at the court holden, &c., on the 21st of December, 1847, that due notice of the said adjournment had been given to the said T. Smith the younger; and the said T. Smith the younger did not attend the said court on the last-mentioned day, as required by the last-mentioned summons, and adjournment thereof, or allege any sufficient excuse for not so attending: that, thereupon, it was then and there ordered by the said judge, that the said T. Smith the younger should be committed for the term of twenty days to the county gaol of Surrey, in the said county, according to the form of the statute in that case made and provided, or until he should be discharged in due course of law: that thereupon one Charles Twamley, then being the clerk of the said court, afterwards, to wit, on the 21st of December, 1847, duly issued, under the seal of the said court, a warrant of commitment directed to the defendant William Tarn Pritchard, who then, and from thence until and at the said times when, &c., was the high bailiff of the said court, as such high bailiff, and to the other bailiffs of the said court, and all constables and peace officers within the jurisdiction of the said court, and to the governor of the county gaol of Surrey, commonly called Horsemonger-Lane Gaol,—which said warrant did impower and require the said high bailiff, bailiffs, and others, to take the said T. Smith the younger, and to deliver him to the governor of the said gaol at the county gaol of Surrey aforesaid, and did impower and require the said governor to receive the said T. Smith the younger, and him safely to keep in the said gaol for the term of twenty days from the arrest under the said warrant, or until he should be [571] sooner discharged by due course of law: that the said T. Smith the younger, afterwards, to wit, on the 8th of January, 1848, was not within the jurisdiction of the said court, but was out of the jurisdiction of the said court, and was believed to be, and was, within the jurisdiction of the Southwark County-Court of Surrey, being also a court constituted and holden under and by virtue of the said act of parliament: that, thereupon, to wit, on the day and year last aforesaid, the defendant William Tarn Pritchard, as such high bailiff of the said Lambeth County-Court as aforesaid, did send the said warrant of commitment to John George Meymott and George Charles Fletcher, who then were, and thence hitherto continually until and at the said times when, &c., were, the joint-clerks of the said Southwark County-Court of Surrey, within the jurisdiction of which court the said T. Smith the younger was believed to be, and was, together with a certain warrant thereto annexed, under the hand of the defendant William Tarn Pritchard, as such high-bailiff as aforesaid, and under the seal of the said Lambeth County-Court, from which the said original warrant of commitment issued, requiring execution of the said warrant of commitment against the said T. Smith the younger, wherever he should be found within the jurisdiction of the said Southwark County-Court: that the said John George Meymott and George Charles Fletcher, as such joint-clerks of the said Southwark County-Court, did thereupon, afterwards, to wit, on the 11th of January, 1848, within the jurisdiction of the said Southwark County Court, seal the said warrant of commitment with the seal of the said Southwark County-Court, and then and there issued the same to the defendant William Pritchard, who then was, and thence until and at the said times when, &c. was, the high-bailiff of the said Southwark County-Court: and there-**[572]**-upon the said last-mentioned high-bailiff became and was authorized and required to act in all respects as if the said original warrant of commitment had been directed to him by the court of which he was so the high-bailiff as aforesaid:* that, before and at the said times when, &c., and on the said 11th of January, 1848, in the first count mentioned, the said T. Smith the younger resided, and continued to reside, and was, in the said factory of the plaintiff in the said first count mentioned,—the same being within the jurisdiction of the said Southwark County-Court; and, on the day and year last aforesaid, was in the said factory, and near to and at a certain open window of the said factory, so that the said defendant William Pritchard could touch and take hold of the said T. Smith the younger, by passing his arm through the said open window: that, thereupon, under and by virtue of the said warrant of commitment, and whilst the same was in full force, and unreturned, the said William Pritchard, as such high-bailiff of the said Southwark County-Court as aforesaid, then holding the said warrant of commitment, did, on the day and year last aforesaid, within the jurisdiction of the said Southwark County-Court, and whilst the said T. Smith the younger was residing and was in the said factory, and was at and near the said open window thereof, pass his arm through the said open window, in order to, and did then and thereby, take hold of and arrest the said T. Smith the younger, and the said T. Smith the younger then forcibly, and against the will of the said defendant William Pritchard, broke away and escaped from the said defendant, and then took refuge and remained in the said factory of the plaintiff in the first count mentioned: that, thereupon, the said defendant William Pritchard, then having reasonable cause to believe, and then believing, that the said T. Smith the younger was then within the said **[573]** factory, and having first demanded and requested the plaintiff to permit the said defendant William Pritchard to enter the said factory-yard and factory, in order to search for, take again, re-seize, and arrest, under the said warrant of commitment, the said T. Smith the younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendant from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendant William Pritchard, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendant could not otherwise enter into the said factory-yard, he the said defendant William Pritchard did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, sever, detach, and remove the said palings and fences of the plaintiff, doing no unnecessary damage to the plaintiff; and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof being then open, in order to search for, take again, re-seize, and arrest the said T. Smith the younger, and, in so doing, the said defendant William Pritchard, as such high-bailiff as aforesaid, did then necessarily and unavoidably make a little noise and disturbance in the said factory, and did continue therein making such noise and disturbance, for the said space of time in the said first count in that behalf mentioned, being a reasonable time to continue therein for the purpose aforesaid, as he lawfully might for the causes aforesaid; doing no unnecessary damage on the occasions aforesaid, which were the said alleged trespasses in the introductory part of the said plea mentioned.

Fourthly,—a similar plea to the last, by the defendants Robert Beaver and David Jones, down to the **[574]** asterisk at p. 572; then as follows:—That, before and at the time of the issuing of the said warrant of commitment as aforesaid, and thence continually until and at the said times when, &c., the defendant Robert Beaver was a bailiff of the said Southwark County Court, having been theretofore, to wit, on the day and year last aforesaid, by a certain writing under the hand of the said defendant William Pritchard by him duly appointed to be such bailiff to assist him the said William Pritchard in the execution of his said office; and thereupon, afterwards, to wit, on, &c. last aforesaid, and before the said times when, &c., the said defendant William Pritchard, as such high-bailiff of the said Southwark County-Court, delivered the said warrant of commitment, so sealed as aforesaid, to the said Robert Beaver, so being such bailiff of the last-mentioned court as aforesaid, to be by him executed in due form of law: that, before and at the said times when, &c., and on the said 11th of January, 1848, in the said first count mentioned, the said T. Smith the younger resided, and continued to reside, and was, in the said factory of the plaintiff in the said first count mentioned, the same being within the jurisdiction of the said Southwark County-Court, and, on the day and year last aforesaid, was in the said factory, near to and at a certain open window of the said factory, so that the said defendants could touch and take hold of the said T. Smith the younger, by passing their arms through the said open window; whereupon, and under and by virtue of the said several premises, and of the said warrant of commitment, and whilst the same was in full force and unreturned, the defendant Robert Beaver, as such bailiff of the said Southwark County-Court, and then holding the said warrant of commitment, and the said David Jones, as his servant, and by his command, did, on the day and year last aforesaid, within the jurisdiction of [575] the said Southwark County-Court, and whilst the said T. Smith the younger was residing, and was, in the said factory, and was at and near to the said open window thereof, pass their arms through the said open window, in order to, and did then and there, thereby take hold of and arrest the said T. Smith the younger, and the said T. Smith the younger then forcibly, and against the will of the said defendants, broke away and escaped from the said defendants, and then took refuge and remained in the said factory of the plaintiff in the said first count mentioned: that thereupon, the defendants, then having reasonable cause to believe, and then believing, that the said T. Smith the younger was then within the said factory, and having first demanded and requested the plaintiff to permit the said defendants to enter the said factory-yard and factory, in order to search for, take again, re-seize, and arrest, under the said warrant of commitment, the said T. Smith the younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendants from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendants, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendants could not then otherwise enter into the said factory-yard, they the said defendants did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, detach, and remove the said palings and fences of the plaintiff in the first count mentioned, doing no unnecessary damage to the plaintiff, and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof then being open, in order to search for, take again, re-seize, and arrest the [576] said T. Smith the younger, under and by virtue of the said warrant of commitment; and in so doing, the said defendants Robert Beaver, as such bailiff as aforesaid, and David Jones, as his servant as aforesaid, did necessarily and unavoidably make a little noise, &c. &c.

Fifthly,—as to the alleged trespasses in the second count of the declaration mentioned, so far as related to assaulting the plaintiff, and then seizing and laying hold of the plaintiff, and a little pulling and dragging him about, and then forcing and compelling the plaintiff to go, and causing him to be conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoning the plaintiff, and keeping and detaining him there for the space of time in the said second count of the declaration in that behalf mentioned, and then forcing the plaintiff to go, and causing him to be conveyed, in custody, to a certain police-office, and there again imprisoning the plaintiff for the space of time in the said second count in that behalf mentioned, and then also taking the plaintiff before a certain police-magistrate, and there again imprisoning the plaintiff for the space of time in the said second count in that behalf mentioned,—the defendants Robert Beaver and David Jones said, that, after the issuing of the said warrant of commitment to the defendant William Tarn

Pritchard, as in the said last plea mentioned, and before the sending of the same by him to the said clerks of the Southwark County-Court, as therein mentioned, and after the sealing and issuing of the same by them to the defendant William Pritchard, and after the delivery by the said William Pritchard of the said warrant of commitment, so sealed as in the said last plea mentioned, to the defendant Robert Beaver, as, and so being, such bailiff of the said Southwark County-Court, as in that plea mentioned, to be by him the said Robert Beaver executed in due form **[577]** of law, and whilst the said Robert Beaver held the said warrant of commitment, and whilst the same was in full force, and unreturned, and whilst the said defendant Robert Beaver, under and by virtue of the said several premises in the said last plea mentioned, and of the said warrant of commitment, and as such bailiff as in that plea mentioned, and whilst the said defendant David Jones, as the servant of the said Robert Beaver, and by his command, as in that plea mentioned, and within the jurisdiction of the said Southwark County-Court, were, in the execution of their duty as such bailiff and servant as aforesaid, arresting and endeavouring to arrest and detain the said T. Smith the younger, at the said open window of the said factory of the plaintiff, as in the said plea, to wit, on, &c., and within the Metropolitan-police district, he, the plaintiff, in order to prevent and hinder the said defendants from performing and executing their said duty, did, with force and arms, assault, beat, strike, and with an iron bar cruelly wound the said defendants Robert Beaver and David Jones: and that therefore they the said defendants Robert Beaver and David Jones, then, to wit, on, &c. last aforesaid, gently laid their hands on and assaulted the plaintiff, in order to take, and did then take, the plaintiff into the custody of the said Robert Beaver; and then, immediately afterwards, as soon as conveniently could be, forced and compelled the plaintiff to go, and caused him to be conveyed, in custody, in and along divers public streets and highways, being the nearest and most convenient in that behalf, to the said station-house in the said second count mentioned, the same being within the said Metropolitan-police district, and being the nearest and most convenient in that behalf, and did then imprison the plaintiff therein, upon the said charge, for the said space of time in that behalf in the said second count **[578]** mentioned, being a reasonable time in that behalf, and, as soon as conveniently could be, forced the plaintiff to go, and caused him to be conveyed, in the said custody, to the Southwark Police-Office, in Blackman-Street, in the borough of Southwark, within the Metropolitan-police district, and then taken before J. C., Esq., one of the magistrates of the police-courts of the Metropolis, sitting at the said Southwark Police-Court, and having jurisdiction in the district in which the said offence was committed, to be examined by and before the said J. C., Esq., as, and so being, such magistrate as aforesaid, concerning the premises, and there imprisoned the plaintiff until the said J. C., Esq., could and did adjudicate on the premises, and no longer; and so the said defendants Robert Beaver and David Jones committed the said alleged trespasses in the introductory part of this plea mentioned.

The plaintiff joined issue on the first and second pleas.

To the third plea (of William Pritchard) the plaintiff replied, that, though true it is that the said plaint was levied by the said T. Smith the younger, in the said Lambeth County-Court, against the said B. Trump, and that judgment in the matter of the said plaint was adjudged to pass against the said T. Smith, the younger; and that, although true it is that it was ordered by the said last-mentioned court, that the said T. Smith the younger should pay the said money, as in the said third plea alleged; and though true it is that a summons was then and there duly issued, according to the practice of the said court, against the said T. Smith the younger, and that the said summons was personally served upon the said T. Smith the younger, and that it was then and there, as in the said third plea alleged, ordered by the said judge of the said county-court of Lambeth that the said T. Smith the younger should be committed to **[579]** prison; and though true it is that a warrant of commitment directed to the said William Tarn Pritchard, as such high-bailiff of the said Lambeth County-Court, and to the other bailiffs of the said court, was duly issued under the seal of the said court; and though true it is that the said William Tarn Pritchard, as such high-bailiff as aforesaid, did send the said warrant of commitment to John George Meymott and George Charles Fletcher, the joint-clerks of the said Southwark County-Court, and that the said J. G. Meymott and G. C. Fletcher, as such clerks as aforesaid, within the jurisdiction and under the seal of the said last-mentioned court, did issue the said warrant of commitment to the said William Pritchard, who then and there was the high-bailiff of the said last-mentioned court; and though true it is that all such proceedings as in the said third plea alleged, were had, done, and performed in the said several county-courts respectively;—yet, for replication to that plea, the plaintiff said that the defendant William Pritchard, at the said times when, &c., of his own wrong, and without the residue of the cause in the said third plea alleged, committed the trespasses in the introductory part of the said third plea mentioned, in manner and form, &c.

There were similar replications to the fourth and fifth pleas, of Beaver and Jones.

Upon these replications issue was joined.

The cause was tried before V. Williams, J., at the sittings in Middlesex after Trinity term, 1848. The facts were as follows:—

The defendant William Pritchard was the high-bailiff of the Southwark County-Court: Beaver was his under-bailiff. The defendant William Tarn Pritchard was the high-bailiff of the Lambeth County-Court: and Jones was his under-bailiff.

Thomas Smith the younger had levied a plaint in an [580] action of trespass in the Lambeth County-Court, against one Trump, for an alleged illegal distress, and, being nonsuited, was ordered by that court to pay Trump 2l. 11s. for costs. A warrant issued out of the Lambeth County-Court against T. Smith the younger for non-payment of those costs, and was delivered by William Tarn Pritchard to Jones to be executed. T. Smith the younger, however, residing within the district of the Southwark County-Court, it became necessary to obtain the assistance of William Pritchard, the high-bailiff of that district, in the manner pointed out by the 104th section of the county-court act, 9 & 10 Vict. c. 95 (*a*). Accordingly, the warrant from the Lambeth [581] County-Court was sent to the clerks of the Southwark County-Court, and by them sealed and delivered to William Pritchard, whose under-bailiff Beaver accompanied Jones to the factory of the plaintiff, who was the father of the party against whom the warrant was directed. The officers Beaver and Jones, believing that they saw T. Smith the younger through a window of the plaintiff's factory, forcibly entered therein for the purpose of apprehending him. The plaintiff resisted them; whereupon they retired, but afterwards returned, and took the plaintiff into custody, on a charge of having obstructed and assaulted them in the execution of their duty, and carried him before a police-magistrate.

The jury found that Thomas Smith the younger was not in the factory at the time

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(*a*) Which enacts, "that, in all cases where a warrant of execution shall have issued against the goods and chattels of any party, or an order for his commitment shall have been made under this act, and such party, or his goods and chattels, shall be out of the jurisdiction of the court, it shall be lawful for the high-bailiff of the court to send such warrant of execution or of commitment to the clerk of any other court constituted under this act, within the jurisdiction of which such party, or his goods and chattels, shall then be, or be believed to be; with a warrant thereto annexed, under the hand of the high-bailiff and seal of the court from which the original warrant issued, requiring execution of the same; and the clerk of the court to which the same shall be sent, shall seal or stamp the same with the seal of his court, and issue the same to the high-bailiff of his court; and thereupon such last-mentioned high-bailiff shall be authorised and required to act in all respects as if the original warrant of execution or commitment had been directed to him by the court of which he is the high-bailiff, and shall, within such time as shall be specified in the rules of practice, return to the high-bailiff of the court from which the same originally issued, what he shall have done in the execution of such process, and, in case a levy shall have been made, shall, within such time as shall be specified in the rules of practice, pay over all moneys received in pursuance of the warrant to the high-bailiff of the court from which the same shall have originally issued, retaining the fees for execution of the process: and, where any order of commitment shall have been made, and the person apprehended, he shall be forthwith conveyed, in custody of the bailiff or officer apprehending him, to the gaol or house of correction, or other prison of the court within the jurisdiction of which he shall have been apprehended, and kept therein for the time mentioned in the warrant of commitment, unless sooner discharged under the provisions of this act: and all constables and other peace officers shall be aiding and assisting within their respective districts, in the execution of such warrant."

the officers attempted to break in for the purpose of taking him. And the learned judge thought that William Tarn Pritchard, the high-bailiff of the Lambeth County-Court, was not liable at all; but that William Pritchard, the high-bailiff of the Southwark County-Court, was liable for the breaking and entering charged in the first count, and the defendants Beaver and Jones for the trespasses charged in both counts.

A verdict was thereupon taken for the defendant William Tarn Pritchard, and for the plaintiff, as against William Pritchard, for 10l., upon the first issue, so far as it related to the breaking and entering charged in the first count; and as against Beaver and Jones in respect of the trespasses in both counts, with 70l. damages,—being 10l. on the first count, and 60l. on the second count.

[582] Byles, Serjt., in Michaelmas term last, on behalf of the plaintiff, pursuant to leave reserved to him at the trial, moved for a rule calling upon the defendants to shew cause why the verdict found for William Tarn Pritchard should not be set aside, and a verdict entered for the plaintiff as against all the defendants, for 70l., or for 10l., as the court should direct. He referred to the 33rd and 104th sections of the 9 & 10 Vict. c. 95, and to the case of *Smart* v. *Hutton* (8 Ad. & E. 568, n.), and submitted that both the high-bailiffs were responsible for what was done by the under-bailiffs under colour of the warrant. [Wilde, C. J. Jones was not acting under the orders of the high-bailiff of the Lambeth County-Court. He was acting out of his jurisdiction.] Where a bailiff goes out of his county, and arrests a man, the sheriff is liable. [Wilde, C. J. No authority was given by the high-bailiff of the Lambeth County-Court to his officer: his act was merely ministerial. Maule, J. Jones acted as the assistant of the under-bailiff of the Southwark County-Court.] For a trespass committed under a backed warrant, the magistrate who originally issues the warrant is liable. [Maule, J. The situation of sheriffs is peculiar. Here, you are seeking to make one liable for the acts of a person over whom he has no manner of control.]

Wilde, C. J. The rule will go as against the two under-bailiffs, and the high-bailiff of the Southwark County-Court only. We are all clearly of opinion that there is no ground whatever to charge the high-bailiff of the Lambeth County-Court. He acted ministerially only, under the statute. There was no privity between him and those who acted under the warrant from the Southwark County-Court.

[583] Humfrey and Hannen shewed cause. It is conceded that the plaintiff is entitled to a verdict against William Pritchard, Beaver, and Jones, for 10l., upon the issue on not guilty to the first count: but the former is clearly not liable at all for the assault charged in the second count. *Smart* v. *Hutton* has no application. What was done there, was done under colour of the writ. Here, at the time of the alleged assault complained of in the second count, all connection between the high-bailiff of the Southwark County-Court and the subordinate officers, had ceased. The duties and liabilities of the high-bailiff are defined by the 33rd section of the county-court act, which enacts, "that the said high-bailiffs, or one of them, shall attend every sitting of the court, for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge; and shall, by themselves, or by the bailiffs appointed to assist them as aforesaid, serve all the summonses and orders, and execute all the warrants, precepts, and writs, issued out of the court: and the said high-bailiffs and bailiffs shall, in the execution of their duties, conform to all such general rules as shall be, from time to time, made for regulating the proceedings of the court, as hereinafter provided, and, subject thereunto, to the order and direction of the judge; and the said high-bailiffs shall be entitled to receive all fees and sums of money allowed by this act in the name of fees payable to the bailiff, out of which they shall provide for the execution of the duties for which such fees are allowed, and for the payment of the bailiffs and officers appointed to assist them, according to such scale of remuneration as shall be, from time to time, approved by the judge; and every such high-bailiff shall be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is **[584]** responsible for the acts and defaults of himself and his officers." [Maule, J. The question is, whether the officers were acting under colour of the warrant, at the time they took the plaintiff into custody. They undoubtedly thought they were acting as bailiffs. The 114th section (*a*) must, I think, be restrained

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(*a*) Which enacts, "that, if any officer or bailiff of any court holden under this act, shall be assaulted while in the execution of his duty, or if any rescue shall be to the bailiff assaulted. The principle of the sheriff's responsibility is, that he selects the man to do the particular thing. Here, it may be said that the high-bailiff selects his subordinate officer as a person fit to be intrusted with the power to arrest a person who assaults him in the execution of his duty.] The liability of the high-bailiff for the acts of his subordinates is expressly limited to that of the sheriff at common law. The power given under the 114th section is for the protection of the bailiff himself: what is done under that section, therefore, clearly cannot in any sense be said to be done under colour of the warrant. [Maule, J. Suppose the officers were really assaulted while in the execution of their duty, and they thereupon arrested the plaintiff,—could you say that they were not acting by virtue of the warrant?] Certainly. [Wilde, C. J. The intention of the 114th section, no doubt, was, to prevent interruptions to the execution of process.] A party apprehended under this clause, may be fined and imprisoned by the magistrate. These persons were assuming to exercise a power which the law annexes to the warrant, but not to act under the authority of the **[585]** warrant. Their power was beside and independent of the warrant.

Byles, Serjt., and Bovill, in support of the rule. The defendant William Pritchard is equally liable with Beaver and Jones for the assault complained of in the second count. The 31st section of the statute gives the high-bailiff a discretion in the selection of his bailiffs: there is no hardship, therefore, in holding him responsible for acts done by them in the execution of their duty. If Thomas Smith the younger had been arrested at the time of the first entry, it clearly would have been an arrest by virtue of the warrant. In order to make the high-bailiff responsible, it is not necessary that the act of the under-bailiff should be an act done strictly under the warrant: it is enough if he thinks he is acting, and means to act, by virtue of the warrant. [Maule, J. Is that quite so? The high-bailiff is not, I apprehend, responsible for everything the under-bailiff fancies or believes to be done in pursuance of his duty.] His responsibility is the same as that of the sheriff: and the sheriff is liable, though the officer mistakes; as, if under a warrant directing him to take A., he arrests B. [Wilde, C. J. Suppose the officer comes to the court for an attachment upon an unfounded charge of interruption in the execution of his duty,—would the sheriff be responsible for what might be done under that process? Maule, J. The case of the sheriff is somewhat different: he directs the officer to take Smith, and the officer by mistake takes Brown. In this case, the bailiffs take the plaintiff, not under the order of any one, but under the permission of the act of parliament.] It is not by any means conceded that the under-bailiffs did not do what they did, by the order of the high-bailiff. The high-bailiff, when he appoints an under-bailiff, appoints him to do all that the act of parliament **[586]** enables him to do. [Maule, J. The particular power in question clearly is one which the under-bailiff has the option of exercising or not, as he likes.] Assuming it to be discretionary, if he does it, he does it under colour of his office. In *Smart* v. *Hutton* (8 Ad. & E. 568 n.), it was held that the sheriff is civilly liable for misconduct of his officer in executing a writ, though the act done be contrary to the express terms of the writ; as, if he take the person under a fi. fa. Parke, J., there says: "The sheriff is liable for whatever the bailiff does under colour of the writ. The officer is delegated by him to execute the writ; and the officer's acts are his: it is as if the sheriff himself delivered the party to the gaoler's custody." So, in *Ackworth* v. *Kempe* (1 Dougl. 40), it was held, that, if on a fi. fa. against A., a bailiff takes the goods of B., trespass lies against the sheriff. And Lord Mansfield said: "For all civil purposes, the act of the sheriff's bailiff, is the act of the sheriff." And in *Parrot* v. *Mumford* (2 Esp. N. P. C. 585), it was held that an action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the return-day of the writ. [Maule, J. That is not contested.] The high-bailiff is responsible for his bailiff's excess of duty, whether by negligence or otherwise. [Maule, J. In all these cases, there must be a misfeasance

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made or attempted to be made of any goods levied under process of the court, the person so offending shall be liable to a fine not exceeding 5l., to be recovered by order of the court, or before a justice of the peace as hereinafter provided; and it shall be lawful for the bailiff of the court, or any peace officer, in any such case, to take the offender into custody (with or without warrant), and bring him before such court or justice accordingly."

of something which the subordinate officer has been ordered to do.] Or which he was bound to do.

At all events, if the high-bailiff is not responsible for the assault, the plaintiff may have a verdict on the first count against the three, and a verdict for 60l. on the second count against Beaver and Jones. In Tidd's Practice (9th edit. vol. ii. p. 896), it is said: "In trespass against several defendants who join in pleading, if the jury, on the trial, [587] find them all jointly guilty, they cannot assess several damages (*a*). But they may find some of them guilty, and acquit others; in which case, the damages can be assessed against those only who are found guilty: or they may find some of the defendants guilty of the whole trespass, and others of a part only (*b*); or some of them guilty of part, or at one time, and the rest guilty of other part, or at another time (*c*): in either of which cases, they may assess several damages." And the rule is similarly laid down in Archbold's Practice (10th edit., by Chitty, vol. i. p. 449). [Talfourd, J. The answer to that is the answer given by Tindal, C. J., in *Eliot* v. *Allen* (ante, vol. i. pp. 18, 31).] In *Eliot* v. *Allen*, all the defendants were charged with the commission of one offence; and the jury found all guilty of the same acts of trespass. [Maule, J. The whole court is of opinion that this point does not properly arise. What was agreed upon at the trial, was, that the jury should assess the damages separately, leaving the court to apply them as they might think fit.] What, then, becomes of the 60l. damages on the second count? [V. Williams, J. The plaintiff will have his option,—to take a verdict against the three defendants William Pritchard, Beaver, and Jones, on the first count, with 10l. damages,—or against Beaver and Jones, upon both counts, for 70l.,—or this rule will be discharged, with costs.]

Maule, J.(*g*). I think the liability of the high-bailiff is not of a character so extensive as my brother [588] Byles has contended for. He is, by the 33rd section of the 9 & 10 Vict. c. 95, placed in the same situation with regard to his under-bailiffs, as the sheriff is placed in, by the ordinary law, with respect to the bailiffs who execute his warrants. Cases might arise in which the high-bailiff of a county-court might incur a liability exceeding the liability incurred by the sheriff: but it is not suggested that the present is a case of that kind; it is conceded, that his liability under s. 33 is co-extensive with that of the sheriff for the acts of his officers. Now, the liability of the sheriff in case of mistake or misconduct on the part of his officer, though extensive, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not obeyed: he is still liable, provided the thing done be something which by the command or under the authority of the sheriff the officer was bound to do. For the reasons thrown out in the course of the argument, I think the power of arrest given to the officers by s. 114 is permissive and optional only, and not mandatory. The act for which it is here sought to make the high-bailiff responsible is one which, placing it at the highest, he authorised, but did not command, the under-bailiff to do. It may be that it was not even an authority given by the high-bailiff, but a power conferred by the act upon a person whom the high-bailiff has thought fit to intrust with the execution of the process of the court,—to which latter opinion the lord chief justice inclines. In either view, it would be extending the liability of the high-bailiff beyond what any decided case has imposed upon the sheriff, to hold that it attaches in a case like the present. The reason that the sheriff is held liable is, that, having a duty imposed upon him by law, instead of performing it himself, he [589] delegates it to another; and therefore it is but just that he should be responsible for the misconduct of those to whom he so delegates the performance of his duty. For these reasons, I think the law does not impose upon the high-bailiff a liability to the extent which has been contended for. I therefore think the rule should be made absolute,—to enter the verdict for the plaintiff against the defendants William Pritchard, Beaver, and Jones

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(*a*) Citing Cro. Eliz. 860; 11 Co. Rep. 5; 1 Stra. 422; 2 Stra. 910; 5 Burr. 2792; 6 T. R. 199.

(*b*) Citing Cro. Eliz. 860; 11 Co. Rep. 5; Sty. Rep. 5.

(*c*) Citing 11 Co. Rep. 1; Brownl. 233; Cro. Car. 54.

(*g*) Wilde, C. J., had left the court, but desired Maule, J., to say that he concurred in the judgment about to be pronounced.

upon the issue on not guilty as to the first count, with 10l. damages, and discharged as to the rest.

V. WILLIAMS, J. I am of the same opinion. I think the case was very justly and forcibly presented by Mr. Hannen, who said, that, if the bailiff had been called upon to shew the authority which justified him in taking the plaintiff to the police-station, he could only have referred to the authority of the 114th section of the act, and not to the warrant, except as giving rise to the exercise of the authority given by that section. That is putting it upon the true ground. I therefore think that the high-bailiff is not to be held responsible for an act so done under colour of the act of parliament, and not of the warrant.

There can only be a joint verdict in trespass in respect of a joint trespass by all the defendants. I thought at the trial, and I still think, that the three defendants, William Pritchard, Beaver, and Jones, were jointly liable for the trespasses charged in the first count; but that the two latter only were guilty of the trespasses charged in the second count. There ought, therefore, to be a verdict against the three, with 10l. damages, upon the issue on not guilty as to the first count, and a verdict for all the defendants as to the second count; or the plaintiff should have a verdict against Beaver and Jones on both counts, **[590]** with 70l. damages; or the rule will be discharged, with costs.

TALFOURD, J., concurred.

Humfrey, for the defendants, submitted, that, inasmuch as they did not, at the trial, resist a verdict against them upon not guilty to the first count, they ought not to pay, but, on the contrary, should receive, costs on this motion.

Bovill, contrà. The defendants should have given the plaintiff notice that they would not oppose the rule to the extent now suggested, and then there might have been some ground for this application.

Humfrey. We could not consent in that way to the rule being made absolute as to part.

TALFOURD, J. Why not? If you had come into court when the rule was granted, and made the proposal now made, you would have had some ground for what you ask. Not so now.

MAULE, J. It was competent to you, although you signified that assent at the trial, to insist, upon the argument on the rule, that the rule ought to be discharged in toto.

Humfrey. At all events, the defendants ought not to pay the costs of this rule.

MAULE, J. It often happens that a party gets less than he asks by his rule. But it is a very rare thing for the court to make a special order about costs.

[591] V. WILLIAMS, J. If I had acted upon my present impression at the trial, I should have directed the verdict to be entered as now proposed. It was put in the way it was for the purpose of giving the plaintiff the option of coming to the court.

MAULE, J. The only matter in controversy at or since the trial was, whether the high-bailiff of the Lambeth County-Court was liable to the extent of the 70l. In that the plaintiff has failed. We therefore think he ought not to have the costs of this rule.

Rule absolute, to enter a verdict for the plaintiff on the first issue as to the first count, against the defendants William Pritchard, Beaver, and Jones, with 10l. damages; and to enter a verdict on the first issue so far as relates to the second count, for those defendants;—neither party to be entitled to any costs of and occasioned by the rule.

[592] DAVID FITZGERALD v. CHARLES FITZGERALD. Nov. 21, 1849.

[S. C. 19 L. J. C. P. 126; 14 Jur. 485.]

Marriage does not enure as an assignment to the husband of a judgment recovered by the wife, in Ireland, before the marriage, under the 9 G. 2, c. 5 (Irish), amended by the 25 G. 2, c. 14 (Irish), and made perpetual by the 12 G. 3, c. 19, s. 3.—Under these statutes, an examined copy of the inrolment of the memorial of an assignment of such judgment is good evidence of that assignment.

This was an action of debt, by the plaintiff, as assignee of an Irish judgment entered up on a warrant of attorney.

The declaration began by setting out the 9 G. 2, c. 5, the 25 G. 2, c. 14, amending the former act, the 12 G. 3, c. 19, making the 9 G. 2, c. 5, as amended, perpetual, and the Act of Union, passed in the 40 G. 3 (c. 38), by the Irish parliament; and then alleged, that, in 1830, the defendant, by his writing obligatory, acknowledged himself to be bound to Alicia Fitzgerald in the sum of 219l. 9s. 2½d., conditioned to pay 109l. 14s. 7d., with lawful interest, on the 12th of January, 1831, and, that, for securing payment of the bond, the defendant, on the same day and year, executed a warrant of attorney to confess judgment at the suit of Alicia Fitzgerald, and that, in the 11 G. 4, Alicia Fitzgerald impleaded the defendant, and declared against him on the said bond, &c., and judgment was thereupon entered up at her suit in the court of Common Pleas in Ireland; that, afterwards, in the year 1834, Alicia Fitzgerald intermarried with, and became the wife of, Francis Leyden; "and that, by the law of that part of the united kingdom called Ireland, Francis Leyden thereby then became entitled to the said judgment, and the right thereto, and to assign the same as thereinafter mentioned, then became vested in him the said Francis Leyden." The declaration then averred, that, in 1842, Francis Leyden, and Alicia, his wife, by indenture (of which profert was made) assigned the judgment to Thomas Rumley; that a memorial of such assignment **[593]** was duly inrolled, with an affidavit as required by the 9 G. 2, c. 5; that afterwards, on the 30th of September, 1842, by indenture between Francis Leyden, of the first part, Thomas Rumley, of the second part, and the plaintiff, of the third part, Francis Leyden and Thomas Rumley assigned the said judgment to the plaintiff. It then averred the inrolment of a memorial, &c., as of the first assignment, that the debt and damages recovered by the judgment were and are of the value of 200l. English money, and were still unpaid, wherefore, &c.

The declaration also contained a count for interest, and a count upon an account stated.

The defendant craved oyer of the indenture of assignment between Francis Leyden, Alicia Leyden, and Thomas Rumley; and, after setting it out, pleaded,—first, that Francis Leyden did not, by the law of that part of the united kingdom called Ireland, by reason of his intermarriage with Alicia Fitzgerald, become entitled to the said judgment, nor did the right thereto, and to assign the same in manner in the declaration mentioned, become vested in him, in manner and form, &c.; upon which issue was joined,—secondly, that Francis Leyden and Alicia his wife did not assign to Rumley,—thirdly, that they did not perfect a memorial,—fourthly, that no such affidavit was made as alleged,—fifthly, sixthly, and seventhly, similar pleas as to the alleged assignment by Francis Leyden and Thomas Rumley to the plaintiff,—eighthly, as to 2l. 2s. 8d., parcel of the moneys recovered by the said judgment, to wit, for damages for detaining the said debt, payment to Alicia Fitzgerald before her intermarriage with Francis Leyden,—ninthly, as to 70l., parcel of the sum of 219l. 9s. 2½d. recovered by the said judgment, payment to Francis Leyden and Alicia **[594]** his wife, before the assignment to Rumley,—tenthly, to the second and third counts, never indebted.

Issue was joined on all the pleas except the eighth and ninth; and, as to them, the plaintiff replied, denying the payments therein pleaded, upon which issue also was joined.

The cause came on to be tried before Parke, B., at the Surrey summer assizes, 1847, when, on behalf of the plaintiff, an examined copy of the judgment-roll was given in evidence; then, an examined copy of a memorandum of the assignment of the debt, on the foot of the judgment, was tendered, and, after objection, admitted, but not as evidence of an assignment or memorial. An examined copy of the inrolment of the memorial on the record, was then tendered, and, after objection, admitted, on the principle that inrolments of record directed by statute are evidence: *Smartle* v. *Williams* (1 Salk. 280): it concluded in these words—"The execution of which said deed, and of this memorial, by the said Francis Leyden, are witnessed by John Shevlan Maloney, of Bedford Street, Liverpool, gentleman, and Daniel Charles Leyden, of Parliament Street, Liverpool, officer of Customs, Liverpool.

"Francis Leyden (L.S.).
"Alicia Leyden (L.S.).

"Signed and sealed in the presence of
"J. S. Maloney.
"D. C. Leyden."

Then followed an affidavit by J. S. Maloney, that he saw the deed and memorial duly executed by Francis Leyden and Alicia Leyden.

Similar evidence was given of the execution of the second assignment; but the memorial, as inrolled, stated that the deed and memorial were executed by both [595] Francis Leyden and Thomas Rumley, in the presence of the two witnesses.

The original affidavit made by Maloney, and filed, was admitted.

For the defendant, it was objected,—first, that, as the judgment was a chose in action of Alicia Leyden before marriage, the husband could not dispose of it without first reducing it into possession, and therefore the defendant was entitled to the verdict on the first issue,—secondly, that the execution of the memorial by Mrs. Leyden was not attested by two witnesses,—thirdly, that the inrolment of the second memorial shewed that the judgment was assigned to Rumley in trust for the husband, Francis Leyden, and the statute 9 G. 2, c. 5, was intended to apply to assignment for value only.

For the defendant, the payment of 2l. 2s. 8d. was proved, as alleged in the eighth plea.

The learned baron reserved the points raised as to the effect of the assignments, and also those as to the evidence; and, subject to them, directed a verdict for the plaintiff; the defendant having leave to move for a nonsuit, or to enter a verdict in his favour on all or some of the issues found for the plaintiff.

Channell, Serjt., in Michaelmas term, 1847, obtained a rule nisi to enter a verdict for the defendant, or for a new trial on the ground of misreception of evidence. He submitted that the issue on the second plea was not made out: and he sought to distinguish the cases of *Hobhouse* v. *Hamilton* (1 Sch. & Lefroy, 207), *Malcomson* v. *Gregory* (1 Hudson & Brooke, 310), and *Maguire* v. *Armstrong* (1 Hudson & Br. 313, n.), on the ground, that, in neither of them was there a precise issue taken upon the [596] assignment, as here; and that, in Ireland, the memorial would be a record. [V. Williams, J., observed that the Vice-Chancellor of England had twice held that a chose in action of the wife, does not pass to the husband by the marriage, unless reduced into possession in the life-time of the wife: and that it is difficult to see how the assignee of a judgment in Ireland can be in a better position than an assignee of a chose in action in England.]

Shee, Serjt., and Bovill, in Trinity term, 1848, shewed cause. The first question is, whether the effect of the marriage of Francis Leyden with Alicia Fitzgerald was, to vest in the former the property in this judgment. Another question is, whether the plaintiff proved the second issue: and this must depend upon whether the evidence of the memorial and inrolment, unopposed, was sufficient.

The question will mainly turn upon the two Irish statutes of 9 G. 2, c. 5, s. 1, and 25 G. 2, c. 14, s. 1, made perpetual by the 12 G. 3, c. 19, s. 3. The title of the former is, "An act for the more effectual assigning of judgments," &c.: and the 1st section, —reciting that "whereas judgments, statutes-staple, and statutes-merchants, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees: and whereas assignees of such judgments, statutes-staple, or statutes-merchants, as the law now stands, cannot revive or discharge the same in their own names, but in the name of the conusees of such judgments, statutes-staple, or statutes-merchants, or their representatives, which is often attended with very great inconveniences; and the conusee may, after such assignment, enter satisfaction on the record of the said judgments, statutes-staple, or statutes-merchant, without [597] the knowledge or consent of the assignee,"—for remedy thereof enacts, "that, from and after the first day of next Easter term, where any conusee or conusees of a judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, shall assign the same to any person or persons whatsoever, such conusee or conusees, his, her, or their executors or administrators, shall also perfect a memorial of such assignment under his, her, or their hand and seal, upon parchment or vellum, attested by two or more credible witnesses; which memorial shall contain the name or names, and addition, of the person or persons assigning such judgment or judgments, statute-staple, or statute-merchant, the name or names of the person or persons to whom the same shall be assigned, and the sum or sums of money mentioned in such assignment or assignments to be remaining due and unsatisfied upon such judgment or judgments, statute-staple, or statute-merchant, with the day and year when such assignment or assignments is, are, was, or were perfected; and that one of the witnesses to such memorial, who shall be a witness tc the assignment of such judgment or judgments, statute-staple, or statute-merchant, shall make an affidavit at the foot of such memorial, of the true perfection of such assignment and memorial, before the respective officer or officers where such judgment or judgments, statute-staple, or statute-merchant, is, are, or shall be entered, his or their legal deputy or deputies, or before any one of the judges of the Four-Courts in Dublin, or before any one of the judges of His Majesty's courts at Westminster, who are respectively hereby impowered to take such affidavit or affidavits; which memorial and affidavit shall be lodged in the proper office where such judgment or judgments, statute-staple, or statute-merchant, is, are, or shall be entered; and the several officers of the said courts are hereby **[598]** required to enter such memorial of such assignment, statute-staple, of statute-merchant, in a roll or rolls of parchment or vellum, to be kept for that purpose in such respective office or offices where such judgment or judgments, statute-staple, or statute-merchant, is, are, or shall be entered; and such officer or officers is and are hereby required to indorse on such assignment or assignments the day of the month and year, and hour of the day, whereon such memorial or memorials was or were so lodged and proved; and, for the more easy and speedy method of finding such assignment or assignments, such respective officer or officers shall enter the number and roll where such assignment or assignments is or are registered, at the foot of each respective judgment or judgments, statute-staple, or statute-merchant, so assigned." And the 2nd section enacts, "that, from and after such time as such memorial or memorials of such assignment or assignments shall be entered on such roll as aforesaid, it shall and may be lawful for the assignee or assignees of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors, administrators, or assigns, and for no other person or persons whatsoever, to revive such judgment or judgments, statute-staple, or statute-merchant, from time to time, in his, her, or their own name or names, and take out one or more execution or executions on the same, in the name or names of such assignee or assignees, his, her, or their executors or administrators, and to sue forth execution or executions thereon, reciting the special matter, and also to discharge or release the same; and also in his, her, or their own name or names to enter satisfaction on the record of such judgment or judgments, statute-staple, or statute-merchant, in as full and ample manner, to all intents and purposes, as if the conusee or conusees of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, could or might do; **[599]** and that the conusor or conusors of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors, administrators, or assigns, may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees; and that such assignees, their executors or administrators, may from time to time assign the same over in manner aforesaid; and such assignment or assignments shall be proved and registered in the respective offices in manner aforesaid; and such assignee or assignees may revive, and sue out execution or executions, in their own name or names, and discharge and acknowledge satisfaction on, such judgment or judgments, statute-staple, or statute-merchant, in manner aforesaid: any law, usage, or custom to the contrary in any wise notwithstanding." And by the 25 G. 2, c. 14, s. 1,—reciting that "whereas some doubts have arisen upon the construction of the 9 G. 2, c. 5, so far as the said act relates to the assignment of judgments and statutes in the several courts of law therein mentioned,"—for the removing of such doubts, it is declared and enacted "that every assignee or assignees of every judgment or judgments, statute-staple or merchant, that are now assigned, or which hereafter shall be assigned, on record, by virtue of the said act, his, her, or their executors, administrators, or assigns, may not only revive such judgment or judgments, statute or statutes, from time to time, in his, her, or their own name or names, and take out one or more execution or executions thereon, for the recovery of his, her, or their demands thereon, as by the said act, among other things, is directed; but that also such assignee or assignees of such judgment or judgments, statute or statutes, now assigned, or hereafter to be assigned, by virtue of the said act, his, her, or their executors, administrators, or assigns, may bring an action of debt, or otherwise proceed or sue thereon, in **[600]** his, her, or their own name or names, and be considered to all intents and purposes in the place, stead, and condition, either in law or equity, of the assignee or assignees."

It is submitted that the effect of these statutes is, to make this judgment a chose in action, assignable at law; and that it vested in Dr. Leyden by his marriage with Alicia Fitzgerald, without any act done to reduce it into possession. The statute 9 G. 2, c. 5, in its terms, is exceedingly comprehensive: it is a remedial act, and is to be construed largely, so as to meet the evil it recites, and fully to effect the purpose for which it was intended. It in terms gives the judgment, without the formality of assignment, to the executor of the conusee. By the marriage, the husband becomes identified with the conusee, and entitled to all her rights. If the marriage did not vest the judgment in the husband, there is no power to assign the judgment at all. [Cresswell, J. A feme covert may part with her interest by matter of record. Maule, J. The great difficulty is, whether the statute meant to confer upon the wife any power which she did not possess at common law. In fact, the plaintiff must contend that the effect of the statute is, to make the husband conusee.] That is precisely what is contended. East-India Bonds are, by the 51 G. 3, c. 64, s. 4, made transferable by delivery,—put upon the same footing as promissory notes under 3 & 4 Ann. c. 9 (made perpetual by 7 Ann. c. 25). If a woman having such securities in her possession, marries, they pass by the indorsement of the husband. In Vin. Abr. Baron and Feme, pl. 12, it is said, "If a feme who has a term or interest, as executrix, by statute-merchant, takes baron, the baron may grant over the interest, without the feme; and good, in assise" (Bro. Abr. Grants, pl. 157, citing 24 E. 3, 63 (M. 24 E. 3, fo. 63, pl. 62). Again, pl. 14, "If obligation is made to a feme sole, **[601]** and she takes baron, and the baron releases all actions, and dies, the feme shall be barred" (Bro. Abr. Baron and Feme, pl. 44, citing 7 H. 6, 2. (T. 7 H. 6, fo. 2, pl. 6)). The instances given in Com. Dig. Baron and Feme (E. 2), are to the same effect. [Coltman, J. In Mr. Butler's note (304) to Co. Litt. 351 a., he says (*b*): "With respect to such part of the wife's personalty as is not in her possession,—as, money owing or bequeathed to her, or accrued to her in case of intestacy, or contingent interests,—these are a qualified gift by law to her husband, on condition that he reduce them into possession during the coverture; for, if he happen to die in the life-time of his wife, without reducing such property into possession, she, and not his representatives, will be entitled to it (*c*). His disposing of it to another, is the same as reducing it into his own possession."] In *Lord Carteret* v. *Paschal* (3 P. Wms. 200), it was held, that, if the wife has a judgment, and it is extended upon an elegit, the husband may assign it without a consideration; so, if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and, by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for, it is in nature of an extent. Stock in the public funds,—which is a right to receive a perpetual annuity, subject to redemption,—a chose in action,—vests by the marriage in the husband: *Pringle* v. *Hodgson* (3 Ves. 619); *Wildman* v. *Wildman* (9 Ves. 174, 177). In *Ex parte Barber, In re Shaw* (1 Glyn & J. 1), it was held that the husband alone may sue out a commis-**[602]**-sion upon a promissory note given to the wife dum sola. So, he may sue for it in his own name: *M'Neilage* v. *Holloway* (1 B. & Ald. 218). Lord Ellenborough, in that case, says: "It is laid down in Coke upon Littleton, 351 b., and Com. Dig. Baron and Feme (E. 3), that all chattels personal which the wife has in possession in her own right, are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognised. The words chattels personal are sufficiently large to cover a negotiable instrument of this sort: it is payable to her order; and, if the relation of husband and wife had not subsisted, a formal indorsement to transfer the property in the instrument would have been necessary. Then, the question is, whether, the marriage having vested the right in the husband, it be necessary to go through the form of an indorsement. The law does not require superfluous acts. Is it then necessary that that should appear on the face of the bill? It can only be necessary as evidence of an election on his part to take to the property in his marital right: but that is unequivocally shewn by bringing the action in his own name. No case having been cited to shew that a formal indorsement is necessary, I think, that, by the act of marriage itself, he is virtually an indorsee. If he had appeared as such

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(*b*) This part of the note is an addition in the sixteenth edition.

(*c*) Citing 1 Roll. Abr. 342, 350; Moore, 452; Gold. 160; 2 Vent. 141.

on the face of the bill, there could be no doubt of his right to maintain this action: but the marriage has in fact given him all the rights of an indorsee; and it therefore seems to me to be unnecessary for us to go through the formal derivation of title by indorsement." The reasons which apply to the ordinary case of a stranger making himself a party to a record by sci. fa., are inapplicable on the present occasion. Every object for which a sci. fa. for the husband could be required, is provided for by the **[603]** statute. An Irish judgment, under this act, is in the nature of a personal chattel. The effect of marriage is to make the husband the wife's representative: her separate existence is lost, and merges in her husband, subject to certain modifications. The effect of the act is, to make the husband conusee of the judgment, which he may enforce by action, though not by execution. [Maule, J. Can he enforce it in any way which does not enable the other party to deny the marriage? That is the difficulty I feel. The main object of the 9 G. 2, c. 5, was, to put an end to suing upon judgments in another person's name, or by sci. fa.] That certainly was one object, but not the only one.

2. The next question is, whether the assignment alleged in the declaration, was properly proved by the copy of the inrolment of the memorial which was produced. It is clear, upon the Irish authorities which were cited on the motion, that the memorial inrolled is the proper, if not the only, proof of the assignment, regard being had to the language of the 9 G. 2, c. 5. In *Hobhouse* v. *Hamilton* (1 Sch. & Lefroy, 207), upon a bill filed by the plaintiff as assignee of a judgment, it appearing that the deed of assignment of the judgment had been lost, an attested copy of the memorial, which had been duly entered pursuant to the statute, was offered in evidence as proof of the assignment. Plunket, for the defendant, objected that the original memorial should be produced: and he compared it to the cases upon the registry act, in which, though it had been decided that the attested copy of the memorial be good evidence of the fact of registry, it was held not to be admissible evidence of the contents of the deed, when, by the loss of the deed, it became necessary to resort to the memorial for secondary evidence, **[604]** and that, in all these cases, the memorial itself was produced. But Lord Redesdale "admitted the distinction as applied to the registry act, viz. that the attested copy of the memorial is evidence only of the fact of registry; but that, if the memorial is meant to be used as evidence of the contents of the deed, the original memorial must be produced. But he held, that, in the case of a judgment, the contents of the deed of assignment were not material: that what appeared on record was the proper evidence of the fact of assignment: that, if a memorial be duly entered, agreeable to the act of parliament, the party cannot say the judgment was not assigned, and can only apply to the court to vacate it if done without authority. His lordship said he had had doubts upon this point in another case, and had looked into the statute, and that he was of opinion, that, by the true construction of the act, the party is bound and concluded by what appears on record, although the assignment might have been forged; and that payment to the assignee on record would be good payment: that, of course, if the record be conclusive as to the fact of assignment, an attested copy of it must be good evidence of that fact, and that there is no occasion to produce the deed of assignment." That case has been followed by *Maguire* v. *Armstrong* (1 Hudson & Br. 313, n.), and *Malcomson* v. *Gregory* (ibid. 310), in both of which it was held, that the attested copy of the memorial of the assignment of a judgment, under this statute, is the proper evidence of such assignment. The same thing, in substance, was decided in *Ramsbottom* v. *Buckhurst* (2 M. & Selw. 565), where it was held, that, in an action by a plaintiff claiming under an elegit, for use and occupation, an examined copy of the judgment-**[605]**-roll, containing the award of elegit, and return of the inquisition, is evidence of the plaintiff's title, without proving a copy of the elegit and of the inquisition. "The judgment-roll," says Lord Ellenborough, "imports incontrovertible verity as to all the proceedings which it sets forth; and, so much so, that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration, or plea, or trial, or that the court did not pronounce such judgment, as stated in the record? I apprehend it would not: and therefore every part of the record, as long as it remains on the files of the court, must be taken to speak absolute verity."

3. Then it is said that the memorial, the examined copy of the inrolment of which was produced, was not attested as required by the statute. The supposed defect is,

that it does not appear from the statement in the body of the instrument that the signature of Alicia Leyden was attested by Maloney. But the ordinary attesting clause shews that the execution by Francis Leyden and Alicia Leyden was attested by both the witnesses: and the affidavit at the foot shews that Maloney did in fact attest the execution by Alicia Leyden as well as by Francis Leyden. But for the statement in the body, there would have been no doubt. The execution by husband and wife is, in point of law, the execution of the husband: *Arnold* v. *Revoult* (1 Brod. & Bingh. 443, 4 J. B. Moore, 66). The statement, therefore, that the wife executed the instrument, is mere surplusage. [Maule, J. The attestation clause would have been perfectly true, if the instrument had been executed by the wife only.] *Burdett* v. *Doe d. Spilsbury* (6 M. & G. 386, 7 Scott, N. R. 66) decides, that, where certain **[606]** formalities of attestation are required by an act of parliament, if the form of attestation that is adopted be inconsistent with the requirements of the act, it will not do; but that a general attestation will do. There, a power of appointment was to be executed "by a will, to be signed, sealed, and published by A. B., in the presence of, and attested by, three credible witnesses:" and it was held to be well executed by an instrument concluding thus,—"I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, set my hand and seal, this 12th of December, 1789,"—such instrument being signed by A. B., and a seal appearing opposite to such signature, and the words "Witness, C. D., E. F., and G. H.," appearing in the usual place of attestation, and it being shewn by extrinsic evidence, that the instrument was in fact so signed, sealed, and published. [Cresswell, J. There was nothing there inconsistent with a right attestation; and the evidence was, that it was rightly done.] Here, there is a right attestation.

Channell, Serjt., and Lush, in support of the rule. Previously to the passing of the 9 G. 2, c. 5, the law of Ireland, as to choses in action, was the same as the law of England. The main question is, whether this case is within that statute. The preamble of the act explains what was its object, viz. to enable parties to make legal assignments of judgments, where before they could only make equitable assignments. To bring a case within the statute, two things must concur,—the party must be the conusee of the judgment, and be under no personal disability to make an assignment. The statute received an interpretation to a certain extent, in this court, in a case of *O'Callaghan* v. *Marchioness Thomond* (3 Taunt. 82), which goes far to shew that it is **[607]** essential that the party whose assignment is set up should be the conusee of the judgment. Here, taking the wife to be conusee of this judgment, she is under a personal disability. The husband clearly does not, by the act of marriage, become conusee of the wife's judgment. The authorities as to the necessity of the husband's becoming party to a judgment by scire facias, to enable him to issue execution, are considered in 2 Wms. Saund. 72 l., 72 m. [Maule, J. Nobody doubts that. When you take out execution, you must have a sci. fa. The court are unanimous in thinking that the husband can only become party to the judgment by sci. fa., though that is not expressly mentioned in the act.] In Roper on Husband and Wife (2nd edit., by Jacob, vol. i. p. 214), it is laid down, that, "for such debts, &c., as were due to the wife before the marriage, and continue unaltered, since the husband cannot disagree to her interest in, and he has only a qualified right to, them, viz. by reducing them into possession during her life, he is unable to maintain an action for such property without making his wife a party" (*b*). To this Mr. Jacob adds: "To this rule an exception has been made in the case of a bill of exchange or promissory note payable to the wife dum sola (*c*). Such instruments, being transferable at law, are considered to bear more resemblance to chattels personal than to other choses in action. The wife, after the marriage, is unable to indorse them: but the husband might pass them by indorsement (*d*), and thus give to the assignee the right of suing on them in **[608]** his own name; and he is therefore held to have the same right himself." This explains the principle upon which *M'Neilage* v. *Holloway* and *Ex parte Barber* proceeded. In *Lord Carteret* v. *Paschal*, the property was treated in equity as land: if it had been extended on elegit before the marriage, the husband would clearly have been entitled

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(*b*) Citing *Hardy* v. *Robinson*, 1 Keb. 440, *Tirell* v. *Bennet*, 2 Keb. 89, *Re Russel and Wife*, Noy, 70, *Milner* v. *Milnes*, 3 T. R. 627, *Rumsey* v. *George*, 1 M. & S. 176.

(*c*) Citing *M'Neilage* v. *Holloway*, 1 B. & Ald. 218, *Ex parte Barber*, 1 Glyn & J. 1.

(*d*) Citing *Barlow* v. *Bishop*, 1 East, 432.

to the rents. In Roper (2nd edit., vol. i., p. 224), it is said: "The interests [of the wife], amongst others, which are assignable at law, are, the personal chattels of the wife in possession, legal terms for years, elegits upon judgments issued before the marriage; and, in analogy to this, he has in equity the same power of assigning terms held in trust for her, and debts or sums of money secured by such terms, decrees made in favour of the wife dum sola for money, and that she shall hold the premises until satisfaction." The cases adverted to by Mr. Justice Williams, when this rule was moved, are *Elwyn* v. *Williams* (7 Jurist, 337) and *Ashby* v. *Ashby* (8 Jurist, 1159, before Knight Bruce, V. C.). In the former, it was held, that, where the husband assigns a chose in action of his wife for valuable consideration, and dies before either he or the assignee has actually obtained possession of it, leaving the wife surviving,—it matters not whether the chose in action was reversionary, so that it could not have been reduced into possession, or whether, the wife having become absolutely entitled, it was still left outstanding, and not reduced into possession, through neglect,—in either case, the wife, surviving, will be entitled, as against the assignee for valuable consideration. The Vice-Chancellor says: "I consider the principle laid down by Sir T. Plumer (in *Purdew* v. *Jackson*, 1 Russ. 1), and twice affirmed by the lord **[609]** chancellor (*a*), to be decisive of the present question. Whether the husband dies in the life-time of the tenant for life, whereby the chose in action cannot, as against the wife, be reduced into possession, or whether he survives, and dies before it is reduced into possession, the same result must, in my opinion, follow; and the consequence is, that, in the present case, a declaration must be made that Mr. Nicholson's covenant, which might operate as an assignment, does not now affect that portion of the chose in action of his wife which was not reduced into possession in his life-time." So, in *Ashby* v. *Ashby*, Sir Knight Bruce held that the surviving wife's right to her chose in action, not reduced into possession, but assigned by the husband during his life-time, is not defeated by such assignment. A legacy is strictly a chose in action.

2. As to the sufficiency of the proof,—the cases of *Hobhouse* v. *Hamilton*, *Maguire* v. *Armstrong*, and *Malcomson* v. *Gregory*, undoubtedly shew that an attested copy of the memorial of the assignment of a judgment, is evidence of the fact of the assignment. But they were cases where the parties were proceeding in the Irish courts, where the judgment was a record; and in one of them,—*Malcomson* v. *Gregory*,—the proceeding was by scire facias (*b*)[1]. [Maule, J. Do you say that the assignment has a different effect here from what it has in Ireland?] I must so contend. [Maule, J. A law in Ireland says that a judgment may be assigned by inrolling a memorial. Another law in Ireland says that the memorial so inrolled shall be a record. The first is a law in this country: the other is not; but it is a rule of evidence.]

[610] 3. The next question is, whether this memorial was in conformity with the statute. The statute 9 G. 2, c. 5, s. 1, requires that there shall be two attesting witnesses to the assignment, and that one of the witnesses to the memorial, shall be an attesting witness to the assignment. There is nothing to shew that Alicia Leyden's execution of the assignment and memorial was attested by two witnesses. Not only is it necessary that two witnesses shall be present at the execution, but the fact that they have so subscribed must appear on the face of the record. In *Wright* v. *Wakeford* (4 Taunt. 213), it was held, by Heath, J., Lawrence, J., and Chambre, J.,—against the opinion of Sir J. Mansfield,—that a power to trustees, with the consent of the cetteux que trust, testified by writing under their hands and seals, attested by two or more credible witnesses, to make sale of lands, is not well pursued, if the attestation be only "sealed and delivered" in the presence of the two witnesses; and that an attestation added after many years, witnessing the signing, sealing, and delivery, at the time of making the deed, will not supply the defect. And the opinion of the three puisne judges was afterwards acted upon by the court of King's Bench in *Doe d. Mansfield* v. *Peach* (*b*)[2]. [Cresswell, J. Is the attestation by two witnesses, the "perfection" of the memorial spoken of in the statute?] It is submitted that it is. It clearly would not be perfected unless attested in the manner required by the statute.

(*a*) By Lord Chancellor King, in *Lord Carteret* v. *Paschal*, 3 P. Wms. 197, and by Lord Cottenham, in *Honner* v. *Morton*, 3 Russ. 65.

(*b*)[1] See 1 Sch. & Lefroy, 14.

(*b*)[2] 2 M. & Selw. 576. And see *Moodie* v. *Reid*, 1 Madd. 516, 7 Taunt. 355; *Doe d. Hotchkiss* v. *Pierce*, 6 Taunt. 402; *Wright* v. *Barlow*, 3 M. & Selw. 512.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

[611] This was an action of debt, brought by the plaintiff as assignee of an Irish judgment entered up on a warrant of attorney. [His lordship stated the pleadings and the facts, ut ante, 592.]

With regard to the evidence, we are of opinion that the examined copy of the inrolment of the memorial, was good evidence of the assignment; as was held by Lord Redesdale in *Hobhouse* v. *Hamilton* (1 Sch. & Lef. 207); and that, for anything appearing on the face of it, the execution of the assignment and memorial was attested by the two witnesses, whose attestation was in general terms—"Signed and sealed in the presence of John Shevlan Maloney and Daniel Charles Leyden."

If the first assignment was inoperative, for want of due attestation, it might be contended that the second, being executed by Francis Leyden, as well as Rumley, would be valid and effectual, if Francis Leyden had power to assign, as alleged in the declaration, and denied by the first plea. The main question, therefore, arises on the issue so raised, viz. whether, on the marriage of Francis Leyden with Alicia Fitzgerald, the right to assign the judgment became vested in him. The judgment being a chose in action of the wife before her marriage, he could not, without the aid of the 9 G. 2, c. 5, have made any valid disposition of it, unless it had first been reduced into possession. In Co. Litt. 351 b., the law is stated in these terms:—"The marriage is an absolute gift of all chattles personal in possession in her own right, whether the husband survive the wife or no: but, if they be in action, as, debts by obligation, contract or otherwise, the husband shall not have them, unless he and his wife recover them." *Garforth* v. *Bradley* (2 Ves. sen. 675), *Purdew* v. *Jackson* (1 Russ. 19), *Honnor* v. *Morton* (3 Russ. 65), **[612]** and *Ellison* v. *Elwin* (13 Simons, 309), all recognise that rule. Nor could the husband have maintained any proceeding to reduce this judgment debt into possession, without making his wife a party: Bac. Abr. Baron and Feme (F.), pl. 14 (*b*); Com. Dig. Baron and Feme (F. 2); *Milner* v. *Miles* (3 T. R. 627).

A case was cited at the bar, from Viner's Abridgment (vol. iv. p. 44, title Baron and Feme (F.), pl. 12)—"If a feme who has a term or interest, as executrix, by statute-merchant, takes baron, the baron may grant over the interest without the feme; and good, in assise:" and Bro. Abr. Grants, pl. 157 (citing 24 E. 3, fo. 63), is referred to. The reason appears in Bro. Abr. Baron and Feme, pl. 59 (citing 37 Ass. pl. 11), viz. that the term or interest was only a chattel, of which the husband might dispose. Now, the statute 9 G. 2, c. 5 (Irish), begins by reciting, "whereas, judgments, statute-staple, and statutes-merchant, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees; and whereas assignees of such judgments, as the law now stands, cannot revive or discharge the same in their own names, but in the names of the conusees of such judgments, &c., or their representatives, which is often attended with great inconveniences, and the conusee may, after such assignment, enter satisfaction on the record of the judgments, &c., without the knowledge or consent of the assignee." The mischief to be remedied, therefore, was, that the assignees of judgments, &c., had equitable securities only, which might be afterwards affected by the misconduct of the assignors. For remedy thereof, it was enacted, "that, from and after, &c., where any **[613]** conusee or conusees of a judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, shall assign the same to any person or persons whatsoever, such conusee or conusees, his, her, or their executors or administrators, shall also perfect a memorial of such assignment." The statute then provides for the inrolment of that memorial of record, with certain formalities. Section 2 provides, that, "after such memorial has been entered on the roll, the assignee, his or her executors, administrators, or assigns, and no other person, may revive the judgment, and issue execution, and acknowledge satisfaction, in his or her own name; and that such assignee, his or her executors or administrators, may, from time to time, assign the same over, in manner aforesaid."

The object and effect of the statute is, to give legal securities to those assignees of judgments, who before had only equitable securities, to enable them to have execution

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(*b*) Citing H. 43 E. 3, fo. 10, pl. 31. In that case, the obligation was made to the husband and wife during coverture.

of them in their own name, and to protect the conusors who paid to assignees the money secured by such judgments. Francis Leyden, the husband of Alicia Fitzgerald, is not, by the words of the statute, enabled to assign. He was not the conusee of the judgment, nor the representative of the conusee; nor did he, by his marriage, acquire a disposing power over it. And we cannot discover any intention in the legislature to give a disposing power to those who had it not before, nor any words to effect such an object.

We are, therefore, of opinion that Francis Leyden did not, by reason of his intermarriage with Alicia Fitzgerald, become entitled to the said judgment; nor did the right thereto, and to assign the same, become vested in him; and, consequently, the verdict on the first issue joined, must be entered for the defendant.

The second issue is on the plea denying that Francis Leyden and Alicia his wife assigned to Rumley,—which **[614]** puts in issue the effect of the deed executed by Francis Leyden and Alicia his wife: and, if we are right in holding that Francis Leyden did not, by his marriage, acquire a right to assign, it follows that the verdict on this issue also must be entered for the defendant.

On the third and fourth issues, it will remain, as found, for the plaintiff; and also on the sixth, seventh, and ninth.

On the fifth, eighth, and tenth, it must be entered for the defendant.

Rule accordingly.

ELLIS *v.* WATT, Executor of Trenchard. Nov. 24, 1849.

[S. C. 7 D. & L. 299; 19 L. J. C. P. 113.]

A defendant sued in a county-court as an executor, pleaded plene administravit, and judgment was given for the plaintiff, for the debt, to be levied of assets quando acciderint. The plaintiff afterwards took out a summons, suggesting a devastavit:—Held, no ground for a prohibition,—although the summons was irregular, in not stating that the assets had come to the defendant's hands after judgment.

The plaintiff having levied a plaint for 13l. 15s. 10d. in the Wimborne Minster County-Court of Dorsetshire, against the defendant, as the executor of one Trenchard, the defendant, on the 15th of September, 1849, appeared and pleaded plene administravit.

The judge gave judgment for the plaintiff for the amount claimed, to be levied of assets quando acciderint, and directed the defendant to pay the costs forthwith, which was done. Some time afterwards, the defendant was served with a summons out of the same county-court, suggesting a devastavit, which, upon the hearing, on the 13th of October, was dismissed by the judge, on the ground that such summons varied from the judgment given by the court. On the 29th of October, another summons was served, also suggesting a devastavit, in which the informality contained in the first was corrected. It appeared, that, on the hearing of the former summons, the judge intimated his intention of investigating and adjudicating the defendant's executorship accounts. **[615]** The defendant in his affidavit swore that no assets had come to his hands since the judgment had been given.

Channell, Serjt., now moved for a rule to shew cause why a prohibition should not issue to the judge of the county-court, to restrain further proceedings on the last-mentioned summons. There is no doubt that the proper course, in the superior courts, when judgment against the future assets has been obtained, is to bring a scire facias on the judgment, and to suggest that assets have come to the hands of the defendant: Williams on Executors, p. 1705. Here, the summons does not say when the assets came to the defendant's hands. It may mean that they came before plea pleaded; and, if so, it would be in direct contradiction to the plea, which was found for the defendant. By the 9 & 10 Vict. c. 95, s. 78, the judges are authorised to make rules of practice for the county-courts, but, cases to which such rules do not extend, or which are not provided for by the statute, are to be governed by the practice of the superior courts. [Maule, J. Your application is for a prohibition, which can only be granted where the inferior court has not jurisdiction to proceed.] There may be some doubt, certainly, whether this is a case for a prohibition; but the judge is proceeding in a way not warranted by the practice of the superior courts;

and it is submitted that this summons is in the nature of a scire facias, which the county-court has no jurisdiction to grant. In *Woodhams* v. *Newman* (ante, vol. vii. p. 654), it was held that a defendant is not entitled to enter a suggestion to deprive a plaintiff of costs, under the 129th section of the county-courts act, where the debt or demand originally exceeded 20l., but is reduced below **[616]** that sum by a set-off. Here, the form of summons is that prescribed by the act, where the judgment recovered is de bonis testatoris. By r. 32, "where judgment has been given against executors and administrators, that the amount be levied upon assets of the deceased quando acciderint, the plaintiff may at any time proceed by plaint against them, suggesting that assets have come to their hands; and the court shall proceed and give judgment thereon," &c. The plaintiff should have proceeded under that rule, by a new plaint in the nature of a scire facias, suggesting a devastavit.

Maule, J. It is impossible to say that the judge has not jurisdiction. The parties, however, have fallen into a mistake, in applying a form given by the judges on a judgment de bonis testatoris to a judgment quando acciderint. The defendant may raise an objection, in the nature of a demurrer, to the form of the summons. I think your point is good, and that the judge ought so to decide; in like manner as this court would hold a scire facias to be bad, for not shewing whether assets fell before or after plea pleaded.

V. Williams, J. We must give the judge of the county-court credit for knowing the ordinary law on this subject.

Per curiam. Rule refused.

[617] The Duke of Brunswick *v.* Slowman and Others. Nov. 24, 1849.

The want of a date in the jurat of an affidavit, is not cured by a reference to it in another affidavit, as "an affidavit of A. B. sworn on such a day."—Semble, that this court will not give costs where a rule is discharged solely on the ground that the affidavit upon which it is founded has a defective jurat.

Lush, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the defendant Miles should not be discharged out of custody as to this action, with costs, on the ground that the arrest was contrary to good faith, and also that the ca. sa. under which Miles had been arrested, was void by reason of an informality, to which the attorney who appeared for the other defendants in the cause had by a judge's order undertaken, without Miles's assent, not to object. The motion was founded upon the affidavit of the defendant Miles, and also the affidavit of James Berry, his attorney.

Allen, Serjt., and Henniker, objected that Miles's affidavit could not be used, the jurat being defective. They referred to *Blackwell* v. *Allen* (7 M. & W. 146) and *Cobbett* v. *Oldfield* (16 M. & W. 469) to shew that an affidavit without date, or with a jurat otherwise defective, cannot be received. [Maule, J. For any thing that appears, this affidavit may have been sworn after the rule was granted.]

Lush, contrà. In *Blackwell* v. *Allen*, there was no date whatever to the jurat: the affidavit might have been a stale one. Here, the jurat has the month and the year; and the affidavit speaks of something that took place after the 13th. [Wilde, C. J. Every affidavit must be certain, and must not be left to be eked **[618]** out by extraneous averments, upon an indictment for perjury.] The other affidavit, which refers to the defective affidavit, cures the defect. [Maule, J. It refers to it merely as "an affidavit of James Miles, sworn the 16th day of November instant." That does not help you. You cannot make use of it.]

Lush then sought to support his rule upon Berry's affidavit only, but failed.

Allen, Serjt., asked that the rule might be discharged with costs.

Wilde, C. J. If this rule had been moved solely on the ground that the arrest of Miles was against good faith, and had been met by a technical objection, I should have thought the rule should have been discharged without costs (*a*). But, inasmuch

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(*a*) In *Blackwell* v. *Allen*, the court of Exchequer intimated, that, in future, they would—in conformity with the cases of *Cooper* v. *Archer*, 12 Price, 149, and *Houlden* v. *Fasson*, 6 Bingh. 236, 3 M. & P. 559,—under similar circumstances, discharge a as the rule was also moved on another ground, viz. to set aside the ca. sa., contrary to the undertaking entered into by the judge's order, for which no good ground has been shewn, I think the rule should be discharged with costs.

The rest of the court concurring,

Rule discharged, with costs.

[619] SAINTER *v.* FERGUSSON. Nov. 24, 1849.

The plaintiff obtained a verdict and judgment for 500l. damages, and 135l. 6s. costs: the defendant afterwards became bankrupt, and the plaintiff proved under the fiat for the costs only:—The court refused to enter a suggestion of the proof upon the roll,—there being no precedent, and, in the opinion of the court, no necessity, for it.

The plaintiff having obtained judgment against the defendant in an action for the breach of an agreement, for 500l., and 135l. 6s. for costs, in Easter term last (vide ante, vol. vii. p. 716), and the defendant having become bankrupt, the plaintiff, on the 7th of June last, proved under the fiat for the costs only.

Townsend now moved for a rule calling upon the plaintiff to shew cause why a suggestion should not be entered upon the roll, of the fact of the plaintiff having elected to prove under the fiat. The 59th section of the 6 G. 4, c. 16, enacts "that no creditor who has brought any action, or instituted any suit, against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and, in case such bankrupt shall be in prison or custody at the suit of, or detained by, such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: provided that such creditor shall not be liable to the payment to such bankrupt or **[620]** his assignees, of the costs of such action or suit so relinquished by him," &c. The debt and costs form one entire debt (*a*): the proof of a part, therefore, is an election on the part of the plaintiff to avail himself of the fiat altogether. [Maule, J. Have you any precedent for such an application as this?] This course was suggested in *Kemp* v. *Potter* (6 Taunt. 549). There, the action was commenced on the 18th of July, 1815, and the defendant who was then a bankrupt, on the 21st of July obtained his certificate. On the 17th of November, the defendant filed a plea, of his bankruptcy and certificate. The plaintiff had within the term exhibited under the commission an affidavit of the debt for which this action was brought; whereupon, the defendant had ruled the plaintiff to reply; and the plaintiff obtained a rule nisi to discharge that rule, and all subsequent proceedings, with costs, declaring that he abandoned his action, and had made his election to proceed under the commission. Lens, Serjt., opposed the rule, contending that the defendant was entitled to some certain assurance that the action was at an end; and that the plaintiff ought to discontinue. And Gibbs, C. J., said: "The defendant is not proceeding for costs in this case; for, he never can get them. Perhaps he has some reason to complain of the plaintiff, in that he has commenced his action just at the time when the bankrupt is about to obtain his certificate, and has put him to considerable expense. The defendant having pleaded, rules the plaintiff to reply; and this application is made to discharge that rule with costs: and the question is, whether this is not the proper course for the defendant to take, in order to compel the plaintiff to give him that satisfaction to which he is entitled; for, I think the defendant is entitled to have some entry or suggestion entered on the record, so that it may appear that the defendant **[621]** will be no further troubled in this action; for, otherwise,

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rule with costs. And they followed that course in *Frost* v. *Hayward*, 10 M. & W. 673, and also in *Cobbett* v. *Oldfield*, ubi supra.

And see *Pardoe* v. *Territt*, 5 M. & G. 291, 6 Scott, N. R. 273; *Lackington* v. *Atherton*, 5 M. & G. 292, n., 6 Scott, N. R. 240.

(*a*) Vide *Berry* v. *Irwin*, ante, p. 532.

the defendant stands under the apprehension that the action may at some time be proceeded in."

WILDE, C. J. The plaintiff has, after judgment, proved under the fiat for a part of the judgment-debt. It seems to me that the fact of such proof is quite as good as the suggestion you ask for.

MAULE, J. It does not appear that any such suggestion has ever been entered, or attempted to be entered, on any record whatever, notwithstanding the desire expressed by Lord Chief Justice Gibbs, in *Kemp* v. *Potter*, to originate such a practice. The case being at an end, I cannot discover any advantage to be gained by the course proposed.

The rest of the court concurring,

Rule refused.

DICK *v.* BEAVAN. Nov. 26, 1849.

An affidavit for a distringas to outlawry, stating, that the answers to the attempts made to serve the defendant with the writ of summons at his last known residence here, were, that the defendant is abroad; that all reasonable means and diligence have been ineffectually used to serve the defendant personally, and that the deponent believes the defendant keeps out of the way to avoid service,—is sufficient; a less degree of particularity being required on such an application, than on moving for a distringas to compel appearance.—In proceeding to outlawry by writ of summons and distringas, the first exigi facias is properly tested on the day on which the distringas is returned.—A judge's order for a distringas was made and dated on the 12th of October, upon a defective affidavit: the affidavit was amended, and re-sworn on the 13th, and the order was then delivered out as of the 12th. Upon a motion to rescind the order and subsequent proceedings thereon, the court allowed the date to be altered to the 13th, upon payment, by the plaintiff, of the costs of the amendment and of the application to rescind the order.

A distringas for the purpose of proceeding to outlawry against the defendant, was applied for and granted by Talfourd, J., at chambers, on the 12th of October [622] last, upon an affidavit stating that the deponent, on the 29th of September, attended at the last known place of abode of the defendant, situate and being No. 14 Stratford Place, Oxford Street, in the county of Middlesex, for the purpose of serving him with a copy of the writ of summons, and then and there saw and was answered by a person who stated his name to be Thomas Emney, who, on being asked by the deponent, if the defendant lived there, replied that the defendant had left about ten months since, and had gone to reside abroad; he believed, at Paris. The affidavit then proceeded to state, in the usual way, appointments to call, and calls pursuant thereto, at the place before mentioned, for the purpose of serving the defendant; that similar answers (viz. that the defendant was abroad) were on each occasion received, and that, on the last call, a copy was left: and it continued thus,—"And this deponent further saith that he hath used all reasonable means and all possible diligence to serve the defendant personally with a copy of the said writ of summons; but, on neither of the said occasions, nor at any other time after the issuing of the said writ, was this deponent able to effect such service; and that, for the reasons aforesaid, this deponent verily believes the said defendant kept, and still keeps, out of the way, to avoid personal service of the said writ:" and concluded with negativing the defendant's appearance to the writ, "according to the exigency thereof."

The order for the distringas was made and dated on the 12th of October. The defect in the last paragraph of the affidavit being afterwards discovered, the affidavit was amended, and re-sworn on the 13th, on which day the order was delivered out by the judge's clerk.

Prideaux, on a former day in this term, moved to rescind the order of the learned judge, and all sub-[623]-sequent proceedings thereon, for irregularity, with costs. He submitted, that the affidavit sworn on the 13th of October could afford no foundation for an order bearing date the preceding day; and that, if an indictment for perjury were framed upon it, it would not appear that any judicial proceeding had been taken thereon.

Further, he submitted that the affidavit did not warrant the order, inasmuch as it contained no statement to justify an inference that the defendant had gone abroad with a view to avoid his creditors. In *Grover* v. *Hindmarsh* (7 Dowl. P. C. 607), it was held, that, in order to obtain a distringas to compel appearance, it is not sufficient to shew, that, at the calls, the defendant has been stated to be abroad. [Maule, J. More strictness has been required in the affidavit on moving for a distringas to compel appearance, than where it is to found proceedings to outlawry.] In *Simpson* v. *Lord Graves* (2 Dowl. P. C. 10), it was expressly held, that, where the defendant is absent at the time of the endeavour to serve a writ of summons, a distringas cannot be moved for, unless grounds are shewn from which the court can infer that the defendant is keeping out of the way to avoid being served. [Maule, J. It does not appear that that was a distringas to outlawry.] It must have been. [Wilde, C. J. It is much too doubtful to be relied upon as an authority.] In *Round* v. *Brown* (1 Dowl. N. S. 860), it was shewn by letters from the defendant, that he was abroad for the purpose of avoiding process. Here, there is a total absence of facts from which the court can see any intent to delay or avoid process.

By the 3rd section of the uniformity of process act, 2 W. 4, c. 39, the distringas is to be directed to the sheriff of the county wherein the dwelling-house or place of abode of the defendant shall be situate, and a **[624]** copy of such distringas served on the defendant if he can be met with, or, if not, is to be left at the place where such distringas is executed. [Maule, J. That applies to the distringas to compel appearance. The distringas to outlawry is regulated by the 5th section, which provides, that, upon the return of non est investus and nulla bona as to any defendant against whom such writ of distringas as thereinbefore mentioned shall have issued, it shall be lawful to proceed to outlaw such defendant by writs of exigi facias and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of capias ad respondendum issued after an original writ.] That refers to, and incorporates, the 3rd section. The service of the distringas at the place where it is executed, is a condition precedent to the making the return of non est inventus and nulla bona. [Maule, J. Where was this writ executed?] Nowhere.

He also moved that the writs of exigent and proclamations, and all subsequent proceedings, might be set aside for irregularity, on the ground that the first writ of exigi facias was tested on the day on which the distringas was returned, instead of on the return day,—citing *Vere* v. *Gowar* (3 N. C. 503, 4 Scott, 287). [Maule, J. That is precisely in accordance with the 5th section of 2 W. 4, c. 39, and all the books of practice lay it down that the exigi facias is properly tested on the day of the return of the distringas (*b*).]

WILDE, C. J. The court think you are entitled to a rule upon the first point, but that neither of the others can be sustained.

[625] Wallinger, Serjt., now shewed cause. The fact of the learned judge's order bearing date on the day on which the affidavit had been originally sworn, gives rise to no discrepancy or ambiguity, inasmuch as it was not delivered out, and therefore was not operative as an order, until the 13th, when the affidavit was re-sworn. [V. Williams, J. You should have had the order amended at the time. Wilde, C. J. It is clearly an irregularity: but I think it is competent to the court to allow it to be amended, on payment of costs.]

Prideaux, in support of his rule. The court or a judge has no jurisdiction to make an order for a distringas, unless the affidavit upon which the application is founded, is duly sworn at the time the order is made. [Maule, J. In point of fact, the order here was not issued until the affidavit had been perfected.] It was a complete and perfect order on the 12th. This is not a case in which the court will allow an amendment. In *Doe d. Hill* v. *Tollett* (1 D. & L. 121), where a party obtained a rule nisi upon affidavits which were badly intituled, and, discovering his mistake, he applied to the court for leave to take the affidavits off the file, and amend and re-swear them,—the court refused to allow such a course to be taken, on the ground that the affidavits would appear to have been sworn after the rule was drawn up; and they also refused to allow a fresh rule to be drawn up, on amended affidavits, but suggested a new motion, upon affidavits disclosing the circumstances of the error, giving no opinion, however, upon the validity or effect of such new motion.

(*b*) See *Cox* v. *Beavan*, ante, p. 334, and 337, note (*a*).

WILDE, C. J. The court is perfectly satisfied that the only objection here is, that the order of my brother [626] Talfourd was by mistake misdated. Until delivered out, it was no order at all, and could not be available for any purpose. The only difficulty we have felt, is, as to the amendment. Now, I find many analogous cases in which amendments have been made. In *Stevenson* v. *Castle* (1 Chitt. Rep. 349), a writ of ca. sa. varying from the judgment in the statement of the sum recovered, the court allowed the writ to be amended, on shewing cause against a rule for setting it aside, on payment of costs,—the defendant undertaking to bring no action. So, in *Walker* v. *Hawkey* (5 Taunt. 853, 1 Marsh. 399), where a writ of capias ad respondendum was made returnable on a day certain, instead of being made returnable on a general return day, the court allowed the writ to be amended,—even after a rule nisi had been obtained to quash it for irregularity. I perfectly well remember having myself been concerned frequently in similar motions. I think the rule should be discharged, on payment of costs by the plaintiff, and that the plaintiff should have liberty to amend the judge's order, on payment of costs.

V. WILLIAMS, J. This is as clear a case as could possibly be conceived. I think it would be the height of absurdity to yield to Mr. Prideaux's objection.

Rule discharged accordingly.

End of Michaelmas Term.

[627] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND UPON WRITS OF ERROR, IN THE EXCHEQUER CHAMBER AND HOUSE OF LORDS, IN MICHAELMAS VACATION, IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco in this vacation, were—Maule, J., Cresswell, J., V. Williams, J., Talfourd, J.

LORD v. HALL. Dec. 6, 1849.

[S. C. 19 L. J. C. P. 47.]

Upon an issue as to the indorsement of a promissory note by J. S., it was proved, that the wife of J. S. had the general management of his business; that she was in the habit of drawing, accepting, and indorsing bills and notes in his name; and that the name of J. S. was indorsed upon the note in question by his daughter, by the direction and in the presence of her mother, by whom the note was afterwards handed to the plaintiff:—Held, that it was a question of fact for the jury, whether the indorsement so made was within the scope of the wife's authority; and that the evidence warranted them in concluding that it was.

Assumpsit. The first count of the declaration alleged that the defendant, on the 3rd of May, 1844, made his promissory note in writing, and thereby [628] promised to pay to the order of Joseph Shuttleworth the sum of 25l., three months after the date thereof, and delivered the same to the said Joseph Shuttleworth; and that Joseph Shuttleworth indorsed the same to the plaintiff, &c.

Second plea,—that the said Joseph Shuttleworth did not indorse the note, modo et formâ; whereupon issue was joined.

The cause was tried before V. Williams, J., at the first sitting at Westminster, in Trinity term last. It appeared that Shuttleworth was a mathematical instrument maker; that his wife was in the habit of managing all his affairs, and, amongst other things, drawing, accepting, and indorsing bills in his name; and that the note in question was indorsed by Shuttleworth's daughter, in his name, in the presence and by the direction of her mother; and that it was then delivered by the latter to the plaintiff.

On the part of the defendant, it was insisted that the issue on the indorsement must be found for the defendant; for, that the mother had no right thus to delegate to her daughter the authority to indorse.

The learned judge overruled the objection, and directed a verdict for the plaintiff for 31l. 10s., the amount of the note and interest,—reserving leave to the defendant to move to enter a verdict for him on the second issue, if the court should think the indorsement by Shuttleworth was not well proved.

Humfrey accordingly obtained a rule nisi, against which

Whitehurst now shewed cause. It appeared at the trial that Shuttleworth's business was generally managed by his wife; that she was in the habit of drawing, accepting, and indorsing bills and notes in his name; [629] and that she, having previously by the hand of her daughter indorsed the note in question, delivered it to the plaintiff. The indorsement by the daughter by the direction and in the presence of her mother, was clearly the act of the latter: Qui facit per alium facit per se. This is not, as suggested, a delegation of a delegated authority. Suppose Mrs. Shuttleworth, from some accidental cause, were rendered unable to make the indorsement with her own hand, could it be said that she was precluded from using the hand of another person for that purpose? A recognition of an act of an agent binds the principal. Where a man hands over a bill or note with his acceptance or indorsement upon it, he is estopped from afterwards saying that the acceptance or the indorsement is not his: and here Shuttleworth would be estopped from denying his indorsement, by the act of his acknowledged agent in delivering over the note, indorsed, to the plaintiff.

Humfrey, in support of his rule. The note is handed over by Mrs. Shuttleworth to the plaintiff, with an unauthorised,—a forged,—indorsement by the daughter. How can the defendant be estopped, by something done to the note after it had passed out of his hands, from denying that the indorsement was the indorsement of Shuttleworth? [Maule, J. Shuttleworth was estopped: he has done something which amounts to an order. If the indorsement by the daughter was made under the authority of the father, it is no forgery. The substantial right of the defendant is, to be secure that he pays the right person. The question is whether this was not really the act of the wife.] If the wife might lawfully delegate her authority to the daughter in this way, what is there to prevent the daughter delegating it in her turn to another? [Maule, J. It is conceded that one having an authority of this sort, cannot dele-[630]-gate it.] In *Toms, App., Cuming, Resp.* (7 M. & G. 88, 8 Scott, N. R. 910, 1 Lutw. Reg. Cas. 200), this court held that a notice of objection under the registration act, 6 & 7 Vict. c. 18, s. 17, must be signed by the hand of the party objecting. [Maule, J. Nobody denies the power of the legislature to require a signature by the hand of the party. If the authority given to the wife here was, to indorse by all means which would make the indorsement enure as an indorsement by her, this clearly would be an execution by her of that authority, and no delegation.] To hold that the wife could by any other hand than her own exercise the authority confided to her by her husband, would be to lay down a doctrine which will be very embarrassing to commercial transactions.

Maule, J. It seems to have been put at the trial, as a question of law, whether the rule, delegatus non potest delegare, applied, so as to entitle the defendant to a verdict upon the second issue. It seems to me, however, that this was far from being a correct view of the matter: the maxim has no application at all here. The question is, whether, upon the evidence, the wife was not acting in the strict exercise of the authority conferred upon her by her husband, in doing what she did, viz. in requesting a third person to do it in her presence. There was evidence that the wife had the general management of her husband's business. And, when he authorised her to draw, accept, and indorse bills in his name, that may fairly be extended to authorising her to select some person, pro hâc vice, to write the name of her husband for her. It may be that this may lead to some inconvenience. But, her husband having trusted her to exercise her discretion as to drawing, accepting, and indorsing, may be assumed to [631] trust her also to use her discretion to select the hand of another to carry her intention into effect. I think, and I believe the rest of the court agree with me, that there was evidence for the jury upon this issue: and there could be very little doubt as to the conclusion the jury would come to. I therefore think the verdict ought not to be disturbed. I find a case of *Ex parte Sutton* (2 Cox, B. C. 84), which may be worth considering with reference to this subject. It was there held that an authority given to A. to draw bills in the name of B., may be exercised by the clerks of A. The way in which that case seems to me to apply to the present, is this,—the lord chancellor treats the extent of the authority as a matter of fact to be inferred from the evidence: and that confirms the view we have taken upon this occasion.

CRESSWELL, J. I agree with my brother Maule that this rule ought not to be made absolute. Both parties seem to have treated the question at the trial as one of law. That was clearly a mistake. It was purely a question for the jury, whether or not the evidence shewed an authority given by the husband to the wife to indorse in the way which was adopted here. I am not prepared to say what verdict I should have been disposed to concur in if I had been on the jury. Many reasons might be urged to influence a decision either way. The authority of an agent ought not to be unduly extended.

The rest of the court concurring,

Rule discharged.

[632] VINES v. ARNOLD. Dec. 4, 1849.

[S. C. 7 D. & L. 277; 19 L. J. C. P. 98; 14 Jur. 350.]

A. having a demand against B. for 17l. and 21l. 10s., in respect of two several parcels of goods, levied a plaint against him in the county-court for the first-mentioned sum: on the day appointed for the hearing, A. did not appear; whereupon, B. admitting the cause of action, the judge pronounced judgment for A. for 17l. A. afterwards brought an action in this court for the 21l. 10s.; to which B. pleaded the recovery against him in the county-court,—averring that A. had at the hearing abandoned the excess of his demand beyond the 17l., pursuant to the 63rd section of the 9 & 10 Vict. c. 95:—Held, on a traverse of that allegation,—that the above facts disproved the plea; for, that the mere levying a plaint for a part of the demand, was not, per se, an abandonment of the excess.

Debt, for goods sold and delivered.

Pleas,—first, never indebted,—secondly, that, before the commencement of the suit, and at the time of the entering of the plaint, and of the issuing of the summons thereafter mentioned, to wit, on the 16th of January, 1848, the defendant dwelt within the district for which the Lambeth County-Court of Surrey, held at Denmark-Hill, Camberwell, was then, and still is, holden, and within the jurisdiction of that court; that the plaintiff then dwelt within twenty miles from the defendant, and that the plaintiff was not, nor was the defendant, an officer of that court; that the defendant was then indebted to the plaintiff, as well in the said moneys, and for and in respect of the said causes of action, in the declaration mentioned, as also in the sum of 17l. for the price and value of goods before then sold and delivered by the plaintiff to the defendant, at his request; that the plaintiff then had cause of one action against the defendant, as well for and in respect of the said moneys and causes of action in the declaration mentioned, as for the said 17l., and the same wholly arose within the jurisdiction of the said court; that the said cause of action then was for more than, and exceeded, the sum of 20l., and amounted in the whole to a larger sum, to wit, 38l. 10s.; that [633] the said cause of action then formed and constituted together, and was, one entire debt and demand against the defendant, and for the recovery of the whole of the same a plaint then might and could have been entered by the plaintiff against the defendant at the said county-court, under the statute made and passed in the session of parliament held in the ninth and tenth years of the reign of our Lady the now Queen, intituled, "An Act for the more easy recovery of small debts and demands in England," and he might by law, and according to that statute, have recovered the same in and by a plaint and action at his suit against the defendant in the said court, if the same had not been more than 20l.; that the plaintiff thereupon, for the recovery of the said sum of 17l., to wit, on, &c., commenced and brought a suit against the defendant in the said Lambeth County-Court of Surrey, held at Denmark-Hill, Camberwell, as aforesaid; that, for that purpose, the plaintiff then entered, in a book kept for that purpose, at the office of the clerk of the court, a plaint in writing, stating the names and last known places of abode of the plaintiff and the defendant, and the substance of the action intended to be brought, according to the statute in such case made and provided; that the plaintiff therein stated that the said action was brought for the recovery of the said sum of 17l., and the said plaint was then numbered A. 245, according to the order in which it was entered; that, the said plaint being so entered, thereupon, to wit, on, &c., a summons, stating the substance of the said action, and bearing in the margin thereof the same number as the said plaint was numbered, was, within the jurisdiction of the said county-court, issued out of that court, under the seal thereof, at the suit of the plaintiff, against the defendant, and whereby the defendant was summoned to appear at the Lambeth County-Court of Surrey, to **[634]** be holden at Denmark-Hill, Camberwell, on the 3rd of February, 1848, at the hour of twelve at noon, to answer the plaintiff in an action on contract for the recovery of the said sum of 17l.; that he, the defendant, having appeared in the said action at the said county-court, according to, and as required by, the said summons, and having defended the said action in the said county-court, such proceedings were thereupon had in that action, and upon the said plaint, in that court, that afterwards, to wit, on the 3rd of February, 1848, the said action came on to be tried in the said Lambeth County-Court, at and within the jurisdiction of the said court, before G. C. Esq., the judge thereof, at which time and place the plaintiff was duly, as required by law, called upon to appear, but did not appear; that the defendant then and there did appear, and then admitted the said cause of action to the full amount of the said sum of 17l.; that thereupon it was adjudged by the said court that the plaintiff should recover against the defendant the said sum of 17l. for his debt, together with the costs of suit, amounting to the sum of 2l. 8s. 8d.; that it was then ordered by the said court that the defendant should pay the same by instalments of 1l. 10s. every four weeks, until the same should be wholly paid, the first payment to be made on, &c.; that the said judgment was then entered of record in the said court,—as by the record and proceedings thereof, remaining in that court, would more fully appear; that the said judgment had not been rescinded, reversed, or altered; that the plaintiff did, to wit, on the said hearing of the said action, abandon all demands in respect of, and the whole of, the said cause of action against the defendant, save and except as to the said sum of 17l.; and that the said judgment of the said court upon such plaint as aforesaid was, and still is, according to the said statute, in full discharge of all de-**[635]**-mands in respect of the said cause of action. The plea then concluded with averments of identity of the parties, and that the cause of one action in the county-court was the same identical cause of action as that in the declaration mentioned.

The plaintiff replied, traversing the alleged abandonment of the excess beyond 17l. in the county-court. Issue thereon.

The cause was tried before Coltman, J., at the second sitting at Guildhall, in Hilary term last. The facts were as follows:—The plaintiff was a flour-factor; the defendant a baker, residing and carrying on his business within the jurisdiction of the Lambeth County-Court. On the 21st of January, 1847, the defendant purchased of the plaintiff ten sacks of flour, at 35s. per sack; and a note of the amount, 17l., was given to him by the plaintiff. On the 1st of February, in the same year, the defendant bought of the plaintiff other ten sacks, at 43s. per sack; and on that occasion a bill of both parcels were sent in, amounting to 38l. 10s., deducting 4l. 10s. for short weight and damage.

In January, 1848, the plaintiff levied a plaint against the defendant in the Lambeth County-Court, for a debt of 17l. The matter came on for hearing on the 3rd of February, when, the defendant being present, and admitting the debt, but the plaintiff not appearing, the judge made an order for the payment of the amount by monthly instalments of 30s. each,—the costs of the defendant's attendance to be allowed, if the plaintiff declined to take the order. It did not appear that the plaintiff had availed himself of this judgment. He afterwards brought this action to recover the 21l. 10s., for the second parcel of flour.

On the part of the plaintiff it was insisted, that, inasmuch as he had not appeared in the county-court, and consequently there had been no abandonment of the **[636]** excess of his debt over 20l., the case was not affected by the 63rd section of the 9 & 10 Vict. c. 95 (*a*).

(*a*) Which enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said [county] courts, but any plaintiff having a cause of action for more than 20l., for which a plaint might be entered under this act if not for more than 20l., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20l.; and the judgment of the court upon such plaint shall be in full

The learned judge directed a verdict to be entered for the plaintiff on the first issue, and for the defendant on the second,—reserving to the former leave to move to enter a verdict for him on the second issue also, damages 21l. 10s., if the court should be of opinion that the evidence negatived the second plea.

Hawkins, in Hilary term last, obtained a rule nisi accordingly. He submitted, that, the plaintiff not appearing in the county-court, the judge thereof could not, and in point of fact did not, put him to his election to abandon so much of his entire demand as exceeded 20l.; that the proper course for the defendant to pursue in the county-court, was, to call upon the judge to nonsuit the plaintiff for not appearing, or, in the event of his appearing, to object to the jurisdiction, unless the plaintiff would, under s. 63, elect to take a verdict for 20l., and to abandon the excess. [Maule, J. There may be a verdict for the plaintiff, although he does not appear. The 179th section enacts, "that, if, upon the return day of any summons, or at any continuation or adjournment of the said court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and, if he shall appear, but shall not make proof of his demand to the satisfaction of the court, it shall be lawful for **[637]** the judge to nonsuit the plaintiff, or to give judgment for the defendant; and, in either case, where the defendant shall appear, and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as the judge in his discretion shall think fit; and such sum shall be recoverable, &c.: Provided always, that, if the plaintiff shall not appear when called upon, and the defendant, or some one duly authorised on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the court, if it shall think fit, may proceed to give judgment as if the plaintiff had appeared."]

Joyce now shewed cause. At the time of levying the plaint, the plaintiff had one cause of action only for 38l. 10s.; for, according to the decision of the court of Exchequer in *Aykroyd, In re* (1 Exch. 479, 5 D. & L. 701),—which has since been acted upon in both the other courts,—"cause of action," in the 63rd section of the 9 & 10 Vict. c. 95, means "cause of one action," and is not limited to an action on one separate contract (*b*). And it is admitted on the pleadings in this case, that the debt mentioned in the declaration and the debt claimed in the county-court are identical. [Hawkins, contrà, denied this.] The plaintiff could not split his demand. [Talfourd, J. The issue is, whether or not the plaintiff made his election, under s. 63, to abandon so much of his demand as exceeded the jurisdiction of the county-court.] Suing in the local court was an election. [Maule, J. **[638]** The 63rd section in terms prohibits the splitting of demands so as to bring two suits in the county-court: but it does not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the county-court, and another in the superior court.] The 63rd section expressly provides that the judgment of the county-court upon the plaint "shall be in full discharge of all demands in respect of such cause of action." [Maule, J. That is, where the plaintiff has been called upon and has consented to abandon the excess, "and entry of the judgment shall be made accordingly."] That means merely the legal effect of such a judgment. [Maule, J. I should say it means—something shewing that a larger sum was found to be due, and the excess abandoned.] The replication, it is submitted, does not fairly raise the objection. By seeking to avail himself of the assistance of the county-court, the plaintiff admitted that the matter was within the jurisdiction of that court; and he could only give the court jurisdiction by abandoning all over 20l. [V. Williams, J. All that that proves is, that the trial in the county-court was coram non judice. Maule, J. The defendant, I should think, might waive the condition of abandonment, which was for his benefit.]

Hawkins, in support of his rule. The second plea alleges that the plaintiff did not appear at the hearing; and then it goes on, somewhat inconsistently, to aver that he did, "on the said hearing of the said action, abandon all demands in respect of, and the whole of, the said cause of action against the defendant, save and except as to

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discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

(*b*) I.e. where there is a course of dealing evidencing an intention that the whole shall terminate in one contract. Quære, whether, in the principal case, the sending in of a second bill, including both parcels, was evidence of such an intention.

the said sum of 17l.:" and the replication distinctly traverses this allegation. All the evidence offered to sustain the issue was, that the plaintiff did not appear at the county-court when the cause came on for hearing, and that the defendant admitted the debt, **[639]** and got the judge to give judgment for the plaintiff for 17l. His proper course was to get the cause struck out, or a nonsuit entered. There is no pretence for treating this as a case of abandonment.

Maule, J. I am of opinion that there must be something done by the plaintiff to constitute an abandonment of the excess of the demand, within the 63rd section of the statute. Where the debt exceeds the sum to which the jurisdiction of the court extends, that enures as a defence, and entitles the defendant to judgment, unless the plaintiff elects to bring himself within the jurisdiction, by abandoning the excess. The plaintiff has clearly a right to elect whether he will so abandon, or yield to the objection, and submit to be nonsuited. The legislature never could have intended any thing so unreasonable as Mr. Joyce has contended for; and there certainly are no words in the 63rd section which require us to put such a construction upon it. I think the rule must be made absolute.

Cresswell, J., had gone to chambers, having first intimated his acquiescence in the judgment about to be pronounced.

V. Williams, J. I also am of opinion that the defendant in this case has failed to prove the material allegation in his second plea, which was put in issue by the replication.

Talfourd, J. I am of the same opinion. The 63rd section of the 9 & 10 Vict. c. 95, furnishes strong grounds for supposing that there must be some act of abandonment in the county-court, beyond the mere levying of a plaint, as has been suggested.

Rule absolute.

[640] Devaux and Another v. Conolly. Dec. 10, 1849.

[S. C. 19 L. J. C. P. 71.]

The plaintiffs, merchants in London, ordered of the defendant, a merchant at Singapore, two parcels, of 25 tons and 150 tons respectively, of terra japonica, "provided it can be laid down here, all charges included, at 18s. per cwt." The defendant sent to the plaintiffs invoices and bills of lading representing that two parcels, respective of those weights, had been shipped to their order, and, at the same time, drew bills upon them for the price, which the plaintiffs, upon the faith of the representation contained in the invoices and bills of lading, accepted, and duly paid. Upon the arrival of the goods in London, the net weight,—exclusive of packages, which consisted of baskets and leaves,—proved to be 24 tons and 132¾ tons only. The plaintiffs took the goods, and sold them; and now brought money had and received to recover back the sum over paid, as upon a partial failure of consideration.—Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, and in London to sell it net:—Held, that the plaintiffs were entitled to recover.

This was an action of assumpsit, for money had and received, money paid, and money found to be due on an account stated.

The defendant pleaded non assumpsit.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1848, when a verdict was found, by consent, for the plaintiffs, damages 162l. 11s. 8d., subject to the opinion of the court upon the following case,—for the purpose of which, it was agreed that inferences of fact should be drawn by the court:—

The plaintiffs are merchants in London, in connection with French commercial establishments. The defendant is a partner in a mercantile house at Singapore, trading under the firm of Spottiswoode & Conolly.

The following correspondence took place between the parties, at the dates therein mentioned, and was put in evidence by the plaintiffs:—

"London. 14 January, 1839.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—We have now the pleasure of ad-**[641]**-dressing you a small order for our friend M. S. Legras, of Rouen, viz. twenty-five tons of terra japonica, or gambier, in squares, of good merchantable quality, in baskets, or other suitable packages, provided it can be laid down here, all charges, commission, insurance, and freight included, at a price not exceeding 18s. per cwt. We limit the execution of this order to three months from the arrival of the present, either by original, duplicate, or triplicate.—Yours, &c. "C. DEVAUX & Co."

The terra japonica, or gambier, is a gum obtained from the acacia tree, and is used by dyers.

On the 19th of January, 1839, the plaintiffs wrote to the defendant, as follows:—

"London, 19 January, 1839.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—We confirm our respects of the 14th instant. We have now the pleasure of addressing you the following orders, on account of our friends Messrs. Lefebre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, who order the same on joint account, (inter alia) one hundred and fifty tons of terra japonica, or gambier, in packages, giving the preference to baskets, if the same can be laid down here at a price not exceeding 17s. to 18s. per cwt., all charges, freight, and insurance included. It is understood, if you cannot get all, you may execute any part of the 150 tons. We limit you for the execution of these orders, to from three to four months from the date of the arrival of this letter, by original, duplicate, or triplicate. For the payment of these orders, we shall arrange with Messrs. Small, Col-**[642]**-quhoun, & Co., to whom you will please forward bill of lading and policies of insurance.—Yours, &c. "C. DEVAUX & Co."

Messrs. Small, Colquhoun, & Co., mentioned in the preceding letter, were the defendant's agents in London.

On the 9th of May, 1839, the following letter was addressed by the defendant's house at Singapore to the plaintiffs:—

"Singapore, 9th May, 1839.

"Messrs. Devaux, London."

[This letter related to other transactions. It acknowledged the receipt of the plaintiffs' two letters of the 14th and 19th of January, and contained the following passages:—]

"Your letter of the 19th of January contains an order from you for Messrs. Lefebre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, on joint account, for 100 tons of cutch, &c.; and also for 150 tons of terra japonica, in baskets, provided we can lay it down with you, all charges included, at a price not exceeding 17s. to 18s. per cwt. You limit us, for the execution of these orders, to from three to four months from the arrival of your letter; and we notice, if we cannot execute the whole of the order for the 150 tons of gambier, we may send as much of it as we can. There is at present no vessel loading for Havre; but, should there be, when we have any of the above orders ready for shipping, we will endeavour to get one half of each sent on there.

"We have every reason to expect, unless some very large orders arrive from England, to be able to execute the order for 150 tons of gambier; but, at present, all the large manufacturers of it are engaged to different houses here, for quantities; and, until they have ful-**[643]**-filled their engagements, we cannot get them to contract with us.—Yours, &c. "SPOTTISWOODE & CONOLLY."

On the 13th of May, 1839, the defendant's house again addressed the plaintiffs, as follows:—

"Singapore, 13 May, 1839.

"Messrs. C. Devaux & Co., London.

"Gentlemen,—We beg reference to the accompanying duplicate of our last respects of date the 9th instant, and now wait on you to advise having shipped, in the 'Gilbert Henderson,' the 25 tons of terra japonica ordered in your letter of the 14th January last, amounting, as per invoice, to Sp. $1283.61,—bill of lading and invoice of which we have this day forwarded to Messrs. Small, Colquhoun, & Co.: also first of exchange drawn by us, on you, in their favour, at six months' sight, for 304l. 16s. 2d. sterling, being amount of invoice, at the exchange of 4s. 9d. per Sp. \$; and we hope the same will be duly honored by you, on presentation. We are now going on with the other order for 150 tons of terra japonica, and hope to be able to execute both it and the one for 200 tons.—Yours, &c. "SPOTTISWOODE & CONOLLY."

By the same mail by which the preceding letter was sent to the plaintiffs, the following invoice and bill of lading was sent by the defendant to Messrs. Small, Colquhoun, & Co.:—

"Invoice of 386 baskets of gambier shipped on the 'Gilbert Henderson,' by the undersigned, and consigned to Messrs. Small, Colquhoun, & Co., for account and risk of Messrs. C. Devaux & Co., London:—

[644]

"386 baskets, weighing 420 peculs, 11 catties, $\$2\frac{3}{4}$ . .		\$1155 30
Charges:		
Boat and coollie hire, marking, weighing and shipping	12 00	
Godown rent @ $2\frac{1}{2}$ cents per basket . .	9 65	
Insurance on \$1400 @ 3 per cent., including $\frac{1}{2}$ per cent. for effecting ditto, and policy-fee, 4	46 00	
Commission, at 5 per cent. . .	66 66	128 31
		\$1283 61"

The bill of lading was in the usual form, making the goods deliverable to ——— or assigns, on payment of freight at 5l. 5s. per ton.

The gambier therein mentioned, which had been purchased by the defendant's firm for the plaintiffs, was shipped according to this bill of lading, arrived with the vessel, and was delivered to the plaintiffs, as hereinafter mentioned.

On the 14th of June, 1839, the defendant's house addressed the following letter to the plaintiffs:—

"Singapore, 14th June, 1839.

"Messrs. C. Devaux & Co., London.

"Gentlemen,—We had last the pleasure on the 4th instant; and since then have got the 150 tons of terra japonica, ordered by you for account of Messrs. Lefebre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, shipped on board the 'Elphinstone'; and by this opportunity have forwarded invoice and bill of lading of the same to Messrs. Small, Colquhoun, & Co., and draw on you for the amount, in their favour, say, 1865l. 0s. 3d. sterling.—Yours, &c.

"SPOTTISWOODE & CONOLLY."

By the same mail by which the preceding letter was sent to the plaintiffs, the following invoice and bill of lading were sent by the defendant to Small, Colquhoun, & Co.:—

[645] "Invoice of 2183 baskets gambier shipped on the 'Elphinstone,' by Spottiswoode & Conolly, and consigned to Messrs. Small, Colquhoun, & Co., to order and for account and risk of Messrs. C. Devaux & Co., of London:—

"2183 baskets, weighing 2520 peculs, 58 catties @ $\$\frac{80}{100}$.		\$7057 62
Charges:		
Boat and coollie hire, marking, weighing, and shipping	\$90 00	
Godown rent at $2\frac{1}{2}$ cents per priail . .	63 14	
Insurance on \$8800 at 3 per cent., including $\frac{1}{2}$ per cent. for effecting, and policy-fee 4, Ex. 4/6 .	268 00	421 14
		\$7478 76
Commission, at 5 per cent. . .		373 93
		\$7852 69"

The accompanying bill of lading made the goods deliverable unto order or assigns, he or they paying freight at the rate of 5l. sterling per ton.

The gambier therein mentioned, which had been purchased by the defendant's firm for the plaintiffs, was shipped according to this bill of lading, arrived with the vessel, and was delivered to the plaintiffs as hereinafter mentioned.

The ship "Gilbert Henderson" arrived in London on the 13th of September, 1839, and the invoice and bill of lading relating to the shipment by that vessel were delivered by the defendant's agents to the plaintiffs, in exchange for their acceptance of the bill of exchange for 304l. 16s. 2d. mentioned in the defendant's letter of the 13th of May, 1839. The bill was presented, when due, to the plaintiffs, and paid.

The terra japonica by that ship was landed and weighed at the St. Katherine's Dock. Such landing and weighing commenced on the 24th of September, and **[646]** ended on the 7th of October, 1839. The result appears in a subsequent part of the case.

Before the writing of the letter next hereinafter mentioned, the invoice and bill of lading relating to the shipment by the "Elphinstone," had been received by Messrs. Small, Colquhoun, & Co., and had been exchanged by them for the acceptance by the plaintiffs of the bill of exchange for 1865l. 0s. 3d. mentioned in the defendant's letter of the 14th of June, 1839; but the "Elphinstone" had not then arrived in London. The last-mentioned bill was duly paid at maturity, having been previously discounted by the plaintiffs for Small, Colquhoun, & Co. Both the shipments were received and taken by the plaintiffs under the respective bills of lading.

On the 8th of November, 1839, the plaintiffs addressed the following letter to the defendant's house:—

"London, 8th November, 1839.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—We confirm our last letter, of the 1st instant. The purport of the present is, to communicate to you the result of the shipment per the 'Gilbert Henderson.' We are much astonished to find that the parcel invoiced as 420 peculs, and which ought to have given 25 tons, only turned out 22 tons. We cannot but express our astonishment at this result; particularly as our order, of the 14th of January last, for this parcel, was clearly expressed, and our limit given of 18s. per ton, laid down here. We think that you must have made some mistake in making out your invoice; as, if it were otherwise, our price would have been considerably exceeded; because 22 tons, at 18s., the limit given, make 396l., from which we have to deduct the amount of freight, 115l., leaving 281l., and your draft was for 304l. odd, thus leaving a difference against you of **[647]** 23l., supposing our extreme limit of 18s. to have been paid.

"We hope that the parcel of 150 tons, ordered on the 19th January last, for Messrs. Lefebre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, which you have shipped per the 'Elphinstone,'—your draft for which we have paid,—will not turn out in the same way; because, in that case, we must, on behalf of our said friends, have recourse to you for the difference, as you will have paid more than our limits.—

—Yours, &c. "C. Devaux & Co."

The ship "Elphinstone" arrived in London on the 13th of November, 1839. The terra japonica by that ship was landed and weighed in the London Docks. Such landing and weighing commenced on the 21st of November, and ended on the 4th of December, 1839. The result appears in a subsequent part of the case.

On the 6th of December, 1839, the plaintiffs again addressed Messrs. Spottiswoode & Conolly, as follows:—

"London, 6th December, 1839.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—By your letter of the 5th of July, you inform us that you were about shipping the order for 200 tons of terra japonica on board the 'William Parker,' and that you had taken advantage of the authority given you to draw on us in favour of Messrs. Small, Colquhoun, & Co., at sixty days' sight. You did not mention what sum: but those gentlemen presented us a draft for 2500l., which exceeded our credit 500l., and which we offered to accept, upon condition, that, if our order was not executed according to the limits given, they would repay us the amount. This they declined acceding to. Our object in requesting their guarantee, arose from the circumstance of the parcel of terra japo-**[648]**-nica per the 'Gilbert Henderson,' having turned out short. We saw again Messrs. Small, Colquhoun, & Co. a few days afterwards, and then stated to them, that, as the 'Elphinstone' had arrived with the terra japonica invoiced to us for our friends Messrs. Lefebre, Vidal, & Co., and Fandon & Co., of Havre, they had better let the matter stand over until we had the weights of that parcel, as it would probably guide us as to what we ought to do respecting your draft. We were only able to obtain the weight of the parcel per the 'Elphinstone' this day; and we are sorry to inform you that you have not executed our order according to our instructions. By our letter of the 19th of January last, we ordered 150 tons of terra japonica for our two Havre friends, at 18s. per ton, laid down here, all expenses, insurance, and commission included. In this order, you have invoiced us the parcel by the 'Elphinstone,' the weight turns out to be,—

2183 baskets, net . .	2635 . 0 . 18	
16 bags sweepings .	20 . 2 . 10	
	2655 . 3 . 0	; or

132 tons, 15 cwt. 3 qrs., instead of 150 tons.

"We have paid your draft to Messrs. Small, Colquhoun, & Co., amounting to 1865l. 0s. 3d. The freight paid by the 'Elphinstone' being 5l. per ton net, it follows that the cost price to us, supposing our extreme limit to have been paid, ought only to be 13s. per cwt., without freight.

132 tons, 15 cwt. 3 qrs. @ 13s. is	£1726	4	9	
instead of	1865	0	3	, leaving a
balance in our favour of	£138	15	6	, which we

debit you of. We shall thank you to authorise Messrs. Small, Colquhoun, & Co. to pay us the same, as well as **[649]** the small balance due to us by the 'Gilbert Henderson.' We do not anticipate any objection on your part to do so, as we gave you precise orders that we would not pay more than 18s. per cwt. laid down here; and there is clearly some mistake in the way you have calculated your weights in Singapore; and of course you must bear the consequence of the error. If, however, and contrary to our imagination, you should not think it correct to pay this claim, we shall thank you, as the distance that separates us is so great, to authorise Messrs. Small, Colquhoun, & Co. to appear for you to the action that we shall bring for the same: for, as we shall be obliged to pay our correspondents at Havre, we cannot consent to lose this amount, in a transaction in which our instructions were so clearly defined.—Yours, &c. "C. DEVAUX & Co."

On the 19th of February, 1840, the plaintiffs again addressed the defendant's house at Singapore, as follows:—

"London, 19th February, 1840.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—We hope you will authorise Messrs. Small & Co. to pay us the difference arising from your having exceeded our limits for the parcel of terra japonica per the 'Gilbert Henderson' and the 'Elphinstone.' For the latter, we have got into serious difficulty with our friends Messrs. Lefebre, Vidal, & Co., and Fandon & Co., of Havre. You will keep in mind that our friends understand the price per cwt. laid down here. You will, consequently, have to calculate accordingly. We have found that your invoices turn out 12½ per cent. less than the quantity charged. We are told that that arises from the way you make your purchases of the natives, who do not give you any tare. If, conse-**[650]**-quently, you pay for the baskets the same price as the terra japonica they contain, that will account immediately for the loss our friends complain of. It is impossible that any thing like a loss of 12½ per cent. could arise on the voyage.—Yours, &c. "C. DEVAUX & Co."

In answer to this letter, the defendant's house at Singapore addressed the following letter to the plaintiffs:—

"Singapore, 27th May, 1840.

"Messrs. C. Devaux & Co., London.

"Gentlemen,—We are sorry you refused acceptance of our draft, which was drawn for your interest, and, if our memory serves for the present, we think, by your authority, in so far that we think you stated we might draw on you, if required, to the extent of 2000l. or 3000l. There was no doubt, however, that, had you accepted the draft, and that we had not ultimately shipped to that extent, our friends, we are satisfied, would never object to refund the amount short shipped. But we are of opinion, from patient perusal of your letters, and those of Messrs. Small, Colquhoun, & Co., on this subject, that it was not the amount we had drawn beyond what you state as our credit, that prevented you, but something connected with the expected result of the terra japonica in weight. Now, you had been informed that the baskets and the leaves (or, cagans, as called here,) are weighed as terra japonica; and your orders were always expressly to have it shipped in baskets, with leaves for lining. And we have always complied with these instructions. Your friends could not expect to get packages for nothing: and we are sure you would not expect such from us, without any allowance whatever. In looking over your calculation, we find the loss **[651]** by weight is about 11½ per cent., which we think a very favourable result; and, by making a comparison with other shipments, you will find our statement correct: and, notwithstanding this loss in weight, it appears the terra japonica stood at 19s. 0½d., at least under 19s. 1d., at or above which you quote the price of the article to be. Under these circumstances, of course, you had the option of receiving the goods, by accepting our draft, or declining the same; and, as the article was laid down at what appears the lowest price quoted, we think you would not have been injured by taking it. As you had not taken it, we must only keep it, and do the best we can. We have only further to state that we have used our very best endeavours to meet your wishes; and we feel confident that no person or persons could have done more. And we think, if you make inquiry of other parties who have imported that article, that, generally speaking, the result as to weight will be worse than this shipment under discussion. We cannot, therefore, make any allowance for short weight, under all the circumstances of the case, as there appears to be only 3½ per cent. short, the packages being about 8 per cent.—Yours, &c.

"SPOTTISWOODE & CONOLLY."

On the 2nd of July, 1840, Messrs. Spottiswoode & Conolly again addressed the plaintiffs, as follows:—

"Singapore, 2nd July, 1840.

"Messrs. C. Devaux & Co.

"Gentlemen,—Our last respects was dated the 27th of May; since which time we are in receipt of your esteemed favour of 8th November, 1839, and 19th and 29th of February, and 2nd of April, received as follows, viz. 8th of November, received the 18th of June, 19th and 29th of February, on the 28th of May, and 2nd of April, on the 22nd of June. We observe the loss stated **[652]** in your favour of the 8th of November, on the small shipment of gambier per 'Gilbert Henderson,' and note your remarks that you think there may be some mistake. But by this time you will be aware that the loss is usual and customary. This lot appears to have lost about 12 per cent. The 19th and 29th of February hand us orders for 200 tons and 150 tons of gambier, at 17s. and 17s. 6d. per cwt. We note your remarks on this subject, which shall have our best attention. The 2nd April is to countermand the latter order, viz. 150 tons at 17s. 6d. We regret that we had engaged this quantity some time before the arrival of your letter; and, although it is not yet all received, it entirely depends on the party whether they will keep back any part, or compel us to take delivery. The order for 200 tons we cannot execute without a considerable loss to ourselves; and we think you are not desirous that we should lose by this or any other transaction with you. This present order for 150 tons, we undertake to deliver on your terms, although we are certain of not making one farthing of commission by it. But our motive for undertaking this order was, to shew you that we would rather lose our commission than disappoint you; and, at the same time, to acquaint you, that, on all future orders for this article that you may favour us with, it must be distinctly understood that you, or the person for whom you give the order, must allow for the package beyond the price of the gambier; and the loss by weight in the gambier, we shall take upon ourselves. We are satisfied that no house in Singapore can execute your orders on better conditions than we do: and we have never looked forward to receiving any benefit beyond our commission; and, as you know, we have on all occasions executed these gambier orders under your limit. However, we are fully aware, that, when you expect to receive a certain quantity, you **[653]** ought to get that quantity: and, on all future occasions, we shall take the risk of loss by weight on ourselves.—Yours, &c.

"SPOTTISWOODE & CONOLLY."

On the 20th of October, 1840, the plaintiffs addressed the defendant's house as follows:—

"London, 20th October, 1840.

"Messrs. Spottiswoode & Conolly, Singapore.

"Gentlemen,—We observe, with satisfaction, that you admit, that, in ordering gambier in weight laid down here, we ought to have it: and we hope you will authorise your correspondents to pay us the two small amounts we claim on former parcels. We know that packages are paid as terra in your place: but, in ordered goods laid down here, it cannot be expected that we should pay packages as goods; and you ought to have taken that into calculation, in executing our orders. In future orders, you say you will debit us of the value of the packages. That will be of no consequence to us, provided that the terra japonica, packages included, do not exceed the limit we may give you.—Yours, &c. "C. DEVAUX & CO."

The plaintiffs proved, by the evidence of brokers in London accustomed to the trade, and by particulars of sales of terra japonica, that it is the custom to sell and purchase this article in London by net weight; that it is sometimes sold as so many tons, and at others as so many baskets; but that, in either case, net weight is paid for, the weight of the packages being deducted from the gross weight; and that the cargoes in question were sold by the plaintiffs according to that mode. The loss of weight on the passage, is about 3½ per cent. and 8 per cent. for baskets and leaves.

[654] The defendant examined witnesses at Singapore, under a commission; who proved, that terra japonica is an article of sale and export from Singapore; that it was always exported from Singapore packed in baskets, with an inner covering of kadjang leaves; that this mode of packing was done at Singapore, by the native sellers, but that gambier was likewise imported in the same manner; that it was always bought from the native sellers in baskets and leaves, and the weight of the baskets and leaves was always included with the gambier contained in them; that no tare was ever deducted, and no allowance whatever was made for the baskets and leaves, and that it was imported in the same manner; that the baskets and leaves were paid for as gambier, and the whole received as gross weight; that the weight of the baskets and leaves was taken as part of the gambier, and paid for as such; that this was the invariable practice prior to 1846; that the gambier in question, when shipped, was packed in baskets and leaves, in the usual way, and was purchased by the defendant in the same manner in which it was afterwards shipped, viz. in baskets and leaves; that the packing in baskets and leaves is mostly done at Singapore; and that gambier is not, in general, brought to Singapore ready packed for exportation.

The two cargoes of terra japonica shipped by the defendant for the plaintiffs by the ships "Gilbert Henderson" and "Elphinstone," at the times of shipment at Singapore, and including the baskets and leaves in which the same were packed, weighed respectively as follows, that is to say,

	Peculs.	Catties.		Tons.
The shipment per "Gilbert Henderson" . .	420	11	or	25
That per "Elphinstone"	2520	58	or	150

The same shipments when landed in London, by the **[655]** dock officers, for the plaintiffs, weighed respectively as follows:—

	Tons.	cwts.	qrs.	lbs.
That per "Gilbert Henderson," including baskets and leaves	23	18	3	5
without baskets and leaves .	22	1	0	11
That per "Elphinstone," including baskets and leaves .	143	9	3	11
without baskets and leaves .	132	15	3	6

Eight per cent. is the usual and customary proportion of weight for the baskets and leaves, in packages of terra japonica. The loss of weight was from the usual evaporation during the voyage, and from the drying of the terra japonica during that time. This difference was agreed to be taken at 3½ per cent. loss of weight, and 8 per cent. for baskets and leaves.

The sum of 162l. 11s. 8d. claimed by the plaintiffs in this action, was composed of 49l. 9s. for less weight, and 113l. 2s. 8d. for the weight of baskets and leaves.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover in this action for any, and what, sum. Should the court be of opinion in the affirmative, the verdict was to stand for such sum as the court might direct. Should the court be of opinion in the negative, a nonsuit was to be entered.

The case was argued on the 1st of June last.

Barstow (with whom was Byles, Serjt.) for the plaintiffs (*a*). The plaintiffs are clearly entitled to a verdict **[656]** for the full amount which they claim. The orders for the gambier transmitted on the 14th and 19th of January, 1839, were conveyed in terms as plain and explicit as could be; they were only to be executed provided the article "could be laid down in London, all charges, commission, insurance, and freight included, at a price not exceeding 18s. per cwt. The circumstance of their having paid the bills drawn upon them for the price of the goods,—the deficiency of weight not having at that time been ascertained,—will not, according to the principle laid down in *Kelly* v. *Solari* (9 M. & W. 54), prevent the plaintiffs from recovering back the excess in this form of action. The payment was not a voluntary one. This was a partial failure of consideration, which might have been set up as a defence pro tanto to an action upon the bills, as between the original parties: Bayley on Bills (6th edit., by Dowdeswell, 501); Byles on Bills (5th edit. 93); Story on Bills (§ 187, 2nd edit. p. 207); or, possibly, the plaintiffs might have set it up in answer to an action for goods sold and delivered, as suggested by Parke, B., in *Mondel* v. *Steel* (8 M. & W. 858). It is clear, that, in the case of a total failure of consideration, although the contract is under seal, the money paid may be recovered back in an action for money had and received: *Grenville* v. *Da Costa* (Peake's Add. Cas. 113, 1 Sugden's V. & P., 11th edit., p. 257). It was held in that case, that, if A. agrees to sell an estate to B., and is afterwards disabled from doing so, B. may recover back the money deposited, in an action for money had and received, although the contract for the sale be under seal. "Undoubtedly," said Lord Kenyon, "the plaintiff might have maintained an action of covenant for the breach of the contract; but he might also, when he **[657]** found the defendant rendered incapable of completing it by an order of the court of Chancery, in a cause in which he was a party, rescind the contract, and bring an action for money had and received, to recover back the purchase-money. The defendant held this money against conscience, and therefore might be compelled to refund it, by an action for money had and received." The cases are numerous where money had and received has been brought to recover back money paid in excess, under ignorance of the fact, or under a species of compulsion: *Jones* v. *Barkley* (2 Dougl. 697, in notis); *Dew* v. *Parsons* (2 B. & Ald. 562); *Waterhouse* v. *Keen* (4 B. & C. 200). [Cresswell, J. The point was very much discussed here in the case of *Parker* v. *The Great Western Railway Company* (7 M. & G. 253, 7 Scott, N. R. 835). The principle upon which these cases were decided will probably not be denied, but only the application of it to the particular circumstances of this case. Maule, J. No definite sum was payable from the plaintiffs to the defendant. Here has been a failure on the defendant's part to perform part of the contract. How do the plaintiffs ascertain the amount they are to recover in this action, otherwise than by the same course as they would have done, if they had brought an action for the breach of contract? Is not this, in effect, trying, by an action for money had

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(*a*) The points marked for argument on the part of the plaintiffs, were,—"1. That, according to the contracts between the parties, as set out in the correspondence, the baskets and leaves were not properly brought into weight as part of the commodity sold: 2. That the defendant was liable, as the party dealing with the plaintiffs,—the defendant being either principal, or an agent who did not disclose his own principal, or agent for the plaintiffs: 3. That the sum paid by the plaintiffs beyond the proper sum, was recoverable under one or other of the counts of the present declaration."

and received, what damages the plaintiffs are entitled to for a breach of the contract?] The difference is easily susceptible of calculation. [Maule, J. Can you, out of an express contract to sell 25 tons at a given price, extract an implied contract to sell 22 tons at the same price?] Yes. [Maule, J. It may be so: but it is not so obvious as to make the cases you cite particularly applicable.] The defendant, professing to perform the contract, sends a quantity short of that ordered **[658]** and paid for. When the plaintiffs received the goods they find they are not the quantity they were entitled to receive. Is not money had and received an appropriate remedy to recover back the amount overpaid? [Maule, J. The plaintiffs might have rejected the goods, and recovered back the whole sum paid. Of that there is no doubt. But they keep them. It may be, under the circumstances, that there is a new implied contract on a quantum valebant, giving rise to a right of set-off.] That is the view which was suggested in *Mondel* v. *Steel*, where Parke, B., says (8 M. & W. 871): "It must be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of the price on that account, he must be considered as having received satisfaction for the breach of the contract, and is precluded from recovering in another action to that extent; but no more." So, in *Cox* v. *Prentice* (3 M. & S. 344), where the defendant received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was **[659]** afterwards discovered to exceed the true number,—it was held that the plaintiff might, after having offered to return the bar, have money had and received against the defendant for the price thus paid to him under a mistake, although the defendant had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. [Cresswell, J. There, both parties were agreed as to what should be paid for. Here, a certain quantity of terra japonica is shipped at the foreign port, which the defendant claims to be paid for as if the entire bulk were terra japonica. The plaintiffs, on the other hand, insist that they were entitled to deduct a tare for the baskets and leaves in which the commodity is packed.] Lord Ellenborough, in the case last cited, seems to provide for this very difficulty. "Let us," he says, "put the case of parties agreeing to abide by the weighing of any article at any particular scales, and, in the weighing, an error, not perceived at the time, takes place from some accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon,—would not in that case money had and received be sustainable?" [Maule, J. No doubt about that: it would be like the purchase of a box of eggs at so much per hundred, and, after the buyer has paid for them upon the supposition that the box contained four thousand, he ascertains that there are but three thousand five hundred. That is a very different case from the present. The question here is, whether you can recover back this assumed overcharge, as money had and received, when, in computing the amount, you approach the difficulty of proving under the common count the damages you might be entitled to recover under a special count.] That difficulty, at all events, does not apply to the second order, of the 19th of January, 1839. Under that, the defendant incurred no **[660]** obligation to ship the whole 150 tons. [Maule, J. Possibly you might have had an action upon that contract, if you could shew that the defendant might have shipped the whole quantity, but neglected to do so.] It may be so. But the plaintiffs are clearly entitled to have terra japonica at the price limited, free from loss by evaporation, and free from deduction on account of baskets and leaves.

Bovill (with whom was Channell, Serjt.), for the defendants (*a*). The question is

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(*a*) The points marked for argument on the part of the defendant, were as follows:—

"1. That the plaintiffs' claim, if otherwise well founded, would not support an not, as the argument [661] on the other side assumes, between the two parties contracting as principals. Spottiswoode & Co. were mere commission-agents, employed by the plaintiffs to purchase for them produce in their own names from the native merchants, at prices not exceeding certain given limits. The whole correspondence shews this. [Maule, J. It is clearly a contract of sale, and not of agency.] Then, the article purchased, according to the usage of Singapore,—which, in the construction of this contract, must prevail,—was, terra japonica, as customarily packed, that is, with baskets and leaves. In *Bayliffe* v. *Butterworth* (1 Exch. 425), Alderson, B., says: "A person who deals in a particular market, must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place." That is in accordance with previous decisions in the Queen's Bench (*b*), and has also been adopted in this court (*c*). The plaintiffs perfectly well knew what was the practice at Singapore,—that the packages were paid for as terra japonica, no tare being allowed. If they had so intended, they should, in their instructions to Spottiswoode & Co., have expressly excepted the baskets and leaves. In their letter of the 20th of October, 1840, they write:—"We know that packages are paid as terra in your place; but, in ordered goods laid down here, it cannot be expected that we should pay packages as goods; and you ought to have taken that into calculation in executing our orders." There is nothing upon the face of the special case, to shew that Spottiswoode & Co. were cognisant of any difference in this respect between the practice at [662] Singapore and in this country. Then, is the loss by evaporation during the voyage, to be taken into the estimate of price? [Maule, J. I should think so. Wilde, C. J. The plaintiffs bargain for the article "laid down here, all charges included," at 18s. per cwt.] The bill of lading shews that the goods were shipped on account and risk of Devaux & Co.: it gives the gross weight, and makes the goods deliverable on payment of freight at 5l. per ton, net weight,—assuming that there will be waste on the voyage. Having notice of the custom at Singapore, and of the Singapore weight, and of the price charged, the consignees, nevertheless, choose to take the goods. They ought at once to have repudiated the contract. In *Cornwal* v. *Wilson* (1 Vez. sen. 509), the plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp, the defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a new risk,

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action of indebitatus assumpsit for money had and received, &c., in its present form, against the defendant, who merely acted as commission-agent for the plaintiffs, in purchasing and shipping the merchandise in question:

"2. That the plaintiffs' remedy, if any, should have been by special action, for disobedience of instructions; or, they ought, if their view be correct, to have rejected the shipments altogether:

"3. That there is, in fact, no cause of action whatever against the defendant; he having purchased and shipped the article in the usual way for the plaintiffs, and shipped it on the plaintiffs' account and risk, he is not responsible for the loss of weight from drying and evaporation, which was only the usual and ordinary effect of the voyage; and, with respect to the baskets and leaves, that the article of commerce as purchased at, and exported from, Singapore, consists of the entire packages, or gross weight, of gum, baskets, and leaves; and that, the purchases and shipments in question having been made, in this instance, of that article, in its usual state, and in the usual way, the defendant is in no way responsible:

"4. That the usage, as to the mode of purchasing at Singapore, and not the usage as to the mode of selling in London, must prevail in this case:

"5. That the plaintiffs' limits were merely as to price, without entailing any other responsibility upon the defendant; and such price to be ascertained by taking the cost price, with the addition of the charges and the freight to Europe:

"6. That the defendant in fact fulfilled his instructions: the weight of the baskets and leaves, and the loss by the voyage, were only what is customary; and that the plaintiffs, having adopted and accepted the shipments, and taken the chance of realising a profit, are not entitled to maintain this action."

(*b*) *Sutton* v. *Tatham*, 10 Ad. & E. 27, 2 P. & D. 308. And see *Pollock* v. *Stables*, 12 Q. B. 965.

(*c*) See *Bayley* v. *Wilkins*, ante, vol. vii. p. 886.

was ordered to account for the whole at the cost price. [Cresswell, J. All that that case proves is, that the merchant here, who thought he was dealing with the goods as factor, was found in truth to have dealt with them as his own goods.] Here, the plaintiffs take the goods as their own: the only complaint they make is,—our limits have been exceeded. Where is the binding contract here? Suppose the plaintiffs had refused to take the goods? [Maule, J. In that case, Spottiswoode & Co. would in all probability have brought an action against them for goods bargained and sold.] There was no contract. [Maule, J. There was the order on one side, assented to on the other.

Money had and received clearly will not lie,—even assuming that the defendant incurred any liability at all for exceeding the limit given by the plaintiffs' orders.

[663] Barstow, in reply. There is no pretence for saying that Spottiswoode & Co. were merely agents in the transaction. Assuming that the custom of Singapore as to the weighing of the article in question was known to the plaintiffs, they have equally a right to assume that Spottiswoode & Co. were acquainted with the mode of weighing here. At all events, the plaintiffs were entitled to have, according to the terms of their order, goods "laid down here" at the price named. In their advice of the shipment, Spottiswoode & Co. speak of having shipped so many tons. *Cornwal* v. *Wilson* was a totally different case. There, the agent had exceeded his limits: the principal, finding the hemp had come to a fluctuating market, was trying to play fast and loose; and it was properly held, that, by his mode of dealing with the goods, he had made them his own. Here, there has been a partial failure of consideration. Money had and received is, therefore, the appropriate, and perhaps the only remedy.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This was an action of assumpsit for money had and received, money paid, and money found due upon an account stated. The defendant pleaded non assumpsit.

The cause was tried before the lord chief justice, and a verdict was found for the plaintiff, subject to the opinion of the court upon a special case, which stated, in substance, as follows:—

The plaintiff is a merchant in London, trading in connection with a French mercantile establishment. The defendant is a partner in a mercantile firm at Singapore, trading under the name of Spottiswoode & Conolly.

On the 14th of January, 1829, the plaintiffs, in **[664]** London, wrote to the defendants at Singapore, and ordered twenty-five tons of terra japonica, or gambier, in baskets or other suitable packages, "provided it could be laid down, all charges included, at 18s. per cwt.;" and, on the 19th, they wrote again, and gave a further order for one hundred and fifty tons, giving the same limit as to price, with authority to execute any part of the order, if the whole could not be obtained,—adding: "For the payment of these orders, we shall arrange with Small, Colquhoun, & Co., to whom you will please forward bill of lading and policies of insurance." Small, Colquhoun, & Co. were the defendant's agents in London.

On the 13th of May, 1839, the defendant wrote to the plaintiffs, advising that he had shipped in the "Gilbert Henderson" the twenty-five tons of terra japonica ordered in the letter of the 14th of January, and had forwarded to Small, Colquhoun, & Co. a bill of exchange, at six months' sight, for 304l. 16s. 2d., being the amount of invoice.

On the 14th of June, the defendant wrote again, advising that he had got the one hundred and fifty tons of terra japonica shipped on board the "Elphinstone," and had forwarded invoice, bill of lading, and a bill of exchange for the amount of 1865l., to Small, Colquhoun, & Co.

Both invoices described the terra japonica as packed in baskets, and weighing a certain number of peculs.

The "Gilbert Henderson" arrived in London on the 13th of September. The terra japonica by that ship was landed and weighed at the St. Katharine's Dock between the 24th of September and the 7th of October. The invoice and bill of lading before mentioned were handed over to the plaintiffs in exchange for their acceptance of the bill for 304l. 16s. 2d.

Before the 8th of November, Small, Colquhoun & Co. **[665]** had received the invoice and bill of lading of the one hundred and fifty tons, and handed them to the plaintiffs in exchange for their acceptance of the bill for 1865l., which they soon afterwards discounted for Small, Colquhoun, & Co. The "Elphinstone" had not then arrived in London. Both shipments were received and taken by the plaintiffs under the respective bills of lading.

On the 8th of November, 1839, the plaintiffs wrote to the defendant, expressing their surprise that the first parcel invoiced as 420 peculs, which ought to have given twenty-five tons, only turned out twenty-two tons; and that they supposed there must have been some mistake in making out the invoice. The letter proceeded: "We hope that the parcel of one hundred and fifty tons ordered on the 19th of January, which you have shipped per the 'Elphinstone,' your draft for which we have paid, will not turn out in the same way, because, in that case, we must, on the part of our friends, have recourse to you for the difference, as you will have paid more than our limits."

The "Elphinstone" arrived on the 13th of November. The terra japonica was landed and weighed in the London Docks. The weighing was finished on the 4th of December.

The first parcel of terra japonica, including the baskets and leaves in which it was packed, weighed 23 tons 18 cwt. 3 qrs.: and, without them, 22 tons 1 cwt. The second parcel, including baskets, &c., 143 tons 9 cwt. 3 qrs.; without them 132 tons 15 cwt. 3 qrs.

On the 6th of December, the plaintiffs wrote to the defendant, demanding 23l. as overpaid for the first parcel, and 138l. 15s. 6d. for the second. The defendant refused to repay it, contending that, of the whole deficiency, which was 11½ per cent., 8 per cent. consisted of the baskets and leaves, which were usually weighed with the terra japonica at Singapore, and the **[666]** whole weight paid for as terra japonica, without allowance, and the remaining 3½ per cent. arose from the usual evaporation on the voyage.

Terra japonica is bought in the London market by net weight, after deducting the weight of packages.

On the argument of the case before us, it was contended, for the plaintiffs, that this was a simple case of the partial failure of consideration for the acceptance and payment of two bills of exchange, and that therefore the plaintiffs might recover the excess as money had and received, the plaintiffs not having knowledge, or the means of knowledge, of the real state of facts, when the bills were accepted.

On the other hand, it was contended, that, if any demand at all existed against the defendants, it was for damages sustained by reason of the misconduct of Spottiswoode & Conolly, as agents, in giving more for the terra japonica than the authority given to them warranted; that the plaintiffs had taken the terra japonica at the invoice price, and could not therefore say that the consideration for their acceptances had failed; and that, if they meant to refuse to pay the price at which it was charged, they should have rejected the commodity altogether, or have consented to hold it as factors for the defendant; but that, having taken to it, and dealt with it as owners, they were bound to pay for it at the invoice price,—for which *Cornwal* v. *Wilson* (1 Ves. sen. 509) was said to be an authority. It was not disputed that the plaintiffs were entitled to have terra japonica, in execution of their order, and were not bound to take baskets and leaves in lieu of it.

The case, then, stands thus:—The plaintiffs ordered two parcels of terra japonica, —twenty-five tons, and one hundred and fifty tons,—at a certain price. The **[667]** defendant sent invoices and bills of lading, which represented that two parcels of those respective weights had been shipped; and, on the faith of those invoices, the plaintiffs accepted bills for the value of the whole quantities said to have been shipped. In fact, the defendant only shipped twenty-three tons and one hundred and thirty-two tons. Those quantities the plaintiff received and sold, but never consented to take them as a due execution of their orders, or a satisfaction for their acceptances; for, they immediately wrote and claimed a return of the difference.

The only authority relied on in answer to their claim, was, *Cornwal* v. *Wilson;* but, when examined, it differs essentially from this case. The statement of the case is very short. The defendant, a merchant in London, sent orders to the plaintiffs, merchants in Riga, as his factors, to buy for him some hemp, at a limited price: the plaintiffs exceeded theirs bounds by the difference of 25l. 2s. 6d.: the hemp, coming to England, the defendant refused the contract, but however disposed of it: the question was, in what manner the defendant should be accountable to the plaintiffs.

The lord chancellor, in his judgment, states a variety of facts existing in the case, by which his opinion was influenced; and he did not decide upon the short and simple statement of facts at the commencement of the report. On the contrary, he came to this conclusion:—"The court, then, is to say he meant to take them as his own, notwithstanding what he said; and he ought to account with the plaintiffs according to the price they paid."

In the present case, there is nothing to shew that the plaintiffs ever meant to take the terra japonica at a price exceeding the limits they had given (for, the defendant represented that he had not exceeded those limits), or to accept the baskets and leaves as a sub-**[668]**-stitution for an equal weight of terra japonica. It appears, therefore, to us to be a simple case of failure of consideration; and that the plaintiffs are entitled to recover the excess, as money had and received to their use.

Postea to the plaintiffs.

Smith v. The Hull Glass Company. Nov. 30, 1849.

[S. C. 19 L. J. C. P. 123. Observed upon, *In re Sea, Fire, and Life Assurance Company: Greenwood's case*, 1854, 3 De G. M. & G. 459. Discussed, *Ernest* v. *Nicholls*, 1857, 6 H. L. C. 420. Principle applied, *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 104. For subsequent proceedings see 11 C. B. 897.]

In an action brought against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, for goods ordered by persons in their employ, and supplied for the purposes of the company, and used by them in their works,—it is not necessary for the plaintiff to prove that the persons who gave the orders were authorised by the directors so to do, or that the contract was made pursuant to the provisions of the company's deed of settlement and bye-laws.

Debt, for goods sold and delivered, against the defendants who were described in the declaration as a joint-stock company completely registered before the accruing of the causes of action.

Pleas, never indebted, payment, and a special plea, which in the result became immaterial.

The cause was tried before Cresswell, J., at the first sitting in Michaelmas term, 1848. It appeared that the defendants were a joint-stock company completely registered under the 7 & 8 Vict. c. 110, and that the goods for the price of which the action was brought, had been ordered by the secretary and the working manager of the company, and delivered upon the company's premises, and used by them in the course of their business.

The company's deed of settlement was not produced.

On the part of the defendants, it was insisted, that the plaintiff was bound to shew that the persons giving the orders for the goods were authorised by the directors so to do, and that the deed of settlement and bye-laws of the company gave the directors authority to bind the **[669]** company by contracts for the supply of goods upon credit: and the cases of *Ridley* v. *The Plymouth, &c., Grinding and Baking Company*, and *The Kingsbridge Flour-Mill Company* v. *The Plymouth, &c., Grinding and Baking Company* (2 Exch. 711), were relied on as authorities to shew, that, although joint-stock companies completely registered under the 7 & 8 Vict. c. 110, are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the requisites of the 44th section,—yet that persons seeking to render those companies liable on contracts made with the directors, must shew their authority to bind the company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorised particular individuals to make contracts binding on the company.

The learned judge, acting upon the authority of these cases, directed the jury to find for the defendants.

Talfourd, Serjt., in the course of the same term, obtained a rule nisi for a new trial, on the ground of misdirection. He referred to *Arnold* v. *The Mayor of Poole* (4 M. & G. 860, 5 Scott, N. R. 741), and *Paine* v. *The Strand Union* (8 Q. B. 326, 15 Law Journ., N. S., Q. B. 211); and he distinguished the cases of *Ridley* v. *The Plymouth, &c.*,

Grinding and Baking Company, and *The Kingsbridge Flour-Mill Company* v. *The Plymouth, &c., Grinding and Baking Company*.

Byles, Serjt., and Hugh Hill, in the last term, shewed cause. In order to charge a registered joint-stock company with a contract of this sort, it is not enough to shew that the goods were ordered by the secretary or other officer of the company, and that they were delivered **[670]** to, and used by, the company. This is clearly shewn by the cases referred to at the trial. The question arises upon the 7 & 8 Vict. c. 110, which, in its preamble, recites that "it is expedient to make provision for the due registration of joint-stock companies during the formation and subsistence thereof, and also, after such complete registration as is hereinafter mentioned, to invest such companies with the qualities and incidents of corporations, with some modifications, and subject to certain conditions and regulations, and also to prevent the establishment of any companies which shall not be duly constituted and regulated according to the provisions of this act." By the 7th section, companies within the contemplation of the act are disabled from acting otherwise than provisionally in accordance with the act, until they shall have obtained a certificate of complete registration, in the manner provided for by s. 9; and, to entitle them to obtain such certificate, they are required to register a deed of settlement in the manner, and containing the provisions in s. 7, mentioned. The 18th section provides "that every person shall be at liberty to inspect the returns, deeds, registers, and indexes which shall be made to or kept by the said registrar of joint-stock companies; and that there shall be paid for such inspection such fees as may be appointed by the commissioners of Her Majesty's treasury in that behalf, not exceeding one shilling for each such inspection; and that any person shall be at liberty to require a copy or extract of any such return or deed, to be certified by the said registrar; and there shall be paid for such certified copy or extract such fee as the commissioners of Her Majesty's treasury may appoint in that behalf, not exceeding sixpence for each folio of such copy or extract; and that, in all courts of law and equity, and elsewhere, every such copy or extract so certified shall be received in evidence, without proof of the **[671]** signature thereto, or of the seal of office affixed thereto." The 25th section shews the effect of complete registration, upon obtaining which, it is declared that "such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated, as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company." Contracts entered into by joint-stock companies are regulated by the 44th section, which, "for the purpose of regulating contracts entered into on behalf of any joint-stock company completely registered under this act (except contracts for the purchase of any article the payment or consideration for which doth not exceed the sum of 50l., or for any service the period of which doth not exceed six months, and the consideration for which doth not exceed 50l., and except bills of exchange and promissory notes)," enacts "that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorised by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of 50l., or for any services the **[672]** period of which doth not exceed six months, and the consideration for which doth not exceed 50l., entered into on behalf of any joint-stock company completely registered under this act, may be entered into by any officer authorised by a general bye-law in that behalf; and that every such contract, whether under seal or not, shall, immediately after the same shall have been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay to the company on whose behalf such contract may be made, the amount of the consideration agreed to be paid by or on behalf of such company in respect of such contract." The contract for the supply of these goods was not shewn to have been made in compliance with this provision. The 44th section comprehends all contracts. [Maule, J. Although executed?] The court of Exchequer so held, in the two cases referred to at the trial. The case of a joint-stock company is somewhat like that of a club, the individual members of which are not responsible for goods furnished by a tradesman, on credit, unless it be shewn, either that the party sued was privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club: *Todd* v. *Emly* (7 M. & W. 427). The knowledge of one member is not, as in the case of an ordinary trading partnership, the knowledge of the firm. In *Ridley* v. *The Plymouth, &c., Grinding and Baking Company*, Parke, B., says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of **[673]** such a joint-stock company, until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company, to ascertain the objects of the company; for, the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors, and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority. I perfectly agree that the liability of the company may be shewn without producing the original deed, or a copy of it, provided it be shewn that all persons who formed the company had sanctioned any particular individuals entering into contracts to bind them: if there were any proof of such authority, no doubt the company would be bound." The learned judge in this case properly ruled in accordance with the decision of the court of Exchequer in that case.

F. Robinson, in support of the rule. It may be conceded that corporations are usually bound only by contracts which are entered into by them under their corporate seal,—as was held in *Gibson* v. *The East India Company* (5 N. C. 262, 7 Scott, 74), *Arnold* v. *The Mayor of Poole* (4 M. & G. 880, 5 Scott, N. R. 741), *The Mayor, &c. of Ludlow* v. *Charlton* (6 M. & W. 815), and many other cases. But there are many contracts which even corporations may lawfully perform without seal; such as those relating to matters of frequent occurrence or of little importance, or in respect of goods sold to or by them in the course of their business: *Beverley* v. *The Lincoln Gas Light and Coke Company* (6 Ad. & E. 829); *Church* v. **[674]** *The Imperial Gas Light and Coke Company* (6 Ad. & E. 846, 3 N. & P. 35). In *Paine* v. *The Guardians of the Strand Union* (8 Q. B. 327), it was held that the guardians of a poor-law union cannot bind themselves by an order not under seal, for making a survey and map (according to the statute 6 & 7 W. 4, c. 96, s. 3), of the rateable property of a parish forming part of the union; such order not being a contract necessarily incident to the purposes for which the guardians are made a coporation, by the 5 & 6 W. 4, c. 69, s. 7, and 5 & 6 Vict. c. 57, s. 16; and it not being intended, by the statute 6 & 7 W. 4, c. 96, s. 3, that the guardians of a union should make themselves liable for the expenses of such plan. But, in the subsequent case of *Sanders* v. *The Guardians of the St. Neots Union* (8 Q. B. 810), it was held, that, if work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal. The doctrine that corporations may, for some purposes, contract otherwise than under seal, is as old as the Year Books, M. 4 H. 7, fo. 27, pl. 7, and H. 7 H. 7, fo. 9, pl. 2. If that were so when trade was driven at so gentle a pace as it was in those days, how much more necessary is it now to extend the powers of action of these bodies corporate, to meet the exigencies of our more stirring times. [Maule, J. Nobody denies that this corporation might contract for this purpose without seal: but the question is, whether the evidence shewed that the proper persons did in point of fact contract.] There clearly was evidence for the jury; the goods were supplied for and used by, the company in their business. In *Doe d. Pennington* v. *Taniere* (18 Law Journ., N. S., Q. B. 49), Lord Denman, in **[675]** delivering the judgment of the court, says: "To enforce an executory contract upon a corporation, it might be necessary to shew that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed, against them, that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule, that, in general, a corporation can only contract by deed: it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise." The 44th section of the 7 & 8 Vict. c. 110, is directory only. And, if there was any thing in the company's deed, or in their bye-laws, to prevent such a contract as this from being valid, it was incumbent on the defendants to shew that.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

At common law, one of several partners in a trading concern may bind all by a contract made within the scope of matters relating to the partnership. If the partnership is of many, under whatever firm they trade, and whatever regulations they may make inter se for managing and conducting the concern, each partner would still have the same power to bind his co-partners. If, then, a co-partnership consisting of a few active and many dormant partners had traded under the firm of the Hull Glass Company, the active partners might have bound the rest by contracts made, in the name of the firm, with reference to the co-partnership business. Assume such to have been the constitution of the Hull Glass Company, the present case would have stood [676] thus:—Some of the partners, who were called directors, managed the concern, the other partners were dormant. The person employed to conduct the operative part of the concern, ordered certain goods, which were delivered on the premises of the co-partners, and consumed there in their business. Is not the accepting and using the goods, some evidence that the party ordering had authority from the managing partners to give the order? It would, therefore, be the same as if given by themselves, and would bind the dormant partners. I am not aware that what is called a joint-stock trading company, if in fact a partnership exist between the shareholders, differs from an ordinary partnership in this respect; and, if that be so, but for the stat. 7 & 8 Vict. c. 110, the plaintiff in this case would have made out a primâ facie case against the co-partnership. What, then, is the effect of that statute? It enables certain co-partnerships to obtain a certificate of complete registration; and then confers upon them certain powers. But, in order to obtain such certificate, they must comply with several conditions imposed, one of which is, that they must execute a deed containing various matters specified in the act; and such companies are required to appoint not less than three directors for the conduct and superintendence of the execution of the affairs of the company: and, after complete registration, the directors are, by sect. 27, empowered, 1st, To conduct and manage the affairs of the company according to the provisions and subject to the restrictions of that act and of the deed of settlement, and of any bye-law, and, for that purpose, to enter into all such contracts and do and execute all such acts and deeds as the circumstances may require. The directors, then, are to conduct and manage the affairs of the company, subject to the restrictions of the deed of settlement, or any bye-law: and the first question arising out of that enactment is, [677] whether parties contracting with the directors in matters relating to the co-partnership business, are bound, when seeking to enforce their contracts, to shew that they, the directors, were authorised by the deed or bye-laws to enter into them. It is said that they are so bound, because copies of the deed and the bye-laws are to be registered, and may be inspected by any person on payment of a small fee. But it seems to us that the directors, unless restrained by the act of parliament, or the deed, would have all the authority given to partners by the rules of the common law. Primâ facie, they would, as directors, have that authority. The plaintiff, then, in this case having proved that his goods were supplied to the directors upon their authority, a contract to pay for them would be implied. It may be true that such primâ facie case might have been rebutted by shewing that the directors were restrained by the deed (the act of parliament imposes no such restraint) from making such contract on behalf of the shareholder. But, if the deed contained no such restraining clause, the authority would exist. And the plaintiff cannot be called upon to prove the negative, viz. that the deed contains no such clause. The defendants, if they rely upon a restriction, should have proved its existence. The effect of the registration of the deed, and bye-laws, might be, to affect all parties contracting with the directors with notice of their contents, and, therefore, of any restrictions imposed upon the directors with reference to making contracts: but still the burthen of proving the existence of such restrictions, would lie on the defendants. The case of *Ridley* v. *The Plymouth Grinding and Baking Company* (2 Exch. 711) differs essentially from this. The contract sued upon had no relation to the business carried on by **[678]** the company, and was not within the scope of any implied authority given for the purpose of managing and conducting that business; and therefore it might be correct to hold that the plaintiff was bound to prove affirmatively that the parties who affected to bind the company by their contract, had been authorised to do so, either by the deed, or in some other mode.

In the next case, *The Kingsbridge Flour Mill Company* v. *The Plymouth Grinding and Baking Company* (2 Exch. 718), the deed was in evidence. Parke, B., seems to rely on the circumstance, that it made the concurrence of five directors necessary to make a valid contract; and that no such concurrence was proved. In the present case, the deed was not in evidence; and, in the absence of the deed, there being nothing in the statute to affect the case, we think there was evidence of a contract by the company, which ought to have been submitted to the jury.

We make no observations upon sect. 44, except that it shews, that, as far as the statute is concerned, no particular form of contract is required, in order to make it available against the company.

Rule absolute.

[679] NICKELS *v.* ROSS. Nov. 12, 1849.

[See *In re Avery's Patent*, 1887, 36 Ch. D. 317.]

In case for the infringement of a patent, the declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that the Queen had granted him a patent for his invention; and that the defendant infringed it.—The defendant pleaded,—first, non concessit,—thirdly, after setting out the specification (which recited that the Queen had granted to the plaintiff a patent for improvements in machinery for covering fibres, applicable to the manufacture of braid and other fabrics, communicated to him by a foreigner residing abroad) that, before the granting of the patent, the plaintiff represented to Her Majesty, that, in consequence of a communication made to him by a certain foreigner, residing abroad, he, the plaintiff, was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that Her Majesty, believing, and confiding in the truth, and acting upon the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the declaration mentioned; and that such representation was false; whereby the letters-patent were null and void,—fifthly, that the alleged invention was not new,—eighthly, that the plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed,—ninthly, that no sufficient specification was inrolled.—At the trial, the plaintiff put in the letters-patent and specification, and gave evidence to shew that a machine like his had never been in use before the date of the letters-patent:—Held, that this entitled the plaintiff to a verdict upon the issue joined on the first plea.—And semble, that the plea of non concessit did not impose upon the plaintiff the burthen of shewing that the crown had power to grant, until evidence had been given on the other side to impeach the patent; and that the averment in the declaration, that the plaintiff was the inventor of the improvements for which the patent was granted, not having been traversed, the defendant was not at liberty to controvert that fact at the trial.—Held, also, that the plaintiff was entitled to a verdict on the issue joined on the third plea, without any proof that the invention was communicated to him by a foreigner residing abroad, as alleged in the petition recited in the specification,—a party availing himself of information from abroad, being an inventor, within the meaning of the 21 Jac. 1, c. 3, s. 6.—The specification stated the invention to relate to "certain improvements on, or additions to, the apparatus or parts constituting what are called braiding or plaiting-machines, whereby the inventor was enabled to produce, by such machines, elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns, or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic and non-elastic fibres in combination in the same fabric,—such introduced elastic and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of the braiding or plaiting threads or yarns, which, in the progress of working, twist around or over the longitudinal introduced threads, and plait or braid amongst each other." And, after describing the ordinary braiding-machine,—in which all the threads partake of like movements, and all aid in forming a fabric of plaited threads,—the specification (referring to the annexed drawings) proceeded thus to describe the new process:—"the table a moves on a hollow spindle, which is fixed in the framing of the machine by screw and nut at b^1: through the tube b, the strand or thread of india-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; the upper part of the tube b rising to such a position amongst the braiding threads, that, in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns; hence, the braiding will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked,) and the tie-threads of the fabric."—The jury found that the plaintiff's machine was new, but that the use of a hollow revolving spindle or tube was not new:—Held, that, inasmuch as the plaintiff's claim was for the hollow spindle, not generally, but fixed, this finding did not negative the novelty of the plaintiff's invention; and therefore that he was entitled to a verdict on the issues joined on the fifth, eighth, and ninth pleas.

This was an action for an alleged infringement of a patent for "improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics."

[680] The declaration was in the ordinary form.

The defendant pleaded,—first, that Her Majesty did not give and grant unto the plaintiff her special licence, full power, sole privilege and authority, that the plaintiff, his executors, &c., or such other persons as he or they should at any time agree with, and no others, from time to time, and at all times, during the said term in the declaration mentioned, should and lawfully might use, exercise, and vend the said supposed invention in the declaration mentioned, in manner and form as in the declaration in that behalf above alleged; concluding to the country.

Secondly,—that theretofore, and before the making of the said letters-patent in the declaration mentioned, **[681]** to wit, on the 21st of April, 1838, our lady the now Queen sent to her then lord high chancellor of Great Britain for the time being Her said Majesty's warrant and writ closed, under Her said Majesty's privy seal, directed to Her said Majesty's chancellor, whereby Her said Majesty commanded her said chancellor, that, under her great seal of her united kingdom, then remaining in the said chancellor's custody, he the said chancellor should cause Her said Majesty's letters to be made forth patent, in the form therein and nextly hereinafter mentioned and set forth: That the said warrant and writ of our said lady the Queen was afterwards, to wit, on the day and year last aforesaid, delivered to Her said Majesty's chancellor, in Her said Majesty's chancery, then, to wit, on the day and year last aforesaid, being at Westminster, in the county of Middlesex: That the day of the said delivery of the said warrant and writ of our said lady the Queen to the said chancellor, in the said chancery as aforesaid, to wit, the 21st of April, 1838, then being the day of the said delivery of the same to the said chancellor in the said chancery as aforesaid, was afterwards, to wit, on the day and year last aforesaid, duly entered of record in the said chancery of our said lady the Queen at Westminster aforesaid; as by the said record thereof still remaining in the said chancery of our said lady the Queen at Westminster aforesaid, will more fully appear: That afterwards, to wit, on the day and year last aforesaid, Her said Majesty's lord chancellor, by virtue and in pursuance of the said warrant and writ of our said lady the Queen, did, under Her said Majesty's said great seal of the said united kingdom, then remaining in his custody, cause Her said Majesty's letters to be made forth patent, in the form in the said warrant and writ mentioned, and which same letters-patent were letters-patent of the tenor and in the form following, that is to say [the letters-patent were here set out in hæc verba, the invention being therein **[682]** stated to consist of "Improvements in machinery for recovering fibres, applicable in the manufacture of braid and other fabrics"]: That the said warrant and writ of our said lady the Queen, and the parchment writing of the said warrant and writ, was afterwards, to wit, on the 29th of March, 1841, by

Her said Majesty's then keeper of Her said Majesty's privy seal, and by virtue and in pursuance of Her said Majesty's command, altered, by having the word "recovering" erased from the said writ, and by having the word "covering" inserted in place and in lieu of the said word "recovering": and the said warrant and writ, and the parchment writing of the said warrant and writ, was afterwards, to wit, on the day and year last aforesaid, by Her said Majesty's said keeper of the said privy seal, and by virtue and in pursuance of Her said Majesty's command, duly sealed with the said privy seal then remaining in his custody: That the said warrant and writ, and the said parchment writing of the said warrant and writ, so altered as aforesaid, and sealed as last aforesaid, then, to wit, on the day and year last aforesaid, became and was Her said Majesty's warrant and writ under Her said Majesty's said privy seal, directed to Her said Majesty's then chancellor of Great Britain for the time being, whereby Her said Majesty commanded Her said chancellor, that, under Her said Majesty's great seal of Her said united kingdom, remaining in his custody, the said chancellor should cause Her said Majesty's letters to be made forth patent, in the following form, that is to say [here the letters-patent were again set out, as altered]: That the said last-mentioned warrant and writ of our said lady the Queen was afterwards, to wit, on the 19th of January, 1844, and in the seventh year of Her said Majesty's reign, delivered to Her said Majesty's said chancellor of Great Britain for the time being, in Her said Majesty's chancery, then, to wit, on the day and year last aforesaid, being at Westminster aforesaid: That the **[683]** day of the said delivery of the said last-mentioned warrant and writ of our said lady the Queen to the said chancellor in the said chancery as aforesaid, to wit, the 19th of January, 1844, and in the seventh year of the reign of our said lady the Queen, then being the day of the said delivery of the said last-mentioned warrant and writ to the said chancellor in the said chancery as aforesaid, was afterwards, to wit, on the day and year last aforesaid, duly entered of record in the said chancery of our said lady the Queen at Westminster aforesaid,—as by the said record thereof, still remaining in the said chancery of our said lady the Queen at Westminster aforesaid, will more fully appear: That afterwards, to wit, on the day and year last aforesaid, the said letters-patent in this plea firstly mentioned and set forth, were by the plaintiff restored into Her said Majesty's chancery at Westminster aforesaid, and the said last-mentioned letters-patent were then by the said chancellor, and at the instance and request of the plaintiff, cancelled, by having the said great seal under which the said letters-patent had been so made as aforesaid, cut off and taken from the same letters-patent; and, the said letters-patent having been so cancelled as aforesaid, the parchment writing which theretofore had been the parchment writing of the same letters-patent, was then, to wit, on the day and year last aforesaid, in the said chancery at Westminster aforesaid, altered, by having the word "recovering" erased from the said last-mentioned parchment writing, and by having the word "covering" inserted in the said last-mentioned parchment writing in lieu and in place of the said word "recovering": That, the said last-mentioned parchment writing having been so altered as aforesaid, Her said Majesty's said chancellor, afterwards, to wit, on the day and year last aforesaid, did cause to be affixed thereto the said great seal, then remaining in his custody, and thereby then, to **[684]** wit, on the day and year last aforesaid, under the said great seal, then remaining in his custody, cause to be made forth the supposed letters-patent in the declaration mentioned, as and for and in lieu of the letters-patent to be made upon and by virtue and in pursuance of the said last-mentioned warrant and writ of our said lady the Queen: And that the said last-mentioned chancellor did cause the said last-mentioned letters-patent to be so made as aforesaid, bearing date a certain day in the same letters-patent mentioned, to wit, the 21st of April, in the first year of the reign of our said lady the Queen, and bearing date on a certain day, to wit, the day and year last aforesaid, long before the day of the delivery of the said last-mentioned warrant and writ to the said chancellor in the said chancery as aforesaid, contrary to the form of the statute in such case made and provided,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect; verification.

Thirdly, that the said supposed instrument in writing under the hand and seal of the plaintiff, and inrolled as in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures following, that is to say [setting out the specification]: and a true copy of which said drawing and of the said letters and figures in the said specification and instrument in writing mentioned, are hereunto annexed: That, before the making of the said supposed letters-patent in the declaration mentioned, to wit, on the 1st of April, 1838, the plaintiff, by his said petition, mentioned in the declaration, and recited in the said supposed letters-patent, did represent and suggest unto Her said Majesty, that, in consequence of a communication made to him by a certain foreigner resident abroad, he the plaintiff was in possession of an invention [685] of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics: That Her said Majesty, believing, and confiding in the truth, and acting and proceeding upon the said application and suggestion so made by the plaintiff as aforesaid, and in pursuance and in consideration thereof, did make the said supposed letters-patent, gift, and grant of privilege in the declaration mentioned: That the said representation and suggestion so made by the plaintiff unto Her said Majesty as aforesaid, was and is false and untrue: And that the plaintiff was not, before or at the time of the making of the said supposed letters-patent, in possession of the said supposed invention, in manner and form as by the said plaintiff so falsely and untruly represented and suggested unto Her said Majesty, as aforesaid,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect; verification.

Fourthly, that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect in the defendant's said third plea above mentioned and set forth: That, before the making of the said supposed letters-patent in the declaration mentioned, to wit, on the 1st of April, 1838, the plaintiff, by his said petition, mentioned in the declaration, and recited in the said supposed letters-patent, did represent and suggest unto Her said Majesty, that the said supposed invention mentioned in the declaration and in the said specification, was an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics: That Her said Majesty, believing, and confiding in, and also acting and proceeding upon, the said representation and [686] suggestion of the plaintiff, and in pursuance and in consideration thereof, did make the said supposed letters-patent, gift, and grant of privilege, in the declaration mentioned: And that the said last-mentioned representation and suggestion so made by the plaintiff to Her said Majesty as aforesaid, was false and untrue, and Her said Majesty was thereby misinformed and deceived; and that the said supposed invention was not an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics, in manner and form as by the plaintiff so falsely and untruly represented and suggested unto Her said Majesty as aforesaid,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Fifthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect, in the said third plea above mentioned and set forth: and that the said supposed invention mentioned in the declaration, and in the said specification, was not, at the time of the making of the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, a new invention as to the public knowledge, use, and exercise thereof within this realm,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Sixthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect, in the defendant's said [687] third plea above mentioned and set forth; and that the said supposed privilege in the declaration mentioned, was not and is not a privilege of the sole working or making of any manner of manufacture,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect; verification.

Seventhly,—that the said supposed invention mentioned in the declaration, and in the said specification in the defendant's said third plea set forth, was not, at the time of the making of the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, of any use, benefit, or advantage to the public,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Eighthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect, in the said third plea above mentioned and set forth, and a true copy of the said drawing, and of each of the said letters and figures mentioned in the said specification, is hereunto annexed,—without this that the plaintiff did, by the said instrument in writing under his hand and seal, in the declaration mentioned, particularly describe the nature of the said supposed invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above in the declaration alleged; concluding to the country.

Ninthly,—that the plaintiff did not within six calendar months next and immediately after the date of the said supposed letters-patent in the declaration men-**[688]**-tioned, cause any instrument in writing, under the hand and seal of the plaintiff, particularly describing and ascertaining the nature of the said supposed invention, and in what manner the same supposed invention was to be performed, to be inrolled in Her said Majesty's said high court of Chancery,—whereby, and by reason and means whereof, theretofore, and before the commencement of this suit, and also before the committing of the said several supposed grievances in the declaration mentioned, and after the expiration of six calendar months next and immediately after the date of the said supposed letters-patent, to wit, on the 22nd of October, 1838, the said supposed letters-patent, and the said supposed licence, power, privilege, and authority in the declaration mentioned, and all other rights, liberties, privileges, and advantages whatsoever granted by the same supposed letters-patent, utterly ceased, determined, and became void; verification.

Tenthly, not guilty.

The plaintiff joined issue on the first, eighth, and tenth pleas.

To the second, he replied,—that, before the sending of the warrant and writ closed in that plea first mentioned, the plaintiff had, on the 12th of March, 1838, presented the petition in the declaration mentioned, and that Her said Majesty had been then graciously pleased to condescend to his request, and to grant the letters-patent so brought into the court here as aforesaid; that, by a mistake on the part of a clerk in the office of one of Her Majesty's principal secretaries of state, in preparing a certain document, called the Queen's warrant,—being the authority from Her said Majesty to her solicitor-general to prepare a certain other document, called the Queen's bill,—the word "covering," in the title of the plaintiff's invention was written "recovering"; that such mistake was copied **[689]** into the said Queen's bill, and into a certain other document, called the signet bill, and also into the said warrant and writ of privy seal; and that such writ of privy seal, as set out in the defendant's second plea, and containing such mistake, was delivered to the said chancellor on the 21st of April, 1838, and the day of such delivery was duly entered of record as in the said plea alleged, and letters-patent were made as in the said plea first alleged; and that, from the time the said writ of privy seal was first delivered to the said chancellor, the same had hitherto remained in Her Majesty's said chancery; that Her Majesty, having been informed of the mistake so made as aforesaid, was graciously pleased, on the 29th of March, 1841, to order that the said Queen's warrant, signet bill, and Queen's bill, should be amended, to agree with Her Majesty's royal intention, and that the word "recovering" should be made "covering," in the said warrant and bills; and the same were on the day aforesaid amended accordingly; the said writ of privy seal was also, on the day and year last aforesaid, by Her said Majesty's then keeper of Her said Majesty's privy seal, by virtue and in pursuance of Her Majesty's command, altered, to agree with the said Queen's bill, signet bill, and Queen's warrant,—which is the alteration mentioned in the said plea; and that, at the time of such alteration, the said writ of privy seal remained in the said chancery, but the keeper of the privy seal held Her Majesty's privy seal,—which was the alleged sealing of the said warrant and writ in that behalf in the said plea mentioned; that such warrant and writ being so, by command of Her Majesty, altered as aforesaid, did remain in Her Majesty's chancery in the form in the said plea mentioned, which was the delivery of such alleged amended writ to the chancellor in the plea mentioned; that such writ having so remained in the said chancery, from the [690] said 21st of April, 1838, to the 19th of January, 1844, the said chancellor was pleased, on the day and year last aforesaid, to indorse on the said writ, that he had received the same for the purpose of altering the word "recovering" in the said letters-patent, to the word "covering,"—which was the alleged entering of record of the receipt of the said alleged second writ of privy seal in the said plea mentioned; that, thereupon, the said chancellor was pleased, on the day and year last aforesaid, to alter the word "recovering" in the said letters-patent, to the word "covering," to agree with the said writ of privy seal so amended as aforesaid,—which was the alleged making of the letters-patent in the said plea secondly mentioned; that the letters-patent so brought into court by the plaintiff, and then remaining in the court here, were the letters-patent granted to him on the said 21st of April, 1838, and so amended as aforesaid; and that he had brought his action and declared against the defendant for a breach of such letters-patent,—without this that the said letters-patent so granted to the plaintiff were by the said chancery cancelled, and the parchment writing of the same altered into such other letters-patent, as in the second plea alleged, in manner and form as the defendant had above alleged; concluding to the country.

To the third,—that the representation and suggestion so made by the plaintiff to Her Majesty, was not false or untrue, in manner and form as the defendant had above alleged,—concluding to the country.

To the fourth,—that the said representation and suggestion was not false or untrue, in manner and form as the defendant had alleged,—concluding to the country.

To the fifth,—that the invention in the declaration and specification mentioned, was, at the time of the making of the said letters-patent, a new invention as to [691] the public knowledge, use, and exercise thereof within this realm,—concluding to the country.

To the sixth,—that the privilege in the declaration mentioned, was and is a privilege of the sole working, &c. of a manufacture,—concluding to the country.

To the seventh,—that the said invention was, at the time of the making of the said letters-patent, of use, &c. to the public,—concluding to the country.

To the ninth,—that the plaintiff did within six calendar months next and immediately after the date of the said letters-patent, cause an instrument in writing, under the hand and seal of him the plaintiff, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, to be inrolled in Her said Majesty's high court of chancery,—concluding to the country.

To each of these replications the similiter was added.

The cause was tried before Wilde, C. J., at the sittings at Westminster after Hilary term, 1847.

The specification was put in, as follows:—

"Now, know ye, that, in compliance with the said proviso, I, the said C. Nickels, do hereby declare the nature of the invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figures and letters marked thereon, that is to say,—The invention relates to certain improvements on, or additions to, the apparatus or parts constituting what is called braiding or plaiting machines, whereby I am enabled to produce, by such machines, elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns, or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic and non-elastic fibres in combination in the same fabric, such introduced elastic [692] and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of the braiding or plaiting threads or yarns, which, in the progress of working, twist around or over the longitudinal introduced threads, and plait or braid amongst each other, whereby I am enabled to produce elastic and non-elastic braid, and other plaited fabrics, wherein are contained four or more elastic or non-elastic strands or threads on the same plane, which are covered by the ordinary plaiting or braiding operation of the machinery.

"The construction of braiding or plaiting machinery, wherein all the threads partake of like movements, and all aid in forming a fabric of plaited threads, being well known

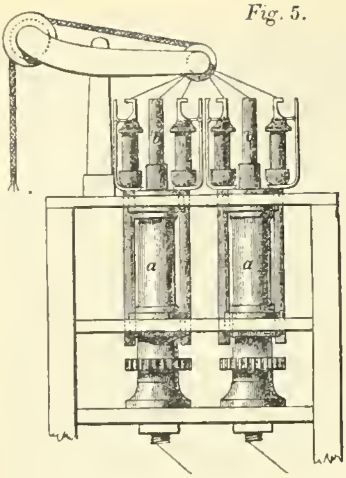


Fig. 5.

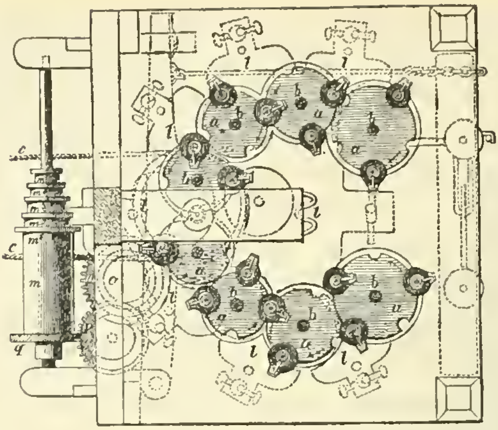


Fig. 4.

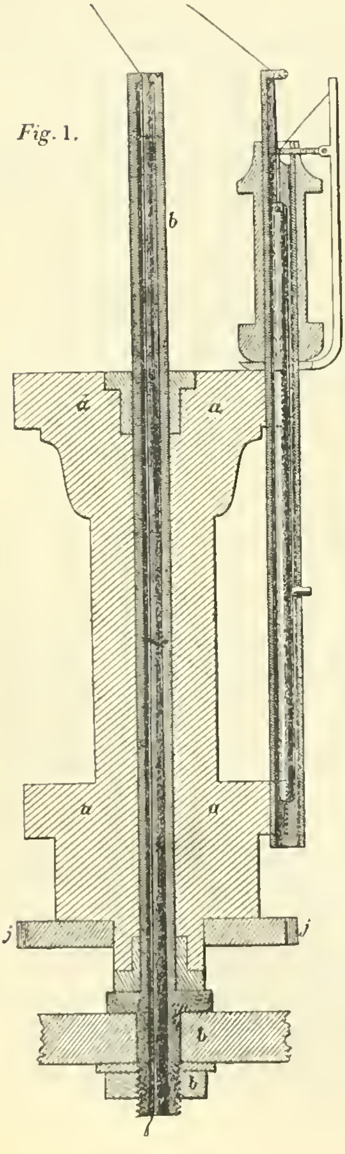


Fig. 1.

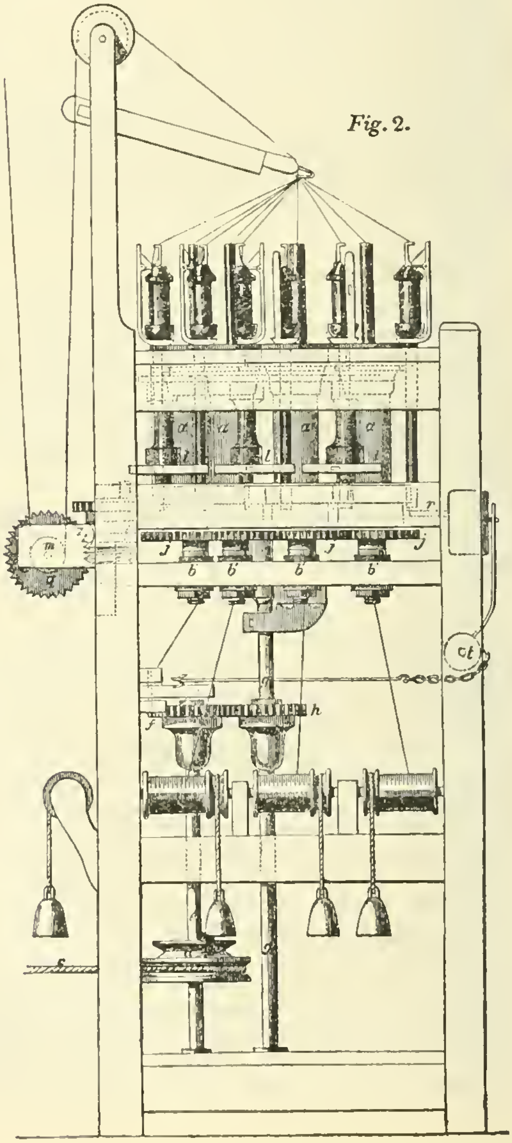
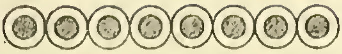
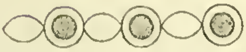


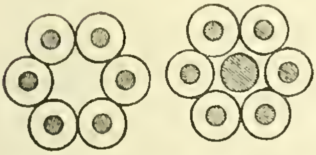
Fig. 2.



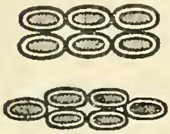
Magnified section of a fabric with eight longitudinal threads, strands, or yarns.



Magnified section of a portion of fabric with three longitudinal threads, the parts of fabric between being produced by revolving heads without longitudinal yarns, threads, or strands.



Two arcular or cylindrical tubes, one with, and one without internal filling.



Two cylindrical tubes, laid flat, in order to be used as a band, strap, or for other purposes.

Fig. 6. 7

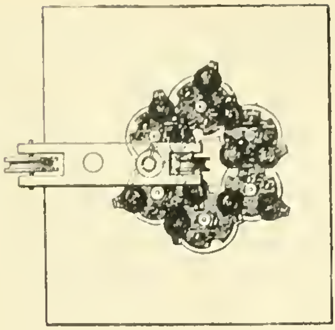
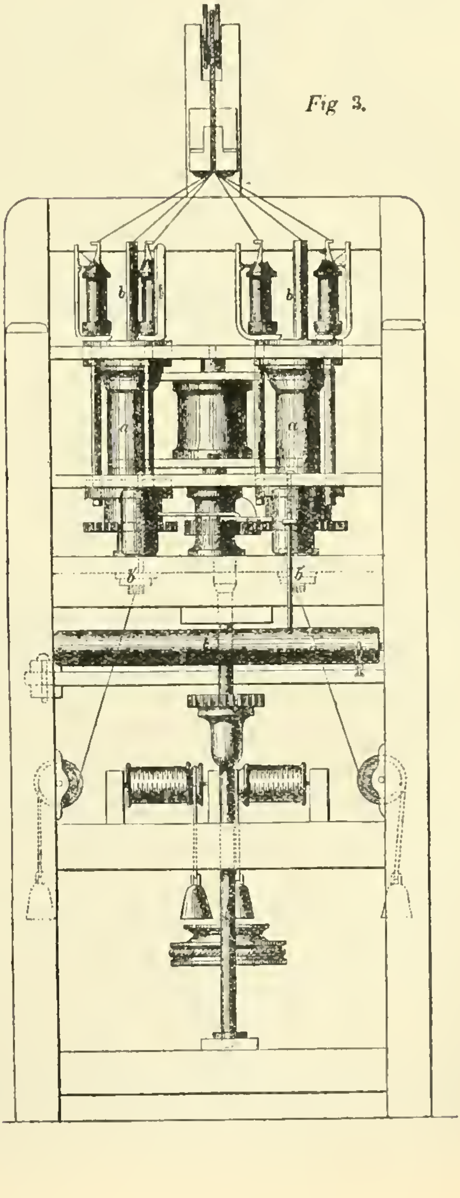


Fig 3.



in the manufacture of braids, it will not be necessary to enter into a long description of the same: all that will be required to make the invention clear, and enable a workman acquainted with such machinery readily to perform my invention, which is only applicable to such machines as work with four or more heads or circular tables for actuating a system or series of bobbins, and consequently capable of introducing four or more elastic or non-elastic, or a combination of elastic and non-elastic, strands or threads in the same plane within the plaited or braided fabric which the machine would otherwise be capable of producing. It is well known, that, according as the width of the braid, or other plaited fabric, produced by braiding machines, is wider or narrower, so are the number of heads or revolving tables, with their bobbins, employed; the threads from the bobbins being caused to plait or braid with one another by the revolution of the tables or heads (each bobbin, in the course of its working, being actuated by each of the revolving tables or heads,) so that, at one moment, each of the threads will, in succession, be at one selvage of the fabric, and progressively traverse across the fabric, in a diagonal direction, to the **[693]** other selvage of the fabric, and then will traverse back, in an opposite diagonal direction, to the selvage from which it started, and so on across from selvage to selvage,—all which is well understood; and the plaiting or braiding bobbin threads alternately pass under and over the longitudinal threads or strands, thus causing such longitudinal threads to be tied into a fabric; the objects of my invention being,—first, so to arrange and adapt the mechanical parts and the apparatus of braiding machinery, that elastic fabrics may be produced therein with four or more strands or threads of india-rubber in the same plane, introduced as longitudinal threads,—secondly, so to adapt and arrange the mechanical parts and apparatus of braiding-machines, that elastic fabrics may be produced therein with four or more strands or threads of india-rubber, and non-elastic threads, in the same plane, introduced as longitudinal threads,—and thirdly, so to adapt and arrange the mechanical parts and apparatus of braiding-machines, that fabrics may be produced therein with four or more threads or strands of cotton, silk, wire, or other fibrous materials, in the same plane, introduced as longitudinal threads: and, in order to give the best information in my power, I will proceed to describe the drawing hereunto annexed:—

"Fig. 1 is a section of a revolving table or head, and of one plaiting or braiding bobbin. Fig. 2 is a side view of a braiding-machine with eight revolving tables or heads, and seventeen plaiting or braiding bobbins. Fig. 3 is a front view of the machine. And fig. 4 is a plan.

"In each of these figures, the same letters indicate similar parts. But I will first describe fig. 1, which, as before stated, shews one of the revolving tables or heads in section: and, as all the heads shewn in figs. 2, 3, and 4, are of a similar construction, the description now given will be applicable to all the tables or heads: **[696]**—*a a* is the revolving table, which is of a like construction to those of other braiding-machines, and has notches or recesses for receiving the pipes or spindles of the plaiting or braiding bobbins; as is clearly shewn in the drawing, and as is well understood. The table *a* moves on a hollow spindle *b*, which is fixed in the framing of the machine by screw and nut at b^1. Through the tube *b*, the strand or thread of india-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; this, I believe, being the most convenient mode of introducing the longitudinal threads into the fabric; the upper part of the tube *b* rising to such a position amongst the braiding-threads, that, in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns: hence, the braiding threads will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked) and the tie-threads of the fabric,—the closeness of the covering by the braiding threads depending on the relative speed at which the work is taken up, in comparison with the speed at which the braiding bobbins pass from selvage to selvage of the fabric. And it should be stated, that, although I prefer that the longitudinal threads (from separate bobbins, or from a beam) should pass up through the axis of the revolving tables or heads, it is evident that the longitudinal threads may be placed on the top of the axis, or otherwise above the table, taking care that the longitudinal threads are so conducted up between the braiding or plaiting threads, that such plaiting or braiding threads may pass under and over the longitudinal threads, and in such manner as to lie on the two surfaces of the fabric produced. The axes or pipes [697] of the braiding or plaiting bobbins are of tubes, as heretofore, in order to allow of means for stopping the machine, in the event of any of the threads breaking, and, at the same time, keeping the thread at the proper tension at all parts of the revolving tables or heads, as is well understood.

"The machine receives motion in the following manner:—*c* is an endless cord or band (driven by a steam-engine, or other power), which drives the pulley *d* on the axis *e*; such axis *e*, by the cog-wheel *f*, gives motion to the axis *g*, by taking into the cog-wheel *h*, which is affixed on the axis *g*. On the upper part of the axis *g* is a cog-wheel *i*, which takes into and drives one of the cog-wheels *j* on the tables or revolving heads. The cog-wheels *j* of the revolving heads gearing one into the other; hence, communicating motion to one, the whole are actuated, and caused to revolve in opposite directions; and, by their revolution, they cause the pipes or spindles of the braiding bobbins to pass from one revolving head to the next as is well understood,—the lappets *l l* acting as guides to cause the pipes or spindles of the braiding bobbins to pass in the proper direction; all which is well understood in the making and working braiding-machines. *m* is the roller for winding up the work: it receives motion from one of the wheels *j*, which takes into and drives the wheel *n*. On a vertical axis at the back of the machine, *o*, is a wheel affixed on the same axis as the wheel *n*; and the wheel *o* takes into and drives the wheel *p* on another vertical axis at the back of the machine, there being a screw or worm affixed on the axis of the wheel *p*, which drives the roller *m*, by taking into the wheel *q*, as is shewn in the drawing. And it will be seen that the roller *m* will wind up the work faster or slower, according as the surface m^1, m^2, m^3, m^4, or m^5, is the surface at any time employed for moving the fabric: and it will be seen [698] that whichever of those surfaces is being used, the speed of the braiding or plaiting bobbins will remain the same; consequently, the fabric produced will have the longitudinal threads more or less closely covered: and the covering of the longitudinal threads may be varied, by working with less braiding threads than there are pipes or spindles for braiding bobbins, that is, using partly empty pipes or spindles, by which an open net covering will be shewn on the surfaces of the longitudinal threads, or the fabrics produced thereby.

"In the event of any of the braiding threads breaking, the rod *m*, the hollow pipe or tube which is the axis of that bobbin, will fall, and, when it comes to the front of the machine, will come against the tail of the catch *r*, and let go the rod *s* from the roller *t*, which will allow of the driving axis falling towards the back of the machine, and thus take its cog-wheel out of action,—all which is well understood, and is shewn in the drawing.

"Having thus given a description of the machinery, I will proceed to give such information as may be desirable for varying the nature of the fabrics produced in the machine. The machine is capable of including eight threads or strands of india-rubber, which will be worked into and covered by the plaiting of the threads from the braiding bobbins: and it should be understood, that the threads or strands of india-rubber may be uncovered, or covered by any of the known means. The india-rubber threads or strands which are to constitute the longitudinal threads, are to be wound on to bobbins or beams, but, by preference, one bobbin to each thread: and care should be taken that the bobbins should be equally weighted, in order that the strands should all be worked into the fabric with an equal strain. One india-rubber thread is to be passed up the hollow axis of each of the revolving heads or tables: [699] and such is to be the case when working with longitudinal threads of silk, cotton, or other suitable fibrous materials. The plaiting or braiding threads, together with the india-rubber threads, are to be collected together, and passed over the wire guide, and then to the roller *m*, or other means of winding up the work as it is made; the machine being capable of varying the speed of drawing up the work quicker or slower in comparison with the speed of the evolutions of the bobbins, the closeness or openness of the plaiting may, as heretofore, be regulated.

"In case it be desirable to make a fabric with less quantity of india-rubber threads, yet of the width the eight revolving heads or tables usually produce, in such case, only part of the hollow axes of the tables or heads may be supplied with india-rubber threads, whilst the other hollow axes may remain empty. Thus, any degree of elasticity may be obtained; because the threads from the bobbins where there are no india-rubber threads to the heads or tables, will produce simple plaiting or braiding fabric. And, again, if it be desired to control the elasticity of the fabric produced in the machine, in such case, some of the hollow axes may be supplied with india-rubber, and some with threads of cotton, silk, or other fibrous materials, by which the fabric will have the elasticity of the india-rubber, and, at the same time, that elasticity may be prevented being drawn on beyond that distance from which it will return to its proper length. Thus, with the machine above described, a good fabric may be obtained by supplying the hollow axis of the first revolving table with threads of cotton or other fibre, the second with india-rubber thread, the third with cotton or other fibre, the fourth and fifth with india-rubber thread, the sixth with cotton or other fibrous material, the seventh with india-rubber thread, and the eighth with cotton or other **[700]** fibrous materials. I give this merely as an instance; as, the numbers of each of the threads may be varied: but, whatever be the threads supplied to the revolving heads,—whether elastic or non-elastic,—they will all be laid into the fabrics longitudinally, and in the same plane with each other. Thus may fabrics of different strengths of elasticity be obtained, and also of different weight, depending on the weight of the non-elastic threads, in comparison with the india-rubber threads,—which is important for surgical bands and other purposes: or, other fabrics may be made with all non-elastic threads or fibrous material laid longitudinally on the fabric produced, such threads being wound on suitable bobbins or beams, and applied to the machine as above described.

"When fabrics are plaited by this description of machinery, having india-rubber threads or strands laid in longitudinally, they are to be submitted to heat, by the application of a hot iron, as is well understood in obtaining elasticity to woven fabrics, where they are partly of india-rubber in a stretched state; for, the thread, when being worked into the fabric of a braiding-machine, is in the same condition as is used for weaving purposes, all which is well understood,—which will reduce the length of the fabric produced in the braiding-machine.

"I would here remark that I have only thought it necessary to shew one machine for plaiting flat fabrics having eight revolving heads or tables: but it is evident that machines may be made with as few as four revolving heads, and many more than eight: and each revolving table or head have a hollow axis, or other suitable means for longitudinal strands or threads, as above explained, depending on the nature of the fabric to be produced. I do not, therefore, confine my invention to any particular number of revolving tables **[701]** or heads and their bobbins, to this or the circular machine hereafter mentioned, provided the mechanical parts and apparatus constituting the machine are suitably arranged or adapted for producing fabrics having four or more yarns or strands laid longitudinally into the plaited or braided fabrics, as herein described.

"The drawing shews also parts of another braiding-machine, which differs from that above described; inasmuch as, in the former machine, the bobbins, having passed from one selvage to the other selvage, pass back again; but, in the machine partly shewn at figures 5, 6, and 7, the apparatus is so arranged that the bobbins are constantly performing in a circle, and consequently will produce a hollow cylinder of plaited fabric; and, the revolving tables or heads having hollow axes, or other suitable arrangement, may have strands or threads elastic or non-elastic, or a combination of elastic and non-elastic, laid longitudinally into such cylindrical tubes of plaited fabrics, and in the same plane or surface; such machine differing from other braiding or plaiting machines only inasmuch as it is capable of laying such longitudinal threads into the plaited fabric as it is made; and, if it be desired, such tube of plaited fabrics may be worked over a cord, or a quantity of threads, and will then resemble a covering machine of the ordinary kind, excepting inasmuch as it has the capability of introducing the longitudinal threads herein explained.

"The various parts in these figures being marked with the same letters of reference as those employed for the other machine, and as this machine does not otherwise differ from other machines which make circular tubes of plaited fabric, the description above given will be sufficient for the workman. And I would state, that, according to the number of revolving tables and their bobbins, and their strength, and the nature of the yarn or threads used, so may be the fabrics produced in these machines: and the circular machine will **[702]** be particularly applicable for making elastic and other cords, ropes, rigger-bands, and such like fabrics, applicable to various useful purposes.

"Having thus described the nature of the invention, and the manner of performing the same, I would have it understood that I make no claim to any of the parts of the apparatus constituting the machine separately, nor combined, so far as the same have been before known and in use. And there may be variations made in the machine, without departing from the nature of the machine, so long as the general adaptation and arrangement of the parts be as herein described."

Evidence was given, on the part of the plaintiff, to shew that a machine constructed like his,—with four or more elastic or non-elastic longitudinal threads, so introduced into the fabric, by means of fixed hollow spindles, as to allow the plaiting or braiding threads to intertwine amongst them without diverting them from their longitudinal position, - had never been in use before the date of the letters-patent: but he gave no evidence as to the alleged invention having been communicated to him by a foreigner residing abroad.

Mr. Carpmael was called, on the part of the plaintiff, to explain the nature of the alleged invention; and, the specification having been put into his hands for that purpose, it was objected for the defendant, that, since the case of *Neilson* v. *Harford* (8 M. & W. 806, 1 Webster's Patent Cases, 331, 370), where it was held that the construction of the specification is for the court alone, the witness could only be asked to explain technical expressions, or terms of art, like the word "mods" in the will of Nollekins, the sculptor,—being, in truth, a mere translator; and that it was not competent to the plaintiff to examine him as to what was claimed by the specification to be new, and what was admitted to be old. The objection, however, was overruled.

[703] Several witnesses, machine-makers and others, who were called on the part of the defendant, deposed to their having, for many years prior to the date of the plaintiff's patent, made or used braiding-machines with from two to twelve hollow revolving spindles for the purpose of introducing longitudinal strands or threads into the fabric: and it was insisted, that the specification was ambiguous and obscure, and did not sufficiently distinguish between what was claimed as new and what was admitted to be old; and that the defendant was entitled to a verdict on the first and third issues, the plaintiff having given no evidence to shew that the crown had power to grant the letters-patent, or that he had, as alleged in the petition referred to in the third plea, had the invention communicated to him from a foreigner residing abroad.

Four questions were presented by the lord chief justice for the consideration of the jury,—first, whether the hollowness of the spindle was new,—secondly, whether the having the hollow spindle fixed or stationary was new,—thirdly, whether the raising the hollow spindle to a particular point of elevation above the bobbins, was new,—fourthly, whether a combination of all these was new.

The jury found that the use of the hollow spindle was not new, but that the using it fixed or stationary, was new.

The learned judge inclined to think that the plea of non concessit imposed upon the plaintiff the necessity of giving affirmative evidence to shew that the crown had power to grant the patent; and that the plaintiff was also bound to give some evidence to shew that the statement in his petition to the crown, that the alleged invention had been communicated to him by a foreigner residing abroad, was true: and he accordingly directed a verdict to be entered for the defendant on the first and **[704]** third issues, and for the plaintiff on all the rest; reserving leave to the latter to move to enter the verdict for him on the first and third issues, if the court should be of opinion that his ruling thereon was erroneous,—and to the former leave to move to enter a verdict for him on the fifth, eighth, and ninth issues, if the court should be of opinion that the specification claimed as new the hollow spindle, whether fixed or revolving, or that the specification did not sufficiently distinguish between what was claimed as new and what was disclaimed as old.

The Attorney General, accordingly, in Easter term, 1847, on behalf of the plaintiff, obtained a rule nisi to enter a verdict for him on the first and third issues. He submitted that non concessit does not put in issue the representations upon which the crown is induced to grant the letters-patent, but merely puts the grantee to prove the fact of the grant having been made, and not its legal effect,—citing *Bedells* v. *Massey* (7 M. & G. 630, 8 Scott, N. R. 337), and the authorities there referred to; and, as to the third issue, that, the plaintiff having alleged in his declaration that he was the true and first inventor of the improvements for which the patent was granted, and that allegation not having been traversed, the defendant was not at liberty to controvert the fact, and, at all events, that the onus of proving the alleged fraud, lay on the party asserting it,—*Doe d. Bridger* v. *Whitehead* (8 Ad. & E. 571, 3 N. & P. 557); *Williams* v. *The East India Company* (3 East, 192); and that, if the plea amounted to a traverse of the allegation that the plaintiff was the true and first inventor, the evidence given on the part of the plaintiff was sufficient to establish the affirmative,—the importer being an inventor **[705]** within the statute 21 Jac. 1, c. 3, s. 6,—*Edgeberry* v. *Stephens* (2 Salk. 447, 1 Webster's Patent Cases, 35).

M. D. Hill also obtained a rule nisi to enter a verdict for the defendant, on the fifth, eighth, and ninth issues, upon the points reserved at the trial; and also for a new trial, on the ground of the improper reception of evidence to explain the specification, and that the verdict for the plaintiff was against the weight of evidence. He cited *Macfarlane* v. *Price* (1 Stark. N. P. C. 199, 1 Webster's Patent Cases, 74), *Harmar* v. *Playne* (11 East, 101), *The King* v. *Cutler* (1 Stark. N. P. C. 354), and *Savory* v. *Price* (R. & M. 1).

M. D. Hill and Hindmarch, in Trinity term, 1848, shewed cause against the plaintiff's rule. Non concessit puts in issue the effect of the grant,—whether the Queen was in a position to make, and the grantee to receive it. The authorities upon the subject are few and clear. In Co. Litt. 260 a., it is said, that, "if a grant by letters-patent under the great seal, be pleaded and shewed forth, the adverse party cannot plead nul tiel record, for that it appears to the court that there is such a record; but, inasmuch as it is in nature of a conveyance, the party may deny the operation thereof, therefore he may plead non concessit, and prove in evidence that the King had nothing in the thing granted, or the like; and so it was adjudged." So, in *Hynde's case*, it was resolved by the court (4 Co. Rep. 71 b.), "that it is true that records import in themselves truth, and conclude all men from denying anything appearing within the record, as antedate, &c.(*h*). But, to take averment which stands with the record, and which doth not **[706]** impugn any thing apparent within the record, the law doth well admit and allow: as, against a fine upon release, to say that the conusee had nothing at the time of the fine levied, as it is held in 16 H. 7, 5 b. (P. 16 H. 7, fo. 5 b., pl. 2). So, against the King's letters-patent under the great seal shewed in court, none can deny them; but non concessit per præd. literas patentes, is a good plea, for, although there be such letters-patent, yet perhaps nothing pass by them, and so, per consequens, non concessit. And, although inrolment, or other matter of record, shall not be tried per pais, yet the time when the inrolment was made, shall be tried per pais; for, the inrolment itself shall never be drawn in question (for, that is agreed by both parties), but only the time of it, as, in the other case, where one pleads a grant of the King by his letters-patent under the great seal, and the other pleads non concessit by the same letters-patent, in that case the letters-patent are confessed, but the effect and operation of them is denied; and therefore the trial shall not be where the letters-patent bear date, but where the lands lie; as it was adjudged." Again, in *Eden's case* (6 Co. Rep. 15 b.), "in the King's Bench, in trespass quare clausum fregit apud Martham, in com' Norf., by Thomas Eden and William Franklyn, against Edward Brown, the defendant pleaded that the Queen was seised in fee, in right of her crown, and, by her letters-patent under the great seal, bearing date at Weldhall, in com' Essex, &c., concessit tenement' præd' in quibus, &c., cuidam A. B., &c. The plaintiff took issue, quod non concessit tenement' præd' per prædictas literas patentes. And this issue was tried in the county of Norfolk, where the land lay, and not where the letters-patent bore date, and the jury found for the plaintiff; and it was moved in arrest of judgment, that it ought to have been tried where the **[707]** letters-patent bore date; et non allocatur per curiam; for, the letters-patent being matter of record, and shewed to the court under the great seal, cannot be denied, nor can the party plead nul tiel record against them, being shewed under the great seal; and therefore the effect of the issue of non concessit is, that the Queen had nothing in the land, or that the tenements did not pass by the letters-patent, in which cases it shall be tried where the land lies: and so it was adjudged." The doctrine laid down in these cases is confirmed by *Baddeley* v. *Leppingwell* (3 Burr. 1544), where Wilmot, J., delivering the judgment of the court, says: "Non concessit puts the operation of the grant in question. If a man pleads a grant from the crown

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(*h*) Citing 37 H. 6, 21 b. (*Quartermain's case*, 37 H. 6, fo. 21 b. pl. 9), Plowd. Com. 491, 8 & 9 Eliz., Dyer, 242 (*Whiteacres* v. *Thurland*).

under the great seal; and the other pleads non concessit: in this case, the letters-patent are confessed; but the effect and operation of them is denied: the effect of that issue of non concessit is, that the crown had nothing in the land, or that the tenements did not pass by the letters-patent. So is *Hynde's case*, in 4 Co. 71 b., and *Eden's case*, in 6 Co. 15 b., expressly." That case is precisely in point. [Maule, J. Suppose the crown, being seised of land, granted it in apt terms, but upon a false suggestion,—could you give evidence of that false suggestion under non concessit?] The cases above cited shew that that may be done. [Maule, J. *Eden's case* and *Baddeley* v. *Leppingwell* certainly do not, either of them, establish that point. In the case of *Alton Woods* (1 Co. Rep. 40 b.), there is much discussion as to the effect of false recitals in the King's grant.] Non concessit puts in issue all that the plaintiff was before the new rules of pleading bound to prove under the general issue: and its effect is not narrowed by the allegation in the declaration that the **[708]** plaintiff was the true and first inventor. It is not essential, though usual, so to aver.

The third plea sets out the specification and the petition upon which the patent was founded. The petition itself was in evidence. It purported to ground the plaintiff's claim to the exclusive privilege he sought, upon the fact of his having obtained the information from a foreigner residing abroad. The plea, it is true, does not allege that the plaintiff acted wilfully and corruptly. The question is, upon which party rests the burthen of proof. The rule of law referred to by Lord Ellenborough in *Williams* v. *The East India Company* (3 East, 199),—that, "where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case, of proving a negative, on the other side,"—has no application here. Primâ facie, all monopolies are void. The statute 21 Jac. 1, c. 3, s. 1, is merely declaratory of the common law: but the 6th section declares and enacts "that any declaration before mentioned, shall not extend to any letters-patent, and grants of privilege for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." It is for a party who seeks to establish a monopoly, to bring his case within the exception, and not for the party opposing it to shew the contrary. **[709]** From the time of Lord Hardwicke, downwards, the usual course, in the case of an infringement of a patent right, where an application has been made to a court of equity for an injunction, has been, to refuse the injunction, unless the right has been established in a court of law: *Blanchard* v. *Hill* (2 Atk. 484); *Bacon* v. *Spottiswoode* (1 Beavan, 382); *Cartwright* v. *Amatt* (2 B. & P. 43); *Harmer* v. *Plane* (14 Ves. 130, 136). The principle laid down in these cases is, that a patent is a bargain between the public on the one side and the patentee on the other; and that care must be taken that the public gets the consideration for the grant, and that the patentee is a person from whom the consideration moves. The statute requires that the patentee shall be the true and first inventor. What do these words mean? Prior to the statute 21 Jac. 1, c. 3, an importer was held to be an inventor: The case of *Monopolies* (*Darcy* v. *Allin*) (11 Co. Rep. 84, Noy, 178, 1 Webster's Patent Cases, 1, 5). In the case of *The Clothworkers of Ipswich* (Godbolt, 351, p. 252), it was resolved by the court, that, "if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate or stock, &c., or, if a man hath made a new discovery of any thing; in such cases, the King, of his grace and favour, in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it." So, in Sheppard's Abridgment (*h*), it is said that "it is generally held by the judges that the King may, for a **[710]** reasonable time, grant a monopoly patent of that which any man, at his own charge, wit, and invention, shall bring in as a new trade or device into the realm; or any new engine, tending to the furtherance of it, for the good of the realm." *Edgeberry* v.

(*h*) Part iii. p. 61, Prerogative of the King, pl. 2; citing Hughes's Abridgment, 254, Godb. 253.

Stephens (2 Salk. 477, 1 Webster's Patent Cases, 35) and other cases (see Lombe's Patent, 1 Webster's Patent Cases, 38) have decided that an invention the knowledge of which is imported from abroad, may be the subject of a patent: but that is the only exception which has ever been made out of the words of the statute; it has never been held that a communication received from a person residing abroad, such person not being a foreigner, will sustain a patent. In *Tennant's case* (Davies's Patent Cases, 429, 1 Webster, 125), a patent founded upon a communication made to the patentee by a Scotchman residing in Glasgow, was held void. [Coltman, J. Do you contend that a communication made to the party by an Englishman residing abroad, would not be sufficient to entitle him to the patent?] There is no case in which that has been decided. But the statement invariably is, that the information was received from a foreigner residing abroad. [Wilde, C. J. The circumstance of the party's importing a new manufacture, and giving the public of this country the benefit of it, is the basis of the grant of a temporary monopoly to him. I am not aware that it has ever been considered necessary that the informant should be a foreigner.] If the patentee has obtained the grant from the crown by means of a representation which is untrue, the patent is void. In *Morgan* v. *Seaward* (2 M. & W. 544, 561, 1 Webster's Patent Cases, 187), Parke, B., says: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law: and such a grant is void, not against the **[711]** crown merely, but in a suit against a third person: *Travell* v. *Carteret* (3 Lev. 134); *Alcock* v. *Cooke* (5 Bingh. 340, 2 M. & P. 625). It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether,—as was held in *Hill* v. *Thompson* (8 Taunt. 375, 2 J. B .Moore, 424) and *Brunton* v. *Hawkes* (4 B. & Ald. 541): for, although the statute invalidates a patent for want of novelty, and, consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether is, that the consideration for the grant is the novelty of all, and, the consideration failing, or, in other words, the crown being deceived in its grant, the patent is void, and no action maintainable upon it." The patentee must be either the inventor, properly so called, or the importer of the invention. In this case, the plaintiff in his petition alleges himself to be an importer. That surely must be a material suggestion. The fact of his making the application in that form, shews that he was not the true and first inventor in any other way. The statement in the petition is in the nature of a warranty, the truth of which must be proved by the party making it, and any fraud or concealment in which avoids the transaction: *Geach* v. *Ingall* (14 M. & W. 95); *Ashby* v. *Bates* (15 M. & W. 589). The rules of evidence are rules which bend to the necessity of the case. It is impossible for the defendant to prove that the plaintiff did not receive the information from a foreigner residing abroad. [Wilde, C. J. Suppose you had pleaded that the plaintiff was not the true and first inventor,—must you not have proved the negative? Would your plea have imposed upon the plaintiff the necessity of proving the affirmative? Is there any case where a patentee **[712]** has proved himself to be the true and first inventor, by shewing that he obtained his knowledge of the invention by communication from a foreigner residing abroad?] There is not. The grant can have no operation against us, except in so far as the grantee is able to substantiate his title. It is suggested in *Bowman* v. *Taylor* (2 Ad. & E. 278, 4 N. & M. 264), by analogy to the case of landlord and tenant, that a licensee cannot dispute the title of the patentee: but, in *Hayne* v. *Maltby* (3 T. R. 438), where A., asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other; in an action by A. on the covenant, it was held that B. was not estopped by his covenant from pleading in bar to the action, that the invention was not new, or that the patentee was not the inventor, but that he might thus shew that the patent was void. [Maule, J. That case is rather hard of digestion.] It has never yet been rejected; and it is sustained by *Chanter* v. *Leese* (4 M. & W. 295, S. C. in error, 5 M. & W. 698). The decision of this court in *Beard* v. *Egerton* (ante, vol. iii. p. 97) does not militate against the doctrine here contended for: the plea there was held bad because it negatived only one of the modes in which the plaintiff might have been the true and first inventor. Here, however, it is submitted that the plea is a material one, and that it lay upon the plaintiff to prove the truth of the representation made in his petition,—that representation being the very gist of his title. [Coltman, J. It is not every false recital in a patent that will render it void.] Certainly not. [Coltman, J. The question is, whether you shew enough, upon the face of your plea, to make it available as an answer. The foundation of the grant is not the communication [713] from abroad, but the first publication of the invention here.] There is a direct averment here that this statement in the plaintiff's petition was the consideration for the grant; and its truth is put in issue. It is the constant course, at nisi prius, to call upon the patentee in the first instance to support his title. In *Dickson* v. *Evans* (6 T. R. 57), Ashhurst, J., says: "It is a general rule of evidence, that, in every case, the onus probandi lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognisant." So, here, it is submitted that it is for the plaintiff to bring himself within the exception in the 6th section of the statute 21 Jac. 1, c. 3.

The Attorney-General, Mellor, and Corrie, in support of the rule. Since the cases of *Nickels* v. *The London Caoutchouc Company* (1 Webster's Patent Cases, 656), *Bedells* v. *Massey* (7 M. & G. 630, 8 Scott, N. R. 337), and *Bunnett* v. *Smith* (13 M. & W. 552), it cannot be doubted that non concessit is a good plea; although what is put in issue by it, may be matter of some doubt. [Cresswell, J. It seems to be universally assumed that it puts in issue all the surrounding circumstances of the grant. Maule, J. The provision requiring notice of objections (*e*) gives force to that argument; for, unless non concessit does put all in issue, the legislature did something which was very idle and superfluous,—which is hardly to be presumed. Cresswell, J. That statute was not passed until after the promulgation of the new rules of Hilary term, 4 W. 4, though the bill was introduced in the session before.] The new rules in case are the same as in assumpsit: and the 3rd rule in assumpsit [714] provides, that "all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud, or otherwise, shall be specially pleaded." Here, the suggestion is, that there was fraud or misrepresentation in the application to the crown: that should have been pleaded specially. [Coltman, J. The plea with which you are now dealing is not a plea in confession and avoidance, but a traverse.] The defendant is, in effect, seeking, under a traverse, to avail himself of matter in confession and avoidance. [Cresswell, J. You say, that, before the new rules, the evidence in question would have been admissible under non concessit: but that the effect of the rules is to exclude it?] Precisely so. [Maule, J. It seems to me to be against the spirit of the new rules, that the fact of the Queen having been deceived in her grant, should be given in evidence under non concessit: but it may be (and I incline to think it is so) that the spirit is not embodied in the language of any of the new rules.] Assuming that to be so, is the plaintiff bound to prove the truth of his representation? That would be contrary to every principle upon which the law of evidence is founded.

Upon the third issue, the case of *Beard* v. *Egerton* (ante, vol. iii. p. 97) has an important bearing. The first introducer of a new manufacture into the kingdom is an inventor within the statute of James. So far as regards the consideration upon which the Queen's grant is founded, it is perfectly immaterial whether the patentee is an actual or only a special inventor. The statute points to no such distinction. The real consideration for the grant of the patent is, the benefit to the public; and, no doubt, if the crown were deceived in that respect, the grant [715] would be void: *Sir Robert Johnson's case* (17 Vin. Abr. 151, title Prerogative of the King (M. c.), pl. 1). In Hindmarch on Patents (page 443), it is said, that, "if the patentee was not an actual inventor, but merely an importer of the invention from abroad, the plaintiff would, under an issue upon a plea alleging that the patentee was not the true and first inventor, make a primâ facie case, in precisely the same way as has already been mentioned, viz. by putting the patent and specification in evidence, and proving the novelty of the invention at the date of the patent. Under this issue, the defendant may shew that the patentee was not the true or actual inventor, and also that he was not the first inventor,—which means, the first person to give the public the benefit of the invention." A party who seeks to avoid a grant of the crown, on the ground of fraud, must prove the fraud. It is an universal principle of justice, that all things are presumed to be rightly done, until the contrary is shewn.

The Attorney-General, Mellor, and Corrie, now shewed cause against the defen-

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(*e*) 5 & 6 W. 4, c. 83, s. 5.

dant's rule. The only question upon the fifth issue is, whether there was evidence to shew that the invention for which the patent was granted was new: and, as to that, there clearly is no ground for finding fault with the conclusion to which the jury came. All that was proved by the defendant's witnesses, amounted to some abortive experiments, which clearly do not affect a subsequently granted patent: *Cornish* v. *Keene* (1 Webster's Patent Cases, 501, 3 N. C. 570, 588, 4 Scott, 337).

Then, as to the eighth and ninth issues, reading the specification with a spirit of fairness, it clearly describes the invention with accuracy. The subject of the construction of specifications was much discussed in *Russell* **[716]** v. *Cowley* (1 C. M. & R. 864), where Parke, B., says, that, "in the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done." The same doctrine is laid down by Lord Ellenborough in *Harmar* v. *Playne* (11 East, 101. And see *Harmer* v. *Plane*, 14 Ves. 130). And in *M'Alpine* v. *Mangnall* (ante, vol. iii. p. 496, 518), Parke, B., says: "The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine that give the vibrating motion to the fabric while in the course of drying." [Wilde, C. J., referred to *Elliott* v. *Turner* (ante, vol. ii. p. 446), where it was held that the words of a specification are to be construed according to their ordinary and proper meaning, unless it be shewn by something in the context (which may be explained by evidence), that a different construction ought to be adopted.

Hindmarch, in support of his rule. The inrolment of a specification is required as a condition of the grant: *Muntz* v. *Foster* (6 M. & G. 734, 7 Scott, N. R. 471, 1 D. & L. 737). Has the patentee in this case fairly and properly complied with that condition? He is particularly to ascertain and describe,—first, the nature of the invention,—secondly, the manner in which it is to be carried into effect: and this information must be conveyed in terms sufficiently clear and precise to inform a workman of ordinary skill to what it does and to what it does not extend. It is expedient to repress the growing tendency to laxity of de-**[717]**-scription in these instruments. "The patentee," says Lord Ellenborough, in *Macfarlane* v. *Price* (1 Starkie, N. P. C. 199, 1 Webster's Patent Cases, 74), "in his specification, ought to inform the person who consults it, what is new, and what is old. He should say, my improvement consists in this,—describing it by words, if he can, or, if not, by reference to figures. But, here, the improvement is neither described in words, nor by figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. The specification states that the improved instrument is made in manner following: this is not true; since the description comprises that which is old, as well as that which is new. Then, it is said, that the patentee may put in aid the figures: but, how can it be collected from the whole of these, in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention: but it would exceed the wit of man to discover from what he is warned in a case like this." So, here, unless extraneous circumstances are called in aid to construe this specification, it is absolutely beyond the power of any human being, to understand it. In the construction of a specification, the rights of the public are to be regarded. *Minter* v. *Mower* (6 Ad. & E. 735, 1 N. & P. 595) is on all fours with the present case: there, the specification described the invention to be of "an improvement in the construction, making, or manufacturing of chairs," and to consist in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acted as a counter-balance to the pressure against the back, and whereby a person sitting in the chair, might, by pressing against the back, cause it to take any inclination, and yet might be supported. In **[718]** an action for infringing the patent, it was pleaded that the plaintiff was not the inventor, and that the specification did not describe the invention: and it was proved that a chair had previously been sold, to which a similar leverage was applied, acting by the pressure in the same way, but having also other machinery, which prevented the inclination of the back from being shifted, except when a spring was touched by the hand. The jury found, that, without such other machinery, the chair previously sold would have produced an equilibrium by the self-adjusting leverage; that the maker of it was the inventor of the machine, and found out the principle, but not the practical purpose to which it was now applied; and that the plaintiff had discovered such purpose. And the court ordered a nonsuit. In *Kay* v. *Marshall* (5 N. C. 492, 7 Scott, 548), a patent was taken out for "new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and by the specification the invention was declared to consist of "new machinery for macerating flax and other similar fibrous substances, previous to drawing and spinning it; and also of improved machinery for spinning the same after having been so prepared." The only alleged improvement in the spinning machinery was declared to be "placing the drawing-rollers only two inches and a half from the retaining-rollers," which was nearer than they had ever before been placed for the purpose of spinning flax. It appeared, however, that spinning-machines were always so constructed, as, by means of slides, to allow the distance of the rollers to be varied according to the staple or fibre of the article to be spun; and that cotton had always been spun with a reach of less than two inches and a half. It was held that this was not the proper subject of a **[719]** patent, though the jury found that the invention was both new and useful; and, consequently, that the specification, being void as to part, was void altogether. In *Hill* v. *Thompson* (3 Meriv. 629, 1 Webster's Patent Cases, 229), upon a motion to revive an injunction after a trial of the right at law, Lord Eldon said: "In his directions to the jury, the judge has stated it as the law on the subject of patents,—first, that the invention must be novel,—secondly, that it must be useful,—and, thirdly, that the specification must be intelligible. I will go further, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled." Here, the specification is clearly bad, for not distinguishing between what is old, and what new.

The verdict upon these issues was clearly against the evidence; indeed, it may be called perverse, for the evidence was all one way. In *Carpenter* v. *Smith* (1 Webster's Patent Cases, 530, 540), a single instance of prior user was held to be sufficient to destroy the patent. [Maule, J. To sustain the verdict, I suppose?] It was so. In *The Houschill Coal and Iron Company, App., Neilson, Resp.* (ibid. 673, 709),—which was an appeal from a judgment of the court of Session in Scotland, disallowing a bill of exceptions,—Lord Lyndhurst, C., says: "I understand the position of the **[720]** learned judge to be this,—that, if the machine had been made, and had been put in trial unless those trials had gone on, and the machines had been used up to the time of the granting of the letters-patent, it would not be evidence of prior use, so as to invalidate the letters-patent. Now, I am obliged to say,—with all deference to the learned judge, and with all respect to the learned judges of the court of Session,—that I think in that respect they are mistaken; and that, if it is proved distinctly that a machine of the same kind was in existence, and was in public use, that is, if use or if trials had been made of it in the eye and in the presence of the public, it is not necessary that it should come down to the time when the patent was granted. If it was discontinued, still that is sufficient evidence in support of the prior use, so as to invalidate the letters-patent." The only novelty here was the raising the hollow spindle, and the fixing it with a screw and nut,—the hollow spindle itself being old, but not appearing to have been fixed before.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

This was an action for the infringement of a patent. The declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that Her Majesty had granted him a patent for his invention; and that the defendant infringed it.

The defendant pleaded several pleas: first, non concessit,—secondly, a plea that need not be considered,—thirdly, after setting out the specification, which recited that the Queen had granted to the plaintiff a patent for improvements in machinery for covering **[721]** fibres, applicable to the manufacture of braid and other fabrics, communicated to him by a certain foreigner residing abroad, the plea averred, that, before the granting of the patent, the plaintiff, representing to Her Majesty, that, in consequence of a communication made to him by a certain foreigner residing abroad, he the plaintiff was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braids and other fabrics; that Her Majesty, believing and confiding in the truth of, and acting upon, the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the declaration mentioned, and that such representation was false, whereby the said letters-patent were and are null and void; concluding with a verification,—fourthly, that the alleged invention was not an improvement,—fifthly, that it was not new,—sixthly, that it was not a manufacture within the meaning of the statute,—seventhly, that it was of no use,—eighthly, that the plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed,—ninthly, that no sufficient specification was inrolled,—tenthly, not guilty.

The cause was tried before me, at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiff on all the issues but the first and third; but leave was reserved to him to move to enter a verdict in his favour on those issues; and the defendant had the like leave as to the fifth, eighth, and ninth issues.

The plaintiff produced the patent in evidence; and gave evidence to shew that a machine constructed as his was, had never been in use before the patent. No evidence was given by either party as to the invention having been communicated to the plaintiff by a foreigner residing abroad. I thought that the plaintiff should **[722]** have given evidence of the affirmative; and directed a verdict for the defendant on the first and third issues—the plaintiff having leave to move to enter it in his favour.

With regard to the fifth issue, viz. that the alleged invention was not new, the jury found that a hollow spindle used in the plaintiff's machinery was not new; but that using it fixed, instead of revolving, was new: and a verdict was taken for the plaintiff on all the issues except the first and third, subject to a motion, as before stated, if the court, upon reading the specification, should think that it claimed the hollow spindle, not only when fixed, but also revolving, or that it did not sufficiently distinguish between what was claimed as new, and what was disclaimed as old.

The Attorney-General, accordingly, obtained a rule to enter a verdict for the plaintiff on the first and third issues; and Mr. M. D. Hill obtained a cross-rule to enter a verdict for the defendant on the fifth, eighth, and ninth issues: he also moved for a new trial, on the ground of parol evidence having been admitted to shew what the specification claimed as new, but my notes of the evidence do not shew that any such evidence had been received; and on the ground that the verdict for the plaintiff was against evidence.

Upon the question raised as to the first issue, the court is of opinion, that there are strong reasons for saying that the plea of non concessit did not impose on the plaintiff the burthen of giving evidence to shew that the crown had power to grant, until evidence to impeach the patent had been given on the other side; and also that the averment in the declaration "that the plaintiff was the inventor of the improvements for which the patent was granted," not having been traversed, the defendant was not at liberty at the trial to controvert that fact. But, without deciding either of **[723]** those points, it appeared to us that the rule for entering a verdict for the plaintiff on that issue must be made absolute, there being evidence at the trial,—viz. that no such machine as the plaintiff's had been known until his was made,—that the plaintiff was the inventor.

As to the third issue, viz. that the plaintiff obtained the patent by means of a false representation to Her Majesty,—the court is of opinion that it was for the defendant to prove the affirmative, and that the record did not (as was contended in argument) shew the falsehood of his representation,—a party having received information from abroad, being an inventor within the meaning of the stat. 21 Jac. 1, c. 3, s. 6. Upon this issue, therefore, the plaintiff is entitled to have the verdict entered in his favour.

With respect to the cross-rule,—upon a careful examination of the specification, we think that is does sufficiently distinguish between what is claimed as new, and what is disclaimed as old; and also that it claims the hollow spindle, not generally, but fixed,—so that the finding of the jury, that the hollow revolving spindle was not new, does not negative the novelty of that which the plaintiff claimed. The verdict, therefore, upon those issues, will remain undisturbed, the court not finding any sufficient grounds for saying that it was contrary to the evidence in the cause.

Rule accordingly (*a*).

[724] DOE D. HENRY EUSTATIUS STRICKLAND *v.* SIR GEORGE STRICKLAND, BART. Dec. 8, 1849.

The testator executed a will in Yorkshire, in 1776, he then having four sons. A fifth son being born in 1777, the testator, in 1778, executed in London what was apparently intended to be a copy of, and was dated on the same day as, the Yorkshire will, and at the same time made a codicil in duplicate,—the ostensible object of the codicil being, to make provision for the newly-born son. The testator's third son died in 1795. The testator died in 1808, leaving the other four sons him surviving. After his death, the Yorkshire will, with one copy of the codicil, were found in an open portfolio upon his library table, with erasures in both, the effect of which would be, in a certain event, to give to the eldest son certain estates which otherwise would have gone to the younger sons in succession. The London will, with the other copy of the codicil, were found, without alteration, locked up in a drawer in the same table. In the portfolio was also found an undated and unfinished sketch of a will. The Yorkshire will, and the codicil found with it, were proved by the testator's widow and executrix. After the death of all his brothers, the testator's fifth son brought an ejectment against the heir of his eldest brother, claiming under the limitations contained in the unaltered (or London) will and codicil.—At the trial, the judge left it to the jury to say,—first, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed one will, the last will of the testator; telling them, that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will, so altered, became the last will of the testator,—secondly, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. The jury found that the two wills and the codicil were intended to form one will, and that the alterations in the Yorkshire will, and in the codicil found with it, were intended to be final:—Held, that these two questions were properly submitted to the jury, and that the direction of the judge was correct in point of law.—Held, also, that it was no ground for a new trial, that the judge left to the jury as a question of fact, that which he should himself have decided as a matter of law,—unless the objection was presented to the notice of the judge at the trial.

This was an action of ejectment whereby the lessor of the plaintiff sought to recover certain estates in the county of York.

[725] The declaration contained two demises, both by Henry Eustatius Strickland, the one laid on the 3rd of December, 1839, the other the 3rd of May, 1838.

The defendant, who was let in to defend as landlord, pleaded not guilty.

The cause was tried before Alderson, B., at the last York spring assises.

The facts that appeared in evidence were as follows:—Sir George Strickland, Bart., of Boynton, in the county of York, the father of the lessor of the plaintiff, and grandfather of the present defendant, on the 18th of July, 1776, being then in Yorkshire, made a will, which was duly executed and attested, as follows:—

"In the name of God, amen: I, Sir George Strickland, of Boynton, in the county of York, Bart., do make this my last will and testament, in manner following, that is to say, I give to my wife my house at Newton, with the farm I now occupy there, for her life: I also give to her my house at Hildenley, with the estate here, for her life: I also give to her my house at Awburn, with the land I now occupy there and [al]so the farm in the occupation of Thomas Dobson, for her life: I also give to her all the stock and

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(*a*) As to pleading in denial of the operation of instruments, see 3 N. & M. 50, n. (*c*); 4 N. & M. 322, n. (*b*); 5 Mann. & R. 464, 1 M. & G. 208.

every thing that shall be upon any of the above-mentioned grounds at the time of my decease, desiring her to leave, as near as conveniently may be, the stock of equal value upon the several grounds above-mentioned, or money equivalent thereto, to those who shall succeed her therein: I also leave to her, after the payment of my debts and all other expenses due from me, all the money which I shall leave at the time of my decease, with all arrears of rent due to me at that time, and all other money due to me at that time from any other person, together with all my Bank bills, and all other bills, and all money owing to me on Government or any security whatever: **[726]** Now, my meaning is, that, if I should leave any money upon Government or any other security whatever, that she should receive the interest of it for life, and that she should leave it to such of my younger children as she thinks proper, or else that it should be divided equally among all my younger children: And I give to her any of my books or furniture that shall be in my house at Boynton at the time of my decease, that she shall chuse: I also give her all my carriages, horses, and stock of sheep and other things that shall be, at the time of my decease, upon any ground I occupy at that time at Boynton, Carnaby, or elsewhere, with all my tea, table, and Sheffield plate, or any other she shall chuse to take. My estate at North Bruton, by a settlement made by my father (*a*), will go to my son William: and my estate at Boynton, by my marriage-settlement, will also go to him. I further give him the lease I have at Boynton, from Pocklington School; also the land late belonging to Sir Griffith or Mr. Boynton; and also the land and appurtenances I bought there; and also my estate at Carnaby: Now, my meaning is, to give him the above lease and land at Boynton, and estate at Carnaby, provided that he will relinquish to the purposes of this will, to be hereafter mentioned, the estates at Wintringham, East Heslerton, and Knapton, which would otherwise devolve to him by a settlement made by my father: but, should he determine to retain those estates, then I leave my estate at Carnaby, with the before-mentioned lease and land at Boynton, to my son George, for his life: I also leave to him, for his life, my estates at Newton and Kirby: I also leave him my estates at Wintringham, East Heslerton, **[727]** and Knapton, for his life, provided my son William will take my estate at Carnaby, with the estates above-mentioned at Boynton, instead of them; in which case, I would have the proportion of the jointure payable to my wife out of the estate at Carnaby, to be paid out of the estate at Wintringham: And, should my son William retain the estate at Wintringham, I give my son George, for his life, all the land and houses and appurtenances that I have bought there: I also impower my son George to settle, out of the estates left to him, 300l. a year, as a jointure, upon his wife, and 5000l. out of the same as fortunes for his children: I also leave to him all the stock and every thing which shall be upon my farm at Newton, or belonging thereto, at the time it comes into his possession. That part of my estate at Newton which I have settled upon my wife for her life, I mean for my son George to inherit after her decease: Now, I leave the above-mentioned estates to my son George, subject to the payment of 100l. a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly: I also leave my estate at Hildenley, after the decease of my wife, to my son Charles, for his life; and my estates at Birkwith, Easton, and Suerby, to him for his life, with a power to settle out of the above estates 300l. a year upon his wife, and 5000l. out of the same as fortunes for his children: I leave the above-mentioned estates to my son Charles, subject to the payment of 50l. a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly: I also leave my estates at Fraisthorp, Willsthorp, and Awburn, to my son Walter, for his life, to inherit what is left to my wife for her life, after her decease, with a power to settle out of the above estates 300l. a year, as a jointure, upon his wife, and 5000l. out of the same, as fortunes for his children: I leave the above-mentioned **[728]** estates to my son Walter, subject to the payment of 50l. a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly. Such parts of my estates as I have left to my wife for her life, I mean to devolve to such of my sons as I have afterwards left them to. I give to my younger sons a power to dig up or cut down anything upon any of the estates I have left them for their lives. In case my

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(*a*) In the copy of the will executed in London on the 15th of May, 1778, the words were,—"by a settlement made by my father's will, will go," &c.

son George should die before my son Charles, I then leave all the estates I have left to my son George, to my son Charles, for his life, he paying to my son Walter, and to each of my unmarried daughters, so long as they continue unmarried, 100l. a year over and above the annuities before mentioned (a)[1]. [*But, if my son Charles should be dead at the time of the decease of my son George, I then give all the estates I have left to my son George, to my son Walter, for his life, he paying the same annuities as my son Charles would have done. And, whichever of my sons Charles or Walter should die first, I leave the estates I have given to either, to the survivor of them, he paying 50l. a year, over and above the 50l. a year first payable out of the estates, to each of my unmarried daughters, so long as they continue unmarried. And, if both my sons Charles and Walter should die before my son George, I then leave the estates I have left to both of them, to my son George, for his life, he paying out of each of them an annuity of 100l. to each of my unmarried daughters, so long as they continue unmarried:*] After his death, to my son William; with a power to leave them to such of his sons as he thinks proper, for their lives, subject to the same annuities as before. But, in case he leaves no sons, or in case of **[729]** failure of issue male from them, then to the heirs male of my other sons, in succession. And, provided my estates which I have left to my younger sons come into the possession of my eldest son, or his sons, or into the possession of any of my younger sons' sons, I then leave a further annuity of 100l. a year to each of my unmarried daughters, so long as they continue unmarried, over and above the annuities before mentioned. And, in case any of my younger children should not have attained the age of twenty-one years, at the time of my decease, I would have my wife receive the rents and annuities left to each of them, for their education and benefit: and I hereby make my wife the sole guardian of my children. And whereas I have left all the estates I have given to my younger sons for their lives, after their decease, to my eldest son and his issue male,—my meaning is, that he or they shall enjoy the same only upon condition that he or they will settle all my estates which will come to him or them after my decease, by virtue of any will or settlement heretofore made, in case of failure of issue male from him or them, upon my other sons and their issue male in succession, and, in failure of them, in the same manner as I settle the rest of my estates in failure of issue male from me: but, in case of his or their refusal to comply with the above settlement, I then leave all the estates I have left to my younger sons for their lives, to them and their heirs male in succession. In case the whole of my estate comes into the possession of my son William, or his issue male, by the death of all my younger sons, I then give to each of my younger sons' children 1000l., to be paid out of my estates which I give to my younger sons for their lives. And, in case all my estates come into possession of any of my younger sons (a)[2], or their issue male, by the death of my eldest **[730]** son without issue male, I then also give 1000l. to each of the children of my other younger sons, to be paid in like manner. But, if all my sons die without issue male, I then leave all my estates to my cousin Walter Strickland, and his issue male; and then to my cousin William Strickland, and his issue male; they and each of them paying to each of my daughters and sons' daughters an annuity of 200l. a year, over and above the annuities payable before: and, in case of failure of heirs male from them, to my heirs female. And I hereby make my wife sole executrix of this my will. It is my meaning, and I do hereby impower my son William, or any other of my sons, when he or they shall be in possession of the estates hereby devised to him or them, in case of failure of issue male from him, whereby they may become possessed of the estates settled upon him, to charge the same with any annuity, not exceeding 800l. a year, upon any woman he or they may hereafter marry, and as a jointure, and in bar of dower, to be payable at such times and in such manner as he or they shall think fit, with all the necessary and usual powers for enforcing the payment thereof; and also with any sum or sums of money, not exceeding the sum of 1000l. in the whole, together with an annuity of 200l. a year, upon each of his unmarried daughters, so long as they continue unmarried, for the fortune and as a provision for any daughter or daughters he or they may happen to leave at his or their deaths, and to be payable at such time or times, and in such manner, as he or they, by will or otherwise, shall direct and appoint; anything herein contained to the contrary notwithstanding. In witness whereof, I have to this my last will and testament, contained in two sheets of paper, to the first set my **[731]** hand, and to this my hand and seal, this 18th day of July, 1776.

(a)[1] The part within brackets and in italics was afterwards erased by the testator from the will executed in Yorkshire.

(a)[2] In the copy of the will executed in London in May, 1778, the words were "any of my younger sons' sons."

"G. STRICKLAND (L.S.).

"Signed, sealed, published, and declared by the said testator as and for his last will and testament, in the presence of us, who, in his presence, and at his request, have subscribed our names as witnesses hereunto.

"Thomas Phillipson.
"Edward Gill.
"John Taylor."

At the time of executing this will, the testator had four sons,—William, George, Charles, and Walter. Another son, Henry Eustatius (the lessor of the plaintiff), was born in August, 1777.

On the 15th of May, 1778, the testator, for the ostensible purpose of making a provision for his son Henry Eustatius, being then in London, made a codicil to his will, which he executed in duplicate, and at the same time re-executed a copy of the original will, dating the copy as of the day of the execution of the original will; the codicils and copy being both attested by the same witnesses.

The codicil was as follows:—

"This is a codicil, to be annexed to, and taken as part of, the last will and testament of me, Sir George Strickland, of Boynton, in the county of York, Bart., dated the 18th day of July, 1776: Whereas, my youngest son, Henry Eustatius, was born since the date of my said will, and is therefore unprovided for by it: And whereas, an exchange hath taken place of part of my intailed estates for part of the lordship of Carnaby, which exchange is confirmed by articles or settlement made on the marriage of my eldest son: And whereas **[732]** there is a parcel of land, in the lordship of Carnaby, situate at the south end of Carnaby Field, of the yearly value of 120l., excepted out of the said exchange, and which I have power to dispose of, and there is due to me from the estate at Carnaby the sum of 5000l., which by the above articles or settlement is charged on that estate; and I am also entitled to an annuity of 19l. a year issuing out of an estate at Carnaby belonging to Mr. Buck: Now, I give the said sum of 5000l. to my said son Henry Eustatius, and devise to him the parcel of land of 120l. a year, and the said annuity of 19l. a year, to enjoy the said land and annuity during his life: And my will is, that the said land and annuity, after the decease of my said son Henry Eustatius, and subject to and charged with such jointure for a wife as shall be made by him, according to the power hereinafter given him in that behalf, shall go to and be enjoyed by such person or persons as shall be then entitled to my estate at Fraisthorp, and for such estate and interest, and with such powers, remainders, and reversions dependent thereon, as such person or persons shall be entitled to the Fraisthorp estate: And whereas I have by my said will devised certain specific estates to my younger sons George, Charles, and Walter, respectively, for their respective lives, with power to make jointures upon their respective wives, and provision for their respective children, and otherwise charged as therein mentioned; and, upon the decease of any one of my said three last named younger sons, I have devised the estates left to him so first dying, unto one or other of the survivors of them three, with such further benefit of survivorship between them, and with such remainders over, and charged as in my said will mentioned: Now, I do hereby revoke the last-mentioned disposition [*in* (*a*) **[733]** *case my said son Henry Eustatius shall be then living, and in that case I devise the specific estates above disposed to him so first dying, after such decease, unto my said youngest son Henry Eustatius, for his life, charged in like manner, and with such power of making a jointure for a wife, as in my said will mentioned and given to any of my said other younger sons respectively:*] And, after the decease of my said son Henry Eustatius, I devise the

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(*a*) These words within brackets and in italics were afterwards erased by the testator from one copy of the codicil.

last-mentioned estates, charged and chargeable as aforesaid, unto such person or persons, in such manner, and for such estate, and subject to such powers, charges, and out-payments, and with such remainders and reversion, as I have by my said will declared concerning the same after the decease of the younger sons so first dying: [*And* (*a*), *in case my said son Henry Eustatius shall survive all my other younger sons, my will is, that he shall succeed to the specific estates devised to them respectively, and enjoy the same during his life, charged as in my said will, and with such remainders over and reversion as therein mentioned:*] And, least any mistake should arise in regard to my meaning of impowering my younger sons respectively to make jointures for their wives, and provision for their respective child or children, I do hereby expressly charge and subject the respective estates devised to my said younger sons respectively for life, with the payment of 300l. a year, clear of all taxes and deductions, to the wife, or respective wives, of such younger son and younger sons respectively, and with the sum of 5000l. for the portion or portions of the child or children of my said younger sons, George, Charles, and Walter Strickland, respectively, but not with any portion for the child or children of my said son Henry Eustatius, who has 5000l. given him as aforesaid,—such children of my sons George, Charles, and Walter Strickland, if there shall be more than one of any of them my said last-named **[734]** sons, shall share the said sum of 5000l. equally between them: And, in all other respects, I confirm my said will. In witness, &c. "G. STRICKLAND (L.S.).

"Signed, sealed, published, and declared by the said Sir George Strickland, the testator, as and for a codicil to his will, in the presence of us, who have subscribed our names, as witnesses thereto, in his presence, and at his request.

"Jona Price, Salters' Hall, London.
"W. Davids, }
"John Jones, } Clerks to Mr. Price."

The testator, Sir George Strickland, died at Boynton on the 13th of January, 1808, leaving four daughters, and four sons,—William (who then became Sir William), the father of the now defendant, George, who died in June, 1832; Walter, who died in October, 1839, and Henry Eustatius, the lessor of the plaintiff: the testator's third son, Charles, having died in the testator's life-time, in 1795.

On the testator's death, the will which he had originally executed in Yorkshire, together with one copy of the codicil, were found in an open portfolio upon his library table,—the parts above set out in italic and within brackets being obliterated by drawing a pen through them, leaving the writing still legible. In the same portfolio was found what appeared to be an unfinished testamentary paper, undated, and bearing upon the face of it indications that the mind of the writer was still in deliberation upon it.

Locked up in a drawer in the same table, and as originally written, and without any alteration, was **[735]** found the other copy of the codicil, and also the copy of the will which the testator executed in London.

The altered will and codicil found in the portfolio were proved by Lady Strickland, as the last will and testament of her deceased husband,—at York, in December, 1808, and in the diocese of Canterbury, in January, 1809.

The testator's sons George and Walter, upon his death, entered upon the estates respectively devised to them. Upon the death of George, on the 5th of June, 1832, the late Sir William Strickland took possession of his estates, in opposition to his brother Walter, who declined to contest the matter with him.

Sir William Strickland died on the 18th of January, 1834.

In November, 1839, the lessor of the plaintiff,—into whose possession the unaltered copy of Sir George Strickland's will and codicil had come, in his character of executor under the will of his mother,—commenced proceedings in equity against the defendant, Sir William's eldest son. The lord chancellor having, upon appeal, in 1848, decided that the remedy of the lessor of the plaintiff was by an action at law, he, in April in that year, formally demanded possession of the estates, and, upon the defendant's refusal, brought this ejectment.

(*a*) See note (*a*), p. 732.

On the part of the plaintiff, it was contended, that, from the circumstance of the London will being found, with a codicil, unobliterated, and carefully kept, both wills and codicils being under the testator's immediate personal control,—the partial obliteration of one, had not, in law, the effect of a revocation.

The learned baron left it to the jury to say,—first, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate **[736]** codicil annexed to each, formed one will, the last will of the testator; telling them, that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will, so altered, became the last will of the testator,—secondly, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will.

The jury found that the two wills and the codicil were intended to form one will, and that the alterations in the Yorkshire will, and in the codicil found with it, were intended to be final. A verdict was thereupon entered for the defendant.

Knowles, in the following Easter term, moved for a rule nisi for a new trial, on the ground of misdirection. It was properly a question for the jury, whether the alteration of the one paper was an alteration of the other: at most, it was a question of inference and presumption. To tell the jury that the alteration of one was necessarily an alteration of the other, was clearly laying down the proposition too broadly, and in a manner calculated to mislead the jury, and to destroy the materiality of that which had been mainly relied on by the lessor of the plaintiff at the trial, viz., that both documents were in the custody and under the control of the testator at the time he made the alteration. The question of intention should have been submitted to the jury. In Williams on Executors (4th edit. p. 126), it is said: "If a will be executed in duplicate, and the testator keeps one part himself, and deposits the **[737]** other with some other person, and the testator mutilates or destroys the part in his own custody, it is a revocation of both (*a*). The presumption of law, in such case, liable of course to be rebutted by evidence is, that the destruction or mutilation of the one duplicate was done animo revocandi as to both. And, in *Pemberton* v. *Pemberton* (13 Ves. 310), Lord Erskine, C., laid down that the same presumption holds, though in a much weaker degree, where both the instruments are in the testator's possession: and, further, that, in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still. But, in *Roberts* v. *Round* (3 Hagg. 548), the testatrix executed her will in duplicate in the year 1814: the will was kept by her, and the duplicate, immediately after execution, was left with her solicitor, who retained possession of it till the year 1827, when he delivered it to her, at her request: on her decease, in the year 1830, the will and duplicate were found in her portfolio, which was on her bed at the time of her death: the will was inclosed in an envelope, indorsed in her handwriting, 'My will, dated the 11th of April, 1814,' and with the word 'mine' written by her in pencil on the outer sheet of the will: the duplicate had been mutilated, by cutting out the names of several of the devisees: and Sir John Nicholl held that such mutilation was neither a total nor a partial revocation. The learned judge, in pronouncing his judgment, made the following observations: 'What, upon the face of **[738]** the instrument, are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found, and that no duplicate had ever existed. This mutilation of the first sheet, leaving the signature untouched, would not be a total revocation; it would be a revocation of those particular devises only; but, there being two papers, both in the deceased's possession, *the presumption of law would be, that, by the preservation of one duplicate entire, she did not intend a revocation of these particular devises*, otherwise she would have mutilated both duplicates. The construction, then, to be put upon this act of mutilation (for, it clearly appears to have been her own act) is, that, at

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(*a*) Referring to *Sir Edward Seymour's case*, cited Com. Rep. 453, 1 P. Wms. 346, 2 Vern. 742; *Onions* v. *Tryer*, 1 P. Wms. 346; *Burtenshaw* v. *Gilbert*, Cowp. 49; *Boughey* v. *Moreton*, 2 Cas. temp. Lee, 532, 3 Hagg. 191; *Rickards* v. *Munford*, 2 Phillim. 23; *Colvin* v. *Fraser*, 2 Hagg. 266.

most, it was a preparation for a projected alteration, to which she had not finally made up her mind, or which she had abandoned; and therefore she preserved entire the duplicate, which she had always retained in her own possession, and on which she had written the word 'mine.'" [Wilde, C. J. The judge there decides upon the fact, as well as the law.] A distinction has always been drawn as to whether the duplicate is or is not in the custody or power of the testator at the time. In *Goodright d. Glazier* v. *Glazier* (4 Burr. 2515), Lord Mansfield mentioned a case at the delegates, of *Mason* v. *Limbrey*, where "the testator, Samuel Mason, made his will of his real and personal estate, and properly executed two duplicates of it, one of which duplicates he kept in his own hands, the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate, and began to write over a new will, but never finished it, nor did he ever apply to Limbrey to get back his duplicate. Sentence was given for the duplicate of the first will, remaining in Mr. Limbrey's **[739]** hands; for, the imperfect sketch of the unfinished second will was no revocation of the first." [V. Williams, J. That case is reported at length by Comyns, by the name of *Limbrey* v. *Mason and Hyde* (Com. Rep. 451).] Then, it was for the judge, and not for the jury, to say whether or not the two were duplicates. [Wilde, C. J. Two instruments cannot well be duplicates, if the one has an effect very different from the other.] Certainly not.

A rule nisi having been granted,

S. Martin (with whom was Cowling) now shewed cause. There was no misdirection. The facts are simple. In 1776, Sir George Strickland, having then four sons, made a will in Yorkshire. Afterwards, a fifth son being born to him, Sir George, in 1778, executed a copy of the will of 1776 in London, and also a codicil in duplicate, making a provision for his newly-born son. There is no further evidence given of any act done by Sir George with regard to these documents. At his death, the Yorkshire will and one copy of the codicil were found together in a portfolio upon a table in the library at Boynton House, with a portion of each obliterated,—the effect of the alterations being, to deprive the lessor of the plaintiff of certain interests which he might have had in remainder expectant on the deaths of his brothers. Acting upon the opinion of Chief Baron Richards, then at the bar, that the altered will and codicil alone constituted the last will and testament of her deceased husband, Lady Strickland, as his executrix, proved them. Under these circumstances, the questions of fact, it is submitted, were properly left to the jury, and the ruling of the learned judge in point of law was correct. It is diffi-**[740]**-cult to see what other question could have been submitted to them. [Maule, J. The second or London will, it will be said, might pass property acquired between the day of its date and its execution. I am not aware of any case of a will being dated at one time and executed at another. V. Williams, J. The codicil makes the Yorkshire will speak as of the date of the execution of the London will. Maule, J. The testator clearly intended to make one will and duplicate codicils.] The authorities as to the effect of an alteration, as a revocation of a will, are all considered in 1 Williams on Executors, 120 et seq.: the result is, that, to constitute a revocation, the act must be done animo revocandi. Here, the jury have found, and upon evidence which clearly justifies their finding, that the alterations were intended by the testator to be final. There is no pretence for disturbing the verdict.

Knowles and Hugh Hill in support of the rule. The London will was an entirely new will, independently of any intention on the part of the testator. It would necessarily have a much larger operation than the Yorkshire will; and, the attesting witnesses being different, it would require different proof. The learned judge left it to the jury to say whether the second will and codicil were a duplicate of the Yorkshire will and codicil. [Cresswell, J. No. Whether the London will was a separate and independent will; or whether the Yorkshire will and the London will formed one will in two parts.] That is substantially the same thing. Either way, it was clearly a misdirection. The learned judge should have himself decided, that, in point of law, the London will was not part of the will executed in 1776. [Maule, J. That the will of 1776 formed no part of the will of the testator.] By leaving the question to the jury in the way he did, the lessor of the **[741]** plaintiff was deprived of the opportunity of tendering a bill of exceptions. A man can have but one last will; though that may be evidenced by several documents; and these need not all bear the same date, for, a man may at different times dispose of different portions of his property. But, if there be different documents relating to the same property, which are inconsistent in their terms, they cannot together constitute the last will; the last executed would, in that case, alone express the last intention of the testator. In Jarman on Wills (vol. i. p. 158), it is said: "Where a testator at different periods of his life has made various testamentary papers, some of which he destroys, and others he leaves undestroyed, each purporting to contain his last will, this character belongs exclusively to such one of the uncancelled papers as was executed most proximately to his decease (*b*); and, in order to ascertain the time of the execution of the respective papers, recourse may be had to evidence, derived either from their own contents, or from extrinsic sources. If, from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir, as to the realty, and the next of kin, as to the personalty, are let in: but this unsatisfactory expedient is never resorted to, until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain (*c*). And, even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in de-**[742]**-termining which is to be preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcileable with the latter paper; supposing, of course, that such latter paper contains no express clause of revocation. As, where a testator made a will devising his lands to trustees, for 200 years, to pay his debts, and afterwards, by another will, devised the same lands to the same trustees for 300 years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all incumbrances affecting the property,—Lord Talbot held that the first term of 200 years was not revoked, as the two terms were not inconsistent, the testator's intention in creating the term of 300 years being merely for the purpose of giving priority in payment to the specialty debts, and the charges affecting the estate (*a*). The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however exists only either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be, to produce partial intestacy, or else where the posterior paper is styled a codicil; for, the office of a codicil being, to vary or add to, and not wholly supplant, a previous will, such a designation of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained." The two instruments are not duplicates of the same will, if there is any variation or difference between them: and parol evidence clearly is not admissible to explain a variance. If these two papers be held to form together one will, it can only be upon the ground that the dispositions in the later one **[743]** are cumulative. [Cresswell, J. Suppose two copies of a will made and executed at the same time, and a word is accidentally omitted from one in the copying, and the testator afterwards, animo cancellandi, destroys one,—would that be a cancellation of both?] It would not, if the omission constituted a material variance; for, in that case, they would not be duplicates.

Maule, J. I am of opinion that this rule,—which was obtained upon the ground of misdirection,—should be discharged. The objection to the direction of the learned judge to the jury was, that he left to them that which he ought himself to have decided as a matter of law. There is also a suggestion that the way in which the questions were put to the jury, was calculated to embarrass and mislead them. But this does not amount to an objection upon which a new trial can be granted. It would be extremely mischievous, if a verdict could be set aside, because the court may think that the judge who presided at the trial has laid too much or too little stress upon this or that part of the case, or has, in some way, dealt differently with the facts from what they themselves would have done had the cause been tried before one of them. If it were so, the number of new trials,—which are a reproach to the law,—would be greatly increased. There can hardly be a greater evil in the administration of justice, than the expense and delay to which suitors are occasionally

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(*b*) Citing *Goodright d. Glazier* v. *Glazier*, 4 Burr. 2512; *Harwood* v. *Goodright*, Cowp. 92.

(*c*) Citing *Phipps* v. *The Earl of Anglesea*, 7 Bro. P. C., Toml. ed., 143.

(*a*) *Weld* v. *Acton*, 2 Eq. Cas. Abr. 777, pl. 26.

exposed from the necessity of setting right those errors which sometimes unavoidably occur on the trial of a cause. I may as well, before I proceed to consider the main question, clear away another point which was made in the course of the argument, viz. that, supposing there was a question of law which was left to the jury as a question of fact, even assuming the jury to have come to what in the opinion of the court **[744]** was the right conclusion, there ought to be a new trial, because the party against whom the decision was given, had, by the course taken, lost the opportunity of tendering a bill of exceptions. There is no foundation for that assumption. It is not true that the party has lost his opportunity of tendering a bill of exceptions, by the course the judge took in his summing up. His counsel might have interposed, and called the attention of the judge to the fact that he was leaving to the jury a question of law, and might then, if necessary, have tendered a bill of exceptions. By not having so interposed, however, the lessor of the plaintiff has not lost more than a party loses in all cases, where he omits to take an objection at the proper time. The party has always his election between a bill of exceptions and a motion for a new trial. Here, he has elected to move for a new trial, on the ground of misdirection: we have now to decide, therefore, whether the learned judge left the proper questions to the jury, and whether he correctly instructed them in point of law.

The first question left to the jury was, whether what was called the London will, was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed one will. If these documents could form one will in two parts, and that question was raised by the evidence, undoubtedly it was a material question in the cause, and one which was proper to be submitted to the jury. It is a question which can only be decided by a consideration of a great many circumstances. It is one which frequently arises in the ecclesiastical courts; and there it is uniformly treated as a question of fact. It is suggested by Mr. Hill, that, there being a variance between the London and the Yorkshire will, though with reference to matters not in question here, they cannot be con-**[745]**-sidered strictly as duplicates. It is to be observed that the learned judge carefully avoids the use of the word "duplicate," with regard to the wills. The codicils, however, are strictly duplicates: the wills are not, if the discrepancies pointed out prevent them from being so considered. It seems to me to be quite unnecessary to say whether they are or are not duplicates, properly so called: the case does not require it. There is nothing to shew that there may not be one will, consisting of two separate and distinct papers, which are contemporaneously executed, and intended each to be the same will. Here was a simultaneous execution of the two codicils and of a copy of the will. That is clear. The testator has evinced an intention that the whole should, if possible, together operate and enure as his last will: and there is nothing, that I am aware of, against reason and law in a testator's entertaining such an intention. I think the question was one which was very fit to be left to the jury.

Then comes the next question. The learned judge told the jury, that, if the Yorkshire will and the London will, with the codicils respectively annexed to each, were intended by the testator to operate together as his last will, the effect of an alteration or obliteration in one, was, to alter or obliterate the other; and that the altered part became the last will of the testator. There is no question here as to a revocation or cancellation of the whole instrument, but only as to certain alterations made in the one document, and in those parts which are in duplicate and unaltered in the other. Now, inasmuch as with respect to that property, the two documents were intended to operate simultaneously, and together to form the last will (assuming the first question to have been rightly left and rightly decided), then the partial cancellation of the one was, in principle and upon authority, a cancellation of the corresponding **[746]** portion of the other. Each part fully and entirely expresses the will and intention of the testator. Having subsequently expressed a different intention by the partial obliteration of one, the alteration so made must be taken to express the testator's last will. I therefore think the proposition of law so laid down by the learned judge, was correctly laid down. This direction of the learned judge is objected to, as being likely to withdraw the attention of the jury from circumstances upon which the counsel for the lessor of the plaintiff had mainly placed reliance, viz. the fact that one of the wills only was altered, when both were equally accessible to the testator, and that the unaltered will seemed to have been kept with the greater care. These, undoubtedly, were circumstances very fit to be taken by the jury into their most serious deliberation, in coming to a conclusion as to the intention with which the alterations were made. If the unaltered part had been found in London, instead of at Boynton, that unquestionably would have strengthened the presumption of intention to alter both parts. All that can be said, however, is, that these were matters very fit to be observed upon; and the jury must be taken to have fully considered them.

The remaining question which was left to the jury was, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. That was leaving to the jury a question of the intention of the testator, which was a question of fact, and one which was undoubtedly a proper one for them. The jury found that the alteration was intended to be final. As to that mode of leaving the question, I do not know that any very serious objection has been urged: but it seems rather to have been suggested that the previous ruling of the learned judge as to the legal **[747]** effect of the alteration of the Yorkshire will, had a tendency to divert the minds of the jury from the surrounding circumstances upon which their judgment was to be formed. That objection I have already disposed of.

Upon the whole, it seems to me that the direction of the learned judge was correct in point of law, and that the jury properly decided the questions submitted to them, and therefore that this rule must be discharged.

Cresswell, J. I am of the same opinion. My brother Maule has gone so fully into the case, that but little remains for me to add. As to the lessor of the plaintiff's being deprived of the opportunity of tendering a bill of exceptions, by the circumstance of the judge leaving to the jury that which was a matter of law for his own consideration,—I remember to have heard Lord Tenterden decide over and over again, that that was no ground for a new trial, where the jury had found as the judge ought to have directed them to find. If the counsel had made his exception at the proper time, the judge would probably have said, "Then, I will decide it myself." And, though we cannot tell how a jury would decide upon a question of fact, we will assume that a judge, when called upon to decide a question of law, will decide it correctly; for, that is the ground upon which it is held that many defects are cured by a verdict

As to the other matters,—the first question which was left to the jury was, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed together the testator's will. The judge says nothing about duplicate wills. If the two could not together form one will, it was undoubtedly incorrect to leave **[748]** that question to the jury. It appeared, that, in 1776, Sir George Strickland made a will in Yorkshire; and that, in 1778, another document, which was apparently intended to be an exact copy of the will before made, was executed by him in London; two codicils in precisely the same terms being executed by him at the same time. If republished at the date of the execution of the copy and the codicils, the will made in Yorkshire in 1776 would speak from May, 1778. The testator annexed a copy of the codicil to each will. Did he not thereby intend the codicil to operate as a republication of the Yorkshire will? I think this question was properly left to the jury: and no objection is made to their finding upon it.

The next objection that was made was, that the learned judge told the jury, that, if the two documents, with the codicils respectively annexed to them, were intended to operate together as the testator's last will, an alteration of one will enured in point of law as an alteration of both. It appears to me that that was strictly correct. I understand the provisions in the Yorkshire will and the London will, as to the estates now in question, to be precisely the same. If the Yorkshire will was republished at the time the London will and the codicils were executed, it is impossible to say that the one was earlier in point of time than the other. They are contemporaneous. By obliterating a portion of the Yorkshire will, the testator did not destroy an earlier and leave a later will: but, the two being contemporaneous, by erasing one, he shews his then will to be, that the portion so erased should form no part of his last will. I therefore think the learned judge was perfectly right in the direction which he reports to us that he gave to the jury, viz. that the alteration in the Yorkshire will had the effect of altering the corresponding clause in the London will.

[749] The last question was, whether the alterations were intended by the testator to be final, and to stand as his last will, or whether they were merely deliberative, and intended to exist only until he made a further or future will. That, as it seems to me, was a proper and a most important question,—the very hinge upon which the decision of the case would turn. Was the testator, at the time he made the alterations in question, merely deliberating as to something he intended to do thereafter? or was he then making his last will? I cannot see how the jury could have been led away from the consideration of that point, by any thing which had passed before. If it could have been shewn by any thing that was said by the jury, that they were really diverted from the consideration of the true point in the case, by the previous observations of the judge, there might have been some ground for Mr. Knowles's argument. But there is no suggestion of the kind. It would be extremely dangerous, and highly injurious to the interests of justice, that new trials should be granted upon a speculative surmise that the jury may have been confused or misled by the particular manner in which the judge frames his direction to them in point of law, or the order in which he presents the facts for their decision.

V. Williams, J. I am of the same opinion. I can entertain no doubt that the partial alteration of the Yorkshire will in this case operated, in point of law, as a revocation pro tanto of the London will. As to what constitutes a duplicate,—I take it to be clear, that, whenever a testator intends to execute a will in duplicate, he intends that each of the documents shall form part of his will. If any authority is wanting for this position, it will be found in the case of *Killican* v. *Lord* [750] *Parker* (1 Lee's Eccl. Cas. 662), where it was held that a duplicate is a part of a will, and to be considered as a testamentary paper; and Sir G. Lee said, "it was the constant rule to bring into the prerogative court all testamentary papers, and that a duplicate is part of the will." In this particular case, the question has been expressly left to the jury, whether the testator intended that the two documents should form one will in two parts. And the jury found that he did so intend. If such was his intention, no doubt the law enabled him to carry it into effect. There being, then, two instruments existing which together formed the testator's will, the next question is, whether an alteration or obliteration made in one of them, operated as an alteration or obliteration of a similar passage in the other. I think the learned judge was right in holding that it did. A long series of cases has decided such to be the legal effect of such an alteration. This rule, therefore, must be discharged.

Talfourd, J., was absent.

Rule discharged.

[751] Sands and Others *v.* Clarke. Dec. 10, 1849.

[S. C. 19 L. J. C. P. 84; 14 Jur. 352.]

In debt by the payee against the maker of a promissory note payable at "No. 11 Old Slip," the declaration stated, that, "when the said promissory note became due, to wit, on, &c., the plaintiffs were ready and willing in due manner to present the said note to the defendant, at the said No. 11 Old Slip, for payment, and then and there to demand of the defendant payment of the said note, and the plaintiffs would have duly presented the same to the defendant, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11 Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said note, nor were there any effects of the defendant at the said No. 11 Old Slip, nor any means or provision there for payment of the said note, and the defendant did not pay the said note when it became due, &c.:"—Held, that the declaration failed to disclose a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shewn for the omission.

This was an action of debt. The first count of the declaration stated, that the defendant, theretofore, to wit, on the 29th of August, 1845, in parts beyond the seas, to wit, at New York, in the United States of America, made his promissory note in writing, and thereby promised to pay to the plaintiffs, by and under the name, style, firm, and description of Messrs. Sands, Fuller, & Co., at No. 11 Old Slip, 846 dollars, for value received, that is to say, 846 dollars currency at New York, six months after date, which period had elapsed before the commencement of this suit, and then delivered the said note to the plaintiffs: Averment, that, when the same became due, the said 846 dollars currency at New York were, and still are, of great value, to wit, 194l. 7s. of lawful money of Great Britain; that, afterwards, when the said promissory note became due, to wit, on the 4th of March, 1846, the plaintiffs were ready and willing in due manner to present the said note to the said defendant, at the said No. 11 Old Slip, for payment, and then and there to **[752]** demand of the defendant payment of the said note, and they, the plaintiffs, would have duly presented the same to the defendant, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11 Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said note, nor were there any effects of the defendant at the said No. 11 Old Slip, nor any means or provision there for payment of the said note; and the defendant did not pay the said note when it became due, &c.

The second count was like the first, on a promissory note between the same parties, dated the 5th of November, 1845, payable at six months after date, for 460 dollars, 80 cents, currency, of the value of 103l. 13s. 6d. of lawful money of Great Britain.

There was also a count upon an account stated.

Special demurrer, assigning for causes,—that it does not appear in the first and second counts of the declaration, or either of them, that the said notes, or either of them, were or was presented at No. 11 Old Slip, nor does it appear that the defendant excused or prevented the plaintiffs from presenting the said notes, or either of them, at the said place; and that, the contract of the defendant contained in each of the said notes, being, to pay if presented at the said place, and there being no presentment at the said place, no breach of contract by the defendant appears in the said counts or either of them.

Joinder in demurrer.

Bramwell, in support of the demurrer. The declaration is bad, for want of an averment of presentment of the notes at No. 11 Old Slip, or an excuse for the **[753]** omission, if any excuse would have been sufficient. In all cases where there is a condition in a contract, performance or a dispensation, must be averred; and there is no difference in this respect between a contract contained in a promissory note, and a contract of any other description. If performance was prevented by the act of the party, that might have been averred. The declaration alleges that the defendant had clandestinely departed and absconded from the place in question, without leaving any effects there, or any provision for payment of the notes. That, in truth, amounts to nothing. In *Sanderson* v. *Bowes* (14 East, 500), it was held that a promissory note of the defendants, promising to pay so much at their banking-house at W., required a demand of payment there, in order to give the holder a cause of action if it were unpaid. The like was held in *Dickinson* v. *Bowes* (16 East, 110). In *Howe* v. *Bowes* (ibid. 112), the court of Queen's Bench held, that, although, where a promissory note is made payable at a particular place, a demand of payment must be made there, in order to give the holder a cause of action, yet that, if the makers (who have become insolvent) shut up and abandon their shop, that is evidence of a declaration to all the world, of their refusal to pay their notes there. But the court of Exchequer, upon a writ of error brought, reversed that judgment; *Bowes* v. *Howe* (5 Taunt. 30); distinctly holding that a note promising to pay on demand at a particular place, must be presented, and a demand of payment made, at that place, unless the makers discharge the holder from the presentment and demand; that the presentment and demand must be alleged, unless a discharge is shewn; and that an allegation that the makers of the note became insolvent, and ceased and **[754]** wholly declined and refused then and thenceforth to pay at the place specified any of their notes, does not shew a discharge of presentment and demand: nor can it be intended from the allegation of refusal, that there was a presentment. It clearly is no excuse for the non-presentment, that the maker of the note was not at the place indicated, when the note became due: and nothing is alleged here, from which the court can infer that a presentment there would have been useless, or was impracticable. If the excuse here suggested were held sufficient, it would be good against an indorser; which can hardly be contended for.

Kennedy, contrà. It would be absurd to hold the idle ceremony of presentment necessary, at a place where there are notoriously no means or provision for payment. The argument on the other side amounts to this,—first, that there can be no excuse at all,—secondly, that this declaration does not allege a sufficient excuse. Formerly, the practice was, to allege a presentment, and to give the matter of excuse in evidence: but the modern course of pleading, where there has in fact been no presentment, or no notice of dishonour, is, to allege the excuse in the declaration. Of this, *Burgh* v. *Legge* (5 M. & W. 418) is an instance. The present case does not rest upon the same loose averments as are found in *Sanderson* v. *Bowes*, *Dickinson* v. *Bowes*, and *Howe* v. *Bowes:* the declaration goes further, and alleges that the defendant had absconded, without leaving any effects at the place where the note was payable, or any means or provision there, for the payment of the note. And, the note having been made specially payable at a particular place, there was no necessity for averring a presentment to the maker himself: *De Bergareche* v. **[755]** *Pillin* (3 Bingh. 476, 11 J. B. Moore, 350); *Gibb* v. *Mather* (8 Bingh. 214, 1 M. & Scott, 387). In Com. Dig. Condition (L. 12), it is said, that, "if a condition be, to do upon request, and he is disabled to perform, there needs no request, for it would be vain:" for which Comyns cites *Sir Anthony Mayne's case* (5 Co. Rep. 21 a.) and *Brailsford* v. *Parsons* (1 Lutw. 308). The resolution in *Sir Anthony Mayne's case* is (e), that, "if a man seised of lands in fee, covenants to enfeoff J. S. of them, upon request, and afterwards he makes a feoffment in fee of the said lands; now, in this case, J. S. shall have an action of covenant, without request" (g). In *Hine* v. *Allely* (4 B. & Ad. 624), in assumpsit upon a bill of exchange drawn upon "P. P., No. 6 Budge Row," and accepted by him, an averment that the bill, when due, was presented and shewn to P. P. for payment, was held to be supported by proof that the holder went to No. 6 Budge Row, to present it, but found the house shut up, and no one there. [Cresswell, J. That case would have been in point, if these notes had been presented at No. 11 Old Slip.] *Terry* v. *Parker* (6 Ad. & E. 502, 1 N. & P. 752) virtually decides this case: it was there held, that want of effects in the hands of the acceptor of an accommodation bill, excuses the indorsee from presenting it for payment, as well as from giving notice of dishonour to the drawer. [Wilde, C. J. Upon the principle that the drawer in that case sustains no damage: he has no right to expect presentment.] *Turner* v. *Stones* (1 D. & L. 122) is also an authority to shew that a presentment is unnecessary, where, from the circumstances, it must necessarily be unavailing. And there are many cases **[756]** to shew that presentment is not necessary, where the party has no right to expect that it will produce any fruits; *De Berdt* v. *Atkinson* (2 H. Blac. 336); *Hardy* v. *Woodroofe* (2 Stark. N. P. C. 319).

Bramwell, in reply. No case has been cited to impugn the authority of *Sanderson* v. *Bowes* and *Bowes* v. *Howe*. [Cresswell, J. May it not be that there is an implied promise on the part of the maker that he will make provision for payment of the note when presented at the place indicated?] It may be so. But, here, no breach of such implied promise is alleged; it is not averred that the defendant made any such promise. This is rather like the case of a demand of rent, which must be made at the premises, although they may be shut up. There is no distinct allegation that presentment at No. 11 Old Slip was impossible, or would have been useless. Every word of the declaration is consistent with there having been an agent of the defendant's there ready to pay the note, if it had been duly presented.

Cur. adv. vult.

Maule, J., now delivered the judgment of the court (c).

This case came before the court upon a demurrer to the declaration, and was argued before the lord chief justice, my brother Cresswell, and myself; and the judgment which I am about to read was prepared by the lord chief justice.

The declaration contains two counts upon promissory notes. The notes are alike in form, and differ only in amount; and the action is against the maker of the notes, by the payees. In each note, the defendant promised to pay the sum therein mentioned, at the respec-**[757]**-tive dates, at No. 11 Old Slip; the period for which the notes were drawn, being averred to have expired before the commencement of the action.

(e) That was the resolution in a case of P. 32 E. 3, in Fitzh. Abr. tit. Barre, pl. 264, cited in *Mayne's case*. Vide post, 762.

(g) And see Co. Litt. 221 a.

(c) The argument had taken place before Wilde, C. J., Coltman, J., and Cresswell, J.

Neither of the counts contains any averment of presentment at No. 11 Old Slip, the place where both notes were made payable: but, by way of excuse for the non-presentment, or of dispensation of the duty of presentment, it is averred, in both counts, that, when the promissory notes therein respectively mentioned became due, the plaintiffs were ready and willing to present the said notes to the defendant, at the said No. 11 Old Slip, for payment, and then and there to demand of the defendant payment of the said notes, and the plaintiffs would have presented the said notes, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11 Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said notes, nor were there any effects of the defendant at the said No. 11 Old Slip, or any means or provision there, for the payment of the said notes, and the said defendant did not pay the said notes when they became due.

To this declaration, the defendant has specially demurred, assigning for cause that it does not appear in the said counts, or either of them, that the said notes, or either of them, were or was presented at No. 11 Old Slip, nor does it appear, that the defendant excused or prevented the plaintiffs from presenting the said notes, or either of them, at the said place, and the contract of the defendant contained in each of the said notes, being, to pay, if presented at the said place, and there being no presentment at the said place, no breach of contract by the defendant appears in the said first and second counts, or either of them.

[758] The demurrer came on for argument in Easter term; and, upon the argument, the counsel upon behalf of the defendant relied upon the special causes of demurrer assigned, and contended that it was settled law that a note made payable, in the body of it, at some specified place, must be presented, when due, at that place; and that the declaration must aver the presentment to have been made, or set forth some acts on the part of the maker to excuse the want of presentment; and that the matter set forth in this declaration, did not furnish any such legal excuse or dispensation: and the case of *Bowes* v. *Howe* (5 Taunt. 30) was cited as a distinct authority governing the present case.

Upon the part of the plaintiff, it was contended that the facts set forth by way of excuse for the non-presentment of the notes, were sufficient in point of law, because they shewed that the presentment, under the circumstances stated, would have been unavailing and useless, and that, by law, conditions to do useless acts were not required to be performed: and *Mayne's case* (5 Co. Rep. 21 a.) was cited as an authority. The plaintiff's counsel also contended that the several cases upon bills of exchange and promissory notes, in which it had been determined that presentment need not be made, or notice given of the dishonour, where no damage could be sustained by the omission, were authorities applicable to the present case.

But the court is of opinion that the authorities referred to on the part of the plaintiff, do not govern this case, and that the matter set forth in the declaration, by way of excuse for the non-presentment, is not sufficient; and that the declaration does not, therefore, shew any breach of the promise contained in the notes.

It is clear that the presentment of the notes at No. 11 Old Slip is, by the notes, made a condition **[759]** precedent to the defendant's liability to pay; and equally clear that it must be performed before he can be charged, unless the defendant has himself discharged the condition, or dispensed with its performance.

The case of *Bowes* v. *Howe* is a strong authority for the defendant. That was an action against the makers of certain promissory notes, by which they had promised to pay 5l. at Workington Bank; and, in order to excuse the non-presentment, the declaration averred, that, after the making of the note, and before the exhibiting of the bill, the defendant had become insolvent, and then, and from thenceforth, until and at the time of the exhibiting of the bill, ceased, and wholly declined and refused, to pay at Workington Bank aforesaid, the sum or sums of money specified in the notes. The declaration concluded with the general breach, that the defendants had not paid although requested. The court of error held that the matter set forth in the declaration did not dispense with the presentment of the notes: and Macdonald, C. B., who pronounced the judgment, remarked that the alleged declaration by the defendants that they would pay none of their notes, was not made to the plaintiffs, but merely that the defendants had declared generally that they neither could nor would pay any of their notes. This case is a decisive authority to the effect that a declaration of insolvency by the maker of a note, or a general declaration by him that he will not pay any of his notes, will not dispense with the presentment.

The declaration in that case went further than the present, which states that the defendant had absconded when the notes became due; which absconding might have taken place even before the giving of the notes: nor does it appear that No. 11 Old Slip was a place shut up, at which, therefore, no demand could be made, or information obtained respecting the defendant. The defendant was not bound to have the money at the Old [760] Slip before the note was presented. It is decided that the known bankruptcy of the maker of a note payable at a particular place, will not dispense with the presentment, although in such a case there can be no presumption that the maker possesses the means of payment: and the averment in this declaration states no circumstances which prevented the presentment being made, but simply such as are calculated to create a strong suspicion that the note would not have been paid; which is not enough.

The case of *De Berdt* v. *Atkinson* (2 H. Black. 336) was cited on behalf of the plaintiff. That was an action by the indorsee of a promissory note, against the payee and indorser. The defence was, that the note had not been presented to the maker: the court held, that, because the defendant, the payee of the note, had given no value to the maker, it was unnecessary that the note should be presented to the maker: and the case was considered as analogous to that of the drawer of an accommodation bill; and, in such cases, the law-merchant has been held to dispense with presentment and notice of dishonor. But the principle of those decisions has no application to a case like the present, in which presentment of the note, or a dispensation with the presentment by the maker of the note, is clearly necessary. That case, however, has been dissented from, if not distinctly overruled: see the remarks of Chambre, J., in *Leach* v. *Hewitt* (4 Taunt. 731), *Brown* v. *Maffey* (15 East, 216), and *Cory* v. *Scott* (3 B. & Ald. 619).

The case of *Turner* v. *Stones* (1 D. & L. 122) was also cited by the plaintiffs' counsel. The action was for money had and received, and the plaintiff sought to recover a sum of 5l., which he had given to the defendant, in exchange for a country bank-note, on Saturday, the 14th of January. The bankers made no payments after that [761] day, and subsequently became bankrupts. On Monday, the 16th of January, the plaintiff returned the note to defendant, who promised to return the money on the Wednesday, but did not, but objected that the note had not been presented at Sheffield. The parties lived at Darlington, a great distance from Sheffield; and the bankers had opened their shop on the Monday for two hours, but made no payments, and, after the two hours, exhibited a placard, announcing that the bank had stopped payment. Coleridge, J., distinctly recognised the authority of *Bowes* v. *Howe*, and treated the question,—whether, as between third persons, the presentment to the maker might be dispensed with, under certain circumstances,—as a distinct question from that of the necessity of presentment, as against the maker of the note. That case is, therefore, no authority applicable to the present.

The case of *Terry* v. *Parker* (6 Ad. & E. 502, 1 N. & P. 752), also cited, was a question whether the averment in the declaration, that the bill was accepted for the accommodation of the defendant (the drawer), and that he had no reason to expect that the bill would be paid, nor had sustained any damage by the non-presentment of the bill to the acceptor, was a sufficient excuse for the non-presentment to the acceptor, and the omission of notice to the defendant. The declaration was held sufficient, for the reason before stated: but that case is inapplicable to the present.

Burgh v. *Legge* (5 M. & W. 418), was likewise cited: but that case is also inapplicable to this case; the only question being, whether the averment of notice to the defendant, who was sued as indorser of the bills upon which the action was brought, was proved by the evidence of conversations between the plaintiff and the defendant before the bills became due, in which the defendant [762] told the plaintiff that the bills would not be paid, and requested that he might not be put to the expense of postage to give him notice of the non-payment: the court held that the evidence was not sufficient; and a nonsuit was entered.

In addition to the several cases upon bills of exchange and promissory notes which have been referred to, the plaintiffs' counsel also cited *Mayne's case* (*a*), as an authority to prove that useless conditions are not required to be performed: and it was argued that the facts alleged in the declaration shewed that the presentment of the notes would have been a useless act, and ought to be held to dispense with the necessity of presentment. The facts of *Mayne's case* exclude the application of the doctrine for which it was cited, to the present case. Mayne leased to Scott for twenty-one years, and covenanted, that, at any time during the life of Scott, upon surrender of his lease, Mayne would grant a new lease for Scott's life (*b*); and gave bond to perform the covenants: and, in an action upon the bond, Mayne pleaded that Scott had not surrendered the lease; to which Scott replied that Mayne had granted the land to another person for eighty years: upon which Mayne demurred; and it was held that Mayne had broken his covenant, without any surrender made, inasmuch as he had disabled himself to take the surrender, and to grant the new lease, and therefore it would have been useless for Scott to execute a deed in the form of a surrender, which would have been wholly inoperative: and so, no doubt, the law is—that, if a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent **[763]** to the act which he has so rendered himself unable to perform.

In this case, the defendant did no act tending to prevent or impede the presentment being duly made: and the court is of opinion that the declaration is defective, and fails to shew a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shewn for the omission. There must, therefore, be judgment, for the defendant.

Judgment for the defendant.

BELL AND OTHERS, Assignees of Thomas Willmott, a Bankrupt, *v.* BIDGOOD.

Dec. 8, 1849.

After declaration, in an action adversely brought, and without collusion, the defendant consented to a judge's order for payment of debt and costs forthwith, the plaintiff to be at liberty, in case of default, to sign judgment and issue execution for the amount:—Held, that a judgment signed thereon was a judgment by nil dicit, and within the protection of the 1 W. 4, c. 7, s. 7.

This was an action of assumpsit upon a feigned issue, framed pursuant to a judge's order made on the 6th of March, 1848, to try whether the execution hereinafter mentioned, was valid against the after mentioned fiat.

The defendant pleaded that the execution was valid against the fiat; and upon that plea issue was joined.

The following case was, by consent, stated, under a judge's order, for the opinion of the court:—

Thomas Willmott, up to and at the time of his bankruptcy, carried on the business of a surgeon and apothecary. Before his bankruptcy, and while he carried on his business, Messrs. Bidgood & Co. drew upon Thomas Willmott, on the 7th of July, 1847, a bill of exchange for 38l. 12s. 9d., payable, four months after **[764]** date, to them or their order; which bill the said Thomas Willmott accepted, and Messrs. Bidgood & Co. indorsed to Henry Bidgood, the defendant in this action, for a bonâ fide, full, and valuable consideration. The bill was not paid by Thomas Willmott, at maturity, and is still wholly unpaid.

The defendant, Henry Bidgood, commenced an action, adversely, and not by collusion for the purpose of fraudulent preference, in the court of Common Pleas, against Thomas Willmott, for the recovery of the amount of this bill. The declaration was duly filed, and notice thereof given to Thomas Willmott, according to the practice

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(*a*) 5 Co. Rep. 25 a. See *Luxmore* v. *Robson*, 1 B. & A. 584; *Beswick* v. *Swindells*, 3 N. & M. 159; 2 M. & G. 746, n. (*b*).

(*b*) "Novel lease (not for Scott's life, but) durant le residue des ans."

of the said court; and, Thomas Willmott having no defence to the said action, the following order was, on the 20th of January, 1848, by consent, made by Cresswell, J.:—

"Upon hearing the attorneys or agents for the plaintiff, and the defendant in person, and by consent, I do order, that, upon payment of 38l. 12s. 9d., the debt for which this action is brought, together with interest from the 10th of November last, and costs, to be taxed as between attorney and client, and paid forthwith, all further proceedings be stayed: And I further order, that, in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expenses."

The costs in the said action were, on the 20th of January, taxed at 10l. 4s. 6d. Default was made by Thomas Willmott in payment, pursuant to the said order, of the several sums of 38l. 12s. 9d., 9s. 9d. for interest, and 10l. 4s. 6d. for costs, making together 49l. 7s.

Thomas Willmott did not plead to, or in any way answer, the said declaration. On the 7th of February, **[765]** judgment was signed in the said action, for 49l. 7s., under the said order.

On the 9th of February, 1848, a writ of fi. fa. was issued by virtue of the judgment, directed to the sheriff of Middlesex, and delivered to them at half past 12 o'clock on the said 9th of February, directing them to levy, &c.

The sheriff, at 2 o'clock in the afternoon of the said 9th of February, seized and took in execution certain goods and chattels of Thomas Willmott, and remained in possession of the same until the 18th of March, when they withdrew, under the authority of the judge's order of the 6th of March, 1848, whereby the sheriff was directed, that, upon payment of 60l. by the plaintiffs in this action, into court, they should withdraw from possession; and which sum of 60l. was paid accordingly, on the 17th of March, 1848.

On the said 9th of February, Thomas Willmott, being unable to meet his engagements, signed a declaration of insolvency in the court of bankruptcy, under the statute 6 G. 4, c. 16, s. 6, and, on the same 9th of February, at 10 minutes before 3 o'clock, caused the same to be filed in the lord chancellor's office of the secretary of bankrupts.

A fiat in bankruptcy, directed to the London court of bankruptcy, was dated and issued on the 10th of February, 1848, against Thomas Willmott, who was declared a bankrupt on the 11th of February; and the plaintiffs were appointed assignees under the fiat on the 25th.

At 4 o'clock in the afternoon of the said 10th of February, the attorney of Thomas Willmott served on the undersheriff of Middlesex a notice that the fiat had issued: and, at a quarter past 2 o'clock on the said 10th of February, the attorney to the fiat served on the said undersheriff, and the officer in possession, notice that **[766]** Thomas Willmott had been adjudged a bankrupt, and required them not to sell or remove any of Thomas Willmott's goods, &c.

The question for the opinion of the court is,—Whether the execution was valid against the fiat. If the court shall be of opinion that it was valid, judgment is to be entered for the defendant immediately after this cause is decided. If the court shall be of a contrary opinion, judgment is to be entered for the plaintiffs.

Rogers, for the plaintiffs. The execution was void as against the assignees under the fiat. There could be no doubt, if it depended on the 108th section of the 6 G. 4, c. 16. But the question is whether the execution is within the protection of the 1 W. 4, c. 7, s. 7, which recites, that, by the 6 G. 4, c. 16, s. 108, it is provided "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors; and that, by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem, with stay of execution, whereby the expense of further proceeding in such action might have been and may be saved or diminished:" and, for remedy thereof, enacts "that no judgment signed, or execution issued, after the passing of this act, on a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, according to the practice of the court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act." It is submitted that it is not within the protec-**[767]**-tion of that provision. In *Crosfield* v. *Stanley* (4 B. & Ad. 87), it was held that the statute did not extend to judgments on warrant of attorney, though given without collusion or intention of fraudulent preference. These consents to judgments have been decided not to be cognovits within the 1 & 2 Vict. c. 110, so as to require attestation, as provided by s. 9 of that act: *Baker* v. *Flower* (8 M. & W. 670). "That section," says Parke, B., "applies to a warrant of attorney or cognovit given by a party out of court; the present case is only one of a consent to an order, if a judge thinks proper to make one. It is true, such a consent much resembles a cognovit; but then it is not one, for, nothing can be done upon it of itself, until a judge's order is made in pursuance of it."

Granger, for the defendant, was not called upon.

MAULE, J. If this is not a cognovit, it is a judgment by nil dicit, and therefore clearly within the spirit of the statute 1 W. 4, c. 7, s. 7. The execution is protected, and the defendant is consequently entitled to our judgment.

CRESSWELL, J., and V. WILLIAMS, J., concurring,

Judgment for the defendant.

[768] MORGAN AND ANOTHER, Executors of John, Earl of Abergavenny, Deceased, *v.* WILLIAM, EARL OF ABERGAVENNY. Dec. 10, 1849.

[Discussed, *Brady* v. *Warren*, [1900] 2 I. R. 649.]

Deer in a park (though an antient and legal park) may be so tame and reclaimed from their natural wild state, as to pass to executors as personal property.—In trover by executors against the heir, for deer in a park, it appeared in evidence that the park was originally about 900 acres in extent, but that, in comparatively modern times some adjoining land had been thrown into it; that a considerable herd of deer (600 and upwards) had always been kept therein; that the deer were attended by keepers, and fed in the winter with hay, beans, and other food; that the does were watched at falling time, and the fawns marked as they dropped; and that some of the deer were occasionally selected from the herd, by means of dogs, and stalled and fattened for consumption or for sale to venison-dealers. There was also a considerable body of documentary evidence to shew that the park had a legal origin.—In his summing up, the judge told the jury, that by the general law, deer in a park went to the heir-at-law of the owner of the park, but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of the deer, and not to the heir of the owner of the park: and he left it to them to say whether the place in question was proved by the evidence to have been an antient park, with the legal rights of a park; telling them, that, if it had been an antient park, and the boundaries could not now be ascertained, though the franchise might thereby become forfeited in reference to the crown, that would not affect the question between the parties relative to the deer,—that question being, whether the deer were tame and reclaimed, which must be determined by the nature and state of the animals, and of the place in which they were kept, and their mode of treatment: and he then left them, in writing, the following questions,—1. Whether they found for the plaintiffs or for the defendant,—2. Whether they found the place to be an antient park, with the incidents of a legal park,—3. Whether the boundaries could be ascertained by distinct marks. —The jury, in answer to the second question so put, said they found the place to be an antient park, with all the incidents of a legal park; and, in answer to the third question, that the boundaries of the antient park could be ascertained. As to the first question, they expressed a desire to abstain from answering it; but, upon being required to say whether they found for plaintiffs or for defendant, they found for the plaintiffs—observing "that the animals had been originally wild, but had been reclaimed:"—Held, that the direction was correct, and the verdict sufficient in point of law; and that the evidence was such as was proper to be submitted to the jury.

This was an action of trover. The first count of the declaration stated that the said John, Earl of Abergavenny, in his life-time, to wit, on the 11th of **[769]** April, 1845, was lawfully possessed, as of his own property, of divers, to wit, 1000 bucks, 3000 does, 1000 fawns, 1000 stags, 1000 harts, 1000 hinds, 1000 red-deer, 1000 fallow-deer, and 1000 other deer, then being captured and reclaimed from their natural and wild state, and tamed and confined and inclosed in divers, to wit, ten closes of the said John, Earl of Abergavenny, in his life-time, and the said deer and animals being of great value, to wit, of the value of 10,000l.; and, being so possessed thereof, the said John, Earl of Abergavenny, afterwards, in his life-time, to wit, on the day and year aforesaid, casually lost the deer and animals aforesaid out of his possession, and the same afterwards, and after the death of the said John, Earl of Abergavenny, to wit, on the 13th of April, in the year aforesaid, came to the possession of the defendant by finding: yet the defendant, well knowing the said deer and animals to have been the property of the said John, Earl of Abergavenny, in his life-time, and of right to belong and appertain to the plaintiffs, as executors as aforesaid, after the decease of the said John, Earl of Abergavenny, but contriving and intending to injure the plaintiffs, as executors as aforesaid, after the decease of the said John, Earl of Abergavenny, in this behalf, did not deliver the said deer and animals, or any of them, nor has he as yet delivered the same, or any of them, to the plaintiffs, as executors as aforesaid, since the decease of the said John, Earl of Abergavenny, although often requested so to do; and the defendant afterwards, and after the decease of the said John, Earl of Abergavenny, to wit, on the said 13th of April, in the year last aforesaid, converted and disposed of the said deer and animals to his, the defendant's, own use.

The second count stated that the plaintiffs, as executors as aforesaid, afterwards, and after the death of [770] the said John, Earl of Abergavenny, to wit, on the 13th of April, 1845, were lawfully possessed, as of their own property, as such executors as aforesaid, of divers deer and animals, to wit, &c. &c., then being tame and reclaimed from their wild state and nature, and then being captured and kept inclosed and confined in divers, to wit, ten closes, and being of great value, to wit, of the value of 10,000l.; and, being so possessed thereof, the plaintiffs afterwards, to wit, on the day and year aforesaid, casually lost the said deer and animals out of their possession, and the same came to the possession of the defendant by finding: yet the defendant, well knowing the said deer and animals to be the property of the plaintiffs, as such executors as aforesaid, and of right to belong and appertain to the plaintiffs, as such executors as aforesaid, but contriving and intending to injure the plaintiffs, as such executors as aforesaid, in this behalf, has not as yet delivered the said deer and animals, or any or either of them, to the plaintiffs, although often requested so to do, and has hitherto wholly neglected and refused so to do, and afterwards, to wit, on the day and year aforesaid, converted and disposed of the said deer and animals to his, the defendant's, own use,—to the plaintiffs' damage, as executors as aforesaid, of 10,000l.: Profert of the letters testamentary.

The defendant pleaded,—first, not guilty, except as to the said causes of action as to twelve bucks, one stag, eight does, and four fawns, parcel of the said bucks, stags, does, and fawns respectively in the declaration mentioned,—secondly, that, except as aforesaid, the said John, Earl of Abergavenny, in his lifetime, was not possessed, neither were the plaintiffs, as executors as aforesaid, after the death of the said John, Earl of Abergavenny, possessed of the said deer or other animals in the declaration mentioned, or any of [771] them, as of his or their own property respectively,—thirdly, that, except as aforesaid, the said deer and other animals in the declaration mentioned, were not, nor was any of them, captured and reclaimed from their natural and wild state, or tamed or kept confined or inclosed,—fourthly, payment of 85l. into court, in respect of the excepted bucks, stag, does, and fawns.

The plaintiffs joined issue on the first three pleas, and took the 85l. out of court, in satisfaction pro tanto.

The cause was tried before Coltman, J., and a special jury, at the sittings at Westminster, after Hilary term, 1847.

The action was brought to recover the value of the deer which were in the park appertaining to Eridge Castle, in the county of Sussex, the principal country residence of the Earls of Abergavenny, at the time of the decease of John, the late earl, on the 12th of April, 1845.

The plaintiffs were Richard Morgan and Azariah Elwood, the executors of the late earl; the defendant was his brother, who, the late earl having died a bachelor, succeeded to the title, and to the family entailed estates.

At the time of the late earl's death, the deer in Eridge Park consisted of five hundred and forty head of fallow-deer, and one hundred head of red-deer, in what was called the Deer Park, twelve bucks in a place called the New Park, and six stags and two bucks which were stalled for fatting.

Eridge Park was an antient park, forming part of the antient manor of Rotherfield,—called in Domesday Book Reredfelle,—which, it seems, was royal demesne, of the fee of Odo, Bishop of Baieux, brother of William the Conqueror, and theretofore held by the Saxon Earl Godwin. In Domesday Book, it is thus described:—"The land consists of twenty-six carucates in de-**[772]**-mesne, four carucates (*a*), and fourteen villeins, with six bordarers, having fourteen ploughs. There are four servi, and wood sufficient to feed fourscore hogs. There is a park. In the time of King Edward the Confessor, it was worth 16l.; and afterwards 14l.; now 12l.: and, nevertheless, renders 30l." (*b*).

The substance of the evidence given on the part of the plaintiffs was as follows:—

In modern times, Eridge Old Park has consisted of about nine hundred acres, a great portion of which is of a rough, wild description, containing a considerable quantity of fern, brake, and gorse. The New Park adjoining consists of about two hundred acres. Some additions were about forty years ago made to the Old Park, by the removal of portions of the antient fences, and erecting paling round the land so added. The deer usually had the range of the Old Park, where they were attended by keepers, and fed in the winter with hay, beans, and other food. The does were watched in the falling season, and the fawns marked, as they were dropped, in order to ascertain their age, and to preserve the stock. At times, certain of the deer were selected from the herd, and caught, with the assistance of lurchers muzzled or with their teeth drawn, and turned into an inclosure in the New Park, or into pens or stalls, for the purpose of fatting them for consumption, or for sale to venison-dealers. The ordinary mode of killing them was by shooting. There was a slaughter-house in the park, for preparing and dressing the carcases. Some years since, a great number of deer were brought to Eridge from Penshurst and other places. Deer sometimes, though rarely, escaped from the park, by leaping over the fences. Some of them were described as being very tame, coming close to the keepers when called at feeding times. Witnesses were also called to prove, that, of late years, deer have been **[773]** commonly bought and sold for profit, like sheep, or other animals kept for the food of man.

The plaintiffs also put in the will of Henry, Earl of Abergavenny (who died on the 27th of March, 1843), dated the 5th of March, 1839, which contained the following bequest to his eldest son, the late earl:—"And I further give and bequeath unto my said son John, Lord Viscount Nevill, all the wine and other liquors which may be in the messuage or mansion-house called Eridge Castle, and in my house in Berkeley Square, and all my carriages and horses, and all my deer, and all such other live and dead stock as shall be in or about the said messuage or mansion-house of Eridge Castle aforesaid, or in and about my house in Berkeley Square aforesaid, or in the parks, pleasure-grounds, plantations, gardens, buildings, offices, and appurtenances, to the same, or either of them, belonging at the time of my decease, or elsewhere," &c.

On the part of the defendant, the conversion was admitted: but it was insisted that Eridge Park was an antient legal park, and that the deer therein, by the law of the land, were not personal property, but formed part of the inheritance.

For the purpose of shewing Eridge to be an antient park, reference was made to the passage above cited from Domesday Book; and the following documents were put in:—An inquisition taken in the 23rd year of the reign of Edward 3, upon the death of Hugh de Spencer;—the will of George Neville, knight, Lord Bergavenny, in the 28 H. 8;—an act of parliament of the 2 & 3 P. & M., "for confirming of the restitution of the heirs male of Sir Edward Nevill, knight," under the limitations of which the family estates of the Earls of Abergavenny are held for an estate in tail inalienable, with a reversion in fee to the crown;—an act of the 35 Eliz. intituled "an act concernynge the lands of Henry, late Lord Bergavenny, deceased," **[774]** passed on the occasion of the marriage of Henry Nevill, the then tenant in tail of the Abergavenny estates, in which there occurs the following description of the park at Eridge, "All those parks or walks in the Forest of Waterdown, in the county of Sussex, called or known by the name of Eridge Park and Fant Pitts (being now made into one park,

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(*a*) About 2400 acres.

(*b*) Vide post, 799 (*a*).

and heretofore divided into two), with all and singular their and every of their appurtenances;"—an account and survey of the Nevill estates, in the 36 Eliz., making mention of the park of Eridge;—An act of 30 G. 3, intituled "an act to confirm a lease lately made by Henry Nevill, Earl of Abergavenny, of certain intailed mines and other hereditaments in the county of Monmouth, and to enable granting future leases of the said intailed mines and other hereditaments, and also of all other estates of which the said earl is seised as tenant in tail male, under an act of parliament passed in the 2nd and 3rd years of King Philip and Queen Mary, and under the limitations of the last will of George, Lord Abergavenny, in the said act of Philip and Mary mentioned;" and containing the following exception, "except only the capital messuage or mansion-house now called Eridge Place, in the county of Sussex, and the park called Eridge Park," &c.;—and an act of 6 & 7 W. 4, c. 18, intituled "An act to enable the granting of leases of certain parts of the estates and hereditaments of which the Right Hon. Henry Nevill Earl of Abergavenny is seized as tenant in tail male under an act passed in the second and third years of the reign of King Philip and Queen Mary, and under the limitations in the will of George Lord Abergavenny in the said act of Philip and Mary mentioned;" and also several leases at various times granted by the successive Earls of Abergavenny, of portions of the property, under these powers.

Several witnesses were also called, to prove the state of the Old Park, and of the deer therein. They stated **[775]** that, although there had been recent additions to the antient park, the old boundaries were still to be seen; and that the deer were generally in a very wild state.

For the plaintiffs, it was submitted, that, although Eridge Park might originally have been a park in the strict sense of the term, having all the incidents of a legal park,—vert, venison, and inclosure,—it had ceased to bear that character, by reason of the manner in which it had in modern times been dealt with; it being essential that the boundaries of an antient park should be strictly preserved: and that, by the mode in which the deer in question had been treated, they had ceased to be feræ naturæ, and had become mere personal property, like sheep or any other domestic animals.

The learned judge, in his summing up, told the jury, that the main question for them to consider was, whether the deer in dispute were to be looked upon as wild, or as tame and reclaimed; and that it had been laid down by the best authorities upon the subject, that deer in a park, conies in a warren, and doves in a dove-cote, generally speaking, go with the inheritance to the heir (*a*), or, in a case like the present, where the estate does not go exactly in heirship, but under the limitations of an act of parliament, to the person next entitled under the parliamentary settlement; but that the rule was subject to this exception,—that, if the animals are no longer in their wild state, but are so reduced as to be considered tame and reclaimed, in that case they go to the executors, and not to the heir. He then proceeded, in substance, as follows:—A large body of evidence has been laid before you, for the pur-**[776]**-pose of satisfying you that Eridge Park was an antient park, having all the incidents and privileges of an antient park, to which rights formerly appertained which are now comparatively valueless. But the question will not turn upon whether Eridge was or was not an antient park; though, at the same time, it may be desirable, if you are able to form an opinion upon it, that you should state it. Undoubtedly, one who has an antient park, having the rights and incidents of a legal park, ought to preserve the boundaries within which he claims to exercise those rights: and probably there can be no doubt, that, if the boundaries are so effaced that they cannot be distinctly ascertained, his franchise, as against the crown, would be lost. But that is a matter which does not, as it seems to me, very much concern the question now before us; because, though some rights might be forfeited by the destruction of the antient boundaries, still, the nature of the animals would remain unchanged. That deer, when caught, and inclosed in a pen, would pass to the executors, there can be no doubt; and, probably, if animals of this sort were inclosed in a small field, well fenced round, and well kept, it could hardly

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(*a*) To this part of the ruling, the plaintiffs' counsel excepted,—contending that the rule of law is, not that deer in a park pass with the inheritance, but that they are not the subject of property at all whilst in a wild state; and that the mere circumstance of their being in an inclosed park made them personal property, unless the inclosure was a park with all the rights and incidents of an antient and legal park.

be said that they were not so far reduced into immediate possession, as to become personal property. It is quite admitted, upon the evidence on the one side and on the other, that there have been, from time to time, additions made to what formerly constituted Eridge Park; though there is some difference as to the quantity. And, observing upon the documentary evidence put in on the part of the defendant, the learned judge said,—with reference to the extract from Domesday Book, and to the inquisition taken in the reign of Edward the Third, upon the death of Hugh de Spencer,—that, at that period, when the forest laws were in full vigour, whenever a "park" was mentioned, it must be understood to **[777]** mean a legal park. And he concluded by asking the opinion of the jury upon two questions which he gave them in writing,—first, whether Eridge Park was an antient park, with all the incidents of a legal park,—secondly, whether the boundaries could be ascertained by distinct marks: telling them that the principal question was, whether they found for the plaintiffs or for the defendant, the others being only incidental.

The jury retired, and, after a protracted absence, returned into court, the judge having left; when, upon the associate asking them whether they found for the plaintiffs or for the defendant, the foreman answered,—"We find,—first, that it was originally a legal park, but that its boundaries have been altered and enlarged,—secondly, we find that the deer have been reclaimed from their natural wild state. What the effect of that opinion is, we are not lawyers enough to say."

The associate declining to receive their verdict in that form, the jury again retired, and, after a short absence, returned into court, the foreman (addressing the associate) saying,—"You may take it in the first instance as a verdict for the plaintiffs." The associate then asked,—"Do you find that there was an antient park, with the incidents of a legal park?" To which the foreman answered,—"We find that it was originally a legal park, but that its boundaries have been altered and enlarged." Associate,—"Do you find that there was an antient park, with the incidents of a legal park?" Foreman—"Yes." Associate,—"Do you find that there were distinct marks by which the boundaries could be ascertained?" Foreman,—"Yes, there were."

The verdict was accordingly entered for the plaintiffs.

Talfourd, Serjt., in the following Easter term, obtained a rule nisi for a new trial, on the grounds,—**[778]** first, that there had been no complete finding by the jury, they not having distinctly answered the real question which was submitted to them, viz. whether the deer were wild or reclaimed;—secondly, that the learned judge misdirected the jury, in presenting the case to them as if the existence or non-existence of Eridge Park, with all the legal incidents of a park, was a mere collateral question, whereas it was of the very essence of the inquiry; Co. Litt. 8 a.; the case of *Swans* (7 Co. Rep. 17 b.); *Davies* v. *Powell* (Willes, 46);—thirdly, that there was no sufficient evidence to warrant the finding.

Humphry, Channell, Serjt., and Bovill, in Easter term, 1848, shewed cause. There is no pretence for saying that the jury did not by their verdict dispose of the substantial question which was presented to them by the learned judge, viz. whether the deer in Eridge Park were wild, or tame and reclaimed. The jury were distinctly told, that, as they found that question one way or the other, their verdict must be for the plaintiffs or for the defendant: and they found for the plaintiffs,—and, further, they expressly said that they found that the deer had been reclaimed from their natural wild state.

The objection to the learned judge's direction, in substance is, that he ought not to have left it to the jury to say whether the deer were reclaimed or not, but whether they were kept in a place having the incidents of a legal park. It is submitted that the direction was correct. The real question to be considered is, whether the deer were in such a state as to be the subject of property: *Mallocke* v. *Eastly* (3 Lev. 227). In the case of *Swans* (7 Co. Rep. 17 b.), it is said: "A man hath not abso-**[779]**-lute property in any thing which is feræ naturæ, but in those which are domitæ naturæ. Where a man hath savage beasts ratione privilegii, as, by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore, in an action quod parcum, warrennum, &c., fregit et intrav', et 3 damas, lepores, cuniculos, phasianos, perdrices, cepit et asportavit, he shall not say 'suos,' for, he hath no property in them, but they do belong to him, 'ratione privileg', for his game and pleasure, so long as they remain in the privileged place; for, if the owner of the park dies, his heir shall have them, and not his executors or administrators, because, without them, the park, which is an inheritance, is not complete. The law there laid down, is not disputed. So, in Com. Dig. Biens (B.) it is said (*a*), that "deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the heir." Again, in Biens (F.), it is said: "In things which are feræ naturæ, none can have an absolute property; as, in deer, conies, &c. Yet a man may have a qualified or possessory property in them; as, if deer, &c., are tame. So, if the possession be ratione privilegii only, he has no property in them; as, if deer are in a park, conies in a warren, &c." (*b*). The question underwent much discussion in *Davies* v. *Powell* (Willes, 46), where Willes, C. J., says: "I do admit that it is generally laid down as a rule, in the old books, that deer, conies, &c., are feræ naturæ, and that they are not distrainable; and a man can only have a property in them ratione loci. And therefore, in the case of *Swans*, and in several other books there cited, it is laid down as a rule, that, where a man brings an action for chasing and taking away deer, hares, rabbits, &c., he **[780]** shall not say 'suos,' because he has them only for his game and pleasure, ratione privilegii, whilst they are in his park, warren, &c. But there are writs in the Register, fo. 102, a book of the greatest authority, and several other places in that book, which shew that this rule is not always adhered to. The writ in fo. 102 is 'quare clausum ipsius A. fregit et intravit, et cuniculos suos cepit.' The reason given for this opinion, in the books, why they are not distrainable is, that a man can have no valuable property in them. But the rule is plainly too general; for, the rule in Co. Litt. is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides, the nature of things is now very much altered, and the reason which is given for the rule, fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit; and therefore must be considered as other cattle." In Williams on Executors (4th edit. vol. i. p. 591), it is said: "The animals which a man has ratione privilegii, are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus, deer in a park (i.e. as it should seem, in a park properly so called, which must be either by grant or prescription), conies in a warren, doves in a dove-house, will not go to the executor or administrator; and the reason assigned by Lord Coke (Co. Litt. 8 a.; 7 Co. Rep. 17 b.) is, because, without them, the inheritance would be incomplete. Another and more obvious reason men-**[781]**-tioned by Lord Coke, in the same case, is, that the deceased had not any property in them." Assuming Eridge Park to have been a park in the strict legal sense, the direction of the learned judge to the jury was free from objection. And, supposing it not to have been a legal park, the executors are, beyond all doubt, entitled to recover. If it were not a legal park, the mere act of inclosing and fencing in the deer, was exercising a dominion over them, which prevented their being considered as being feræ naturæ. That this place had lost its legal character and existence as a park, before the late earl's time, is clear from all the evidence on both sides. Vert, venison, and inclosure are essential incidents of a legal park. [Maule, J. By that you understand, wild deer, feed, and inclosure.] Precisely so. [Maule, J. You say that wild deer in a legal park go to the heir. To whom would wild deer in a usurped park go?] They would be nullius in bonis. By altering or not keeping up the antient inclosures, or by the destruction of all the deer therein,—*Withers* v. *Ischam* (Dyer, 70 a.), *Sir Charles Howard's case* (Cro. Car. 59),—the place becomes disparked. Lord Coke says (Co. Litt. 53 a.): "If the tenant of a dove-house, warren, parke, vivary, estangues, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is waste; and, to suffer the pale to decay, whereby the deer is dispersed, is waste." The like is laid down by Manwood, J., in *Varasor's case* (2 Leon. 222), and by Lord Hobart, in *Cowper* v. *Andrews* (Hobart, 39). Lord Coke, commenting on the word "*Parke*," in Litt. § 378, says (Co. Litt. 233 a.): "This should be written parque, which is a French word, and signifieth that which we vulgarly call a parke, of the French **[782]** word *parquer*, to imparke or inclose. It is called in Domesday, Parcus.

(*a*) Citing Co. Litt. 8 a., and 1 Roll. Abr. 916, l. 50.

(*b*) Citing 7 Co. Rep. 17 b.

In law, it signifieth a great quantity of ground inclosed, privileged for wild beasts of chase, by prescription, or by the King's grant. A forest and chase are not, but a parke must be, inclosed." The same learned author, in 2 Inst. 199, observing upon the word "park," in the stat. of West. 2, c. 20, says: "This is understood of a lawful park, whereunto three things are required,—1. A liberty, either by grant, as is aforesaid, or by prescription,—2. Inclosure by pale, wall, or hedge,—And 3. Beasts savages of the parke." Again, in 4 Inst. 317, he says: "Seeing the jurisdiction of the forest is local, the law of the forest hath provided that the forest should be inclosed by metes and bounds, which indeed are the inclosure of the forest; for, as parks are inclosed with wall, pale, or hedges, so forest and chases are inclosed by metes and bounds; and, as a parke cannot be a parke without such an inclosure in deed, as is aforesaid, so it can be neither forest nor chase without an inclosure in law, that is, by metes and bounds." In *The King* v. *Sir John Byron* (Sir John Bridgman, 23, 26),—in a quo warranto, "for that the defendant for a year past hath used and yet doth use, without any warrant, within the manor of Colswick, in the county of Nottingham, within the bounds of the King's forest of Sherwood, and within the regnards of the same forest, to have a park within the said manor, with a pale, hedge, and ditch inclosed, being two hundred acres of pasture, and a hundred acres of wood, within the said park, et ad venandum, capiendum, occidendum, et opportandum, in the said park and two hundred acres of pasture and a hundred acres of wood, omnes et omnimodas damas domini Regis forestæ suæ prædict. in parcum **[783]** prædict. et prædict. 200 acr. pasturæ et 100 acr. bosci aliquo tempore venand., nec aliquæ aliæ personæ quæcunq. intromittantur ad venandum et fugandum intra parcum prædictum et 200 acr. pasturæ et 100 acr. bosci, sine licentia defendentis,"—the chief justice says: "I agree that one may have a park within a forest, by prescription or by grant; but then the same ought to be kept so inclosed that the beasts of the forest cannot enter into the park, which if not done, it is a forfeiture of the liberty of the park; and so it is, if he have a salterie, or deer-leap; for, the nature of a park is to be inclosed; and in 10 H. 7, 6 (M. 10 H. 7, fo. 6, pl. 12), it is said that a park consists of soile, inclosure, and game. And in the 15 Edw. 3, Thomas, Earl of Lancaster, lord of a forest, did grant leave to one John Harrington, to make a park within the said forest; and there it is adjudged, that, if the grantee does so slightly inclose the park, so that the forest beasts may get in there, that it is a forfeiture, and the lord of the forest may enter and take the deer" (*b*). So, in Com. Dig. Chase (B.), it is said (citing Manw. 52): "A chase is the same liberty as a park, save that it is not inclosed." (C.) "A park is a territory inclosed, which has a privilege for beasts of chase, by prescription or the King's grant (citing Co. Litt. 233 a., 2 Inst. 199, Sir J. Bridgman, 26). And the owner may dispark his park, if he grants or destroys all the venison, vert, or inclosure" (*c*). The same doctrine is to be found in 2 Bl. Comm. 38, and in Chitty's Prerogatives of the Crown, 140, 141. Reliance will probably be placed, on the part of the defendant, upon the case of *Leicester Forest* (Cro. Jac. 155), where Sir Edward Coke said—"it had been adjudged that the non-user of a fair or market, **[784]** or courts, or such like liberties, wherein the subjects have interest for their common profit or common justice, is cause of seizure of them: but the non-user of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is not any cause of their loss or forfeiture." But that was the case of a park in a forest. In Manwood's Forest Laws (edit. 1665 (3rd) C. 1, s. 5, p. 52), it is said: "As a forest, in his own proper nature, is the most highest franchise of noble and princely pleasure that can be incident unto the crown and royal dignity of a prince, so the next in degree unto it is, a liberty of a franke chase. A chase in one degree is the self same thing that a park is; and there is no diversity between them, save only that a park is inclosed, and a chase is always open, and not inclosed." In Cruise's Digest (vol. iii. title xxvii. Franchises, pl. 15, 16, p. 245), it is said: "A park is an inclosed chase, extending over a person's own grounds, privileged for beasts of venery, and beasts of forest and chase, by the King's grant or prescription. And it appears from the Ordinatio de Libertatibus perquirendis, 27 Edw. 1, that those who would purchase a new park should have writs of inquiry out of Chancery, and there make fine for the park having. And, in Madox's History of the Exchequer, there is an instance of a person being fined

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(*b*) And see Manwood's Forest Laws, 3rd edit. p. 90.

(*c*) Citing *Sir Charles Howard's case*, Cro. Car. 59.

forty marks for making a park without the King's licence. To a park, three things are necessary, 1. A grant from the crown,—2. Inclosures by pale, wall, or hedge,—3. Beasts of park, such as buck, doe, &c. And, where all the deer are destroyed, it shall no more be accounted a park; which consists of vert, venison, and inclosure; for, if it be determined in any of these, it is a total disparking. So, in Bac. Abr. Game, it is said: "The wild animals, such as deers, hares, foxes, **[785]** &c., are understood to be those which, by reason of their swiftness or fierceness, fly the dominion of man; and in these no person can have a property, unless they be tamed or reclaimed by him: and, as property is the power that a man hath over any other thing for his own use, and the ability that he has to apply it to the sustentation of his being, when the power ceases, his property is lost; and, by consequence, an animal of this kind which after my seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the Indies, because I have it no longer in my power or disposal. Hence, it appears, that, by the common law, every man had an equal right to such creatures as were not naturally under the power of man, and that the mere caption or seizure created a property in them. By immediate manucaption, or taking them and killing them, they belong to such person, in the same manner as any other chattels, and cannot be violated from him, since the first seizure and caption was sufficient to vest the property of them in him. By taking and taming them, they belong to the owner, as do all the other tame animals, so long as they continue in this condition, that is, as long as they can be considered to have the mind of returning to their masters; for, while they appear to be in this state, they are plainly the owner's, and ought not to be violated: but, when they forsake the houses and habitations of man, and betake themselves to the woods, they are then the property of any man. Another way of gaining property in them is, by inclosure, and then the beasts must be understood to be mine, as the profits of the soil itself are, and they can no more be taken and carried off than any other profits of the land: and, therefore, if deer be inclosed in a park or paddock, conies in a field or warren, they become so my own that no man ought to kill or take **[786]** them away. And, since in this case it is the inclosure only that retains them (for, take away the inclosure, and they are in their natural liberty), therefore the party is said to have right as he hath to any other profits there inclosed, and a distinct and independent right in every animal." "An action of trespass may be brought for taking a man's deer in a park or chase, or conies in his warren, for, the law takes notice that they are inclosed, because these are the proper inclosures for that purpose; and, consequently, those beasts are not in their natural liberty, and therefore the property is in the plaintiff." [Cresswell, J. That is not quite accurate, because a chase is unenclosed.] Much learning upon this subject is to be found in the judgment of Bayley, J., in *Hannan* v. *Mockett* (2 B. & C. 934, 4 D. & R. 518), where most of the authorities upon the subject were considered. Here, the evidence clearly shewed that the antient inclosure of Eridge Park had not been preserved, and consequently that a condition of the presumed grant had not been observed: and the forfeiture of the franchise is not cured by the finding of the jury, that the old boundaries were still ascertainable. In the judgment already adverted to in *Davies* v. *Powell*, Willes, C. J., says: "When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money, as they are now. But now they are become as much a sort of husbandry, as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say, that, when they are kept merely for profit, they are not distrainable, as other cattle, though it has been holden that they were not so when they were **[787]** kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied, both in courts of law and equity, now that personal estates are so much increased, and become so considerable a part of the property of this kingdom. Therefore, without contradicting the reasons which are laid down concerning this matter in the antient books, and without determining any thing with respect to deer in forests and chases, or parks, properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear." The opinion of the jury in this case coincides exactly with that of the judges in that case.

Talfourd and Byles, Serjts., and Willes, in support of the rule. There has been no satisfactory finding by the jury. The simple question left to them was, whether these deer were tame and reclaimed, or wild: the other two questions were put to them rather for the future guidance of the court in banco. It is by no means clear that the jury were unanimous upon the first question; it may be doubted whether their hesitation arose from the effect of their answers to the two other questions, or upon the answers themselves. [Maule, J. The learned judge told the jury to find for plaintiffs or defendant, as they found that the animals were tame or wild: and they found for the plaintiffs. Surely that was a sufficient finding.]

The question whether the animals were wild, or tame and reclaimed, was submitted to the jury entirely upon **[788]** the state of the animals themselves, and the condition of the enclosure. That, it is submitted, was not correct. The question which ought to have been presented to the jury, was excluded, viz. whether Eridge Park was a place which still retained all the incidents of a legal park, or whether it had become disparked by reason of the alterations which appeared to have been made in its boundaries. It is clear, from the old authorities which have been cited, that deer in a legal park go to the heir, and not to the executor. They form, as Lord Coke says, the ornament of the inheritance, which would be incomplete without them. It is said on the other side, that the legal incidents of a park, properly so called, are, vert, venison, and inclosure; and that the destruction of either of these, ipso facto operates as a destruction of the franchise. If venison be indispensable to the subsistence of the franchise, it would be strange, indeed, if it should be held to be destroyed, unless each successive possessor thought fit to bequeath the deer to the person next entitled to the inheritance. And yet such is the inevitable result of the argument on the other side. It is contended, upon the supposed authority of some obiter dicta in *Davies* v. *Powell*, that deer no longer possess the characteristics which marked them formerly. That, however, is begging the whole question. It is further contended that the unauthorised extension of an antient park, destroys the whole franchise. But for that no authority was cited. [Wilde, C. J. Suppose the park were greatly extended, and the number of deer therein proportionately increased, would the heir be entitled to claim the whole herd, by reason of the original existence of the more limited franchise?] It might be a question for the jury, whether the deer were increased to an unreasonable extent. Additions to the stock go to the heir: Co. Litt. 8. Are the rights of the succeeding tenant in tail to be affected by his **[789]** predecessor's extension of the inclosure? In the case of *Leicester Forest* (Cro. Jac. 155), it was resolved by all the court "that parts being laid open to forests for forty years, may yet be inclosed again; and they may kill any deer that come therein." [Maule, J. It may be that the tenant in tail would be a wrong-doer, in prostrating fences, so as to give the deer a larger circuit than he had lawful right to.] It may be that the Crown might complain of the additions made to the park: but it concerns not the subject. [Maule, J. Wild deer in a park, no doubt, go to the heir. Do you contend that reclaimed deer which are kept in a legal park, also go to the heir?] They do, provided they have the range of the park, as the deer in question had. [Wilde, C. J. What would be a reclaiming of deer in a park, except what was done with the deer in this case?] Justinian's Institutes, Lib. II. tit. I. § 12, contains all that is worth looking at out of the law of this country, upon this subject:—"Feræ igitur bestiæ, et volucres, et pisces, et omnia animalia quæ mari, cœlo, et terra nascuntur; simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id, naturali ratione, occupanti conceditur: nec interest, feras bestias et volucres utrum in suo fundo quis capiat, an in alieno. Planè, qui alienum fundum ingreditur, venandi, aut aucupandi gratiâ, potest à domino, si is præviderit, prohiberi ne ingrediatur. Quicquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tuâ custodiâ coercetur. Cum vero tuam evaserit custodiam, et in libertatem naturalem sese receperit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio." There is a marked difference between the Roman law and the law of this country upon this **[790]** subject. "In the view of the Romans," says Dr. Ignatius Kauffman, in a note to the 12th edition of Professor Mackeldey's Compendium of Modern Civil Law, p. 277, "animalia fera, or wild beasts, were res nullius; hence, the property in them ceased as soon as they had made their escape. The property in animalia mansuefacta, or tamed animals, e.g. deer, pigeons, peacocks, bees, or a tamed bear, is lost as soon as they have returned to their natural wild state, and have escaped from our sight (cum oculos effugerint). Animalia mansueta, i.e. animals whose nature renders them familiar with man, as e.g. domestic animals, fowls, &c., are objects of private property, and consequently are not acquired by occupancy. At the present day, in Germany, the right of occupancy, as far as relates to hunting, fishing, and fowling, (all but the right to catch butterflies and cockchafers) is monopolised by the state, the princes, the nobility, and here and there a private proprietor. The romantic period of occupancy has vanished for ever, along with the kindred simplicities of the golden age." In 1 Roll. Abr. Dismes (C.), pl. 5 (translated, 8 Vin. Abr. 576), it is said: "Si home ad phesants, et eux conserve deins un enclose bois, et clipp les wings del phesants, et del eggs hatch et educate jeune phesants, nul dismes serra paye de ceux eggs ou jeune phesants, pur ceo que ils ne sont reclaime, mes continue feræ naturæ, et vellent vaer hors del enclosure si lour wings ne fueront clipp" (*b*). In *Liford's case* (11 Co. Rep. 50 a.), it is said: "It is true, that an integral part, or thing appendant in possession, cannot be parcel, &c. of a reversion expectant upon an estate for life, as has been said; but the trees (as has been often said) are growing out of the inheritance, and attendant upon it; as, by a grant of the reversion, the **[791]** charters and evidences shall pass as things attendant upon the inheritance, and in truth they are the sinews of the inheritance. So, if I have a manor in which there is a park and fish-ponds, and I lease the manor, except the game of deer, and the fish, and afterwards I grant over the reversion, the grantee shall have the deer and the fish, as things attendant upon the inheritance; so not only those which have vegetative life, but all those which have sensitive life, shall go with the inheritance." The reason given by Lord Mansfield, in *Lawton* v. *Salmon* (1 H. Blac. 260, n., 3 Atk. 15, n.), why salt-pans go to the heir, and not to the executors, is, that "the inheritance cannot be enjoyed without them: they are accessaries necessary to the enjoyment and use of the principal." Much learning on the subject of parks, whether in forests or elsewhere, is to be found in Manwood, 224, and also in Com. Dig. Chase (C.). [Wilde, C. J. Is not the result this,—that a park must be inclosed at all events, if in a forest, so as to keep the king's deer out?] That is probably so. A partial destruction of the inclosure, however, will not destroy the franchise. In *Hooper* v. *Andrews* (1 Roll. Rep. 120, S. C. per nom. *Cowper* v. *Andrews*, Hobart, 39), Warburton, J., says: "Un parke consist sur deere et inclosure; si tout le deere morust, uncore si sont restore arere, le parke continue." The learned judge, in this case, should have directed the jury to take into their consideration the circumstance of this being a legal park, in order to enable them to determine the question, and the only substantial one, which he did leave to them, viz. whether the deer were tame and reclaimed, or otherwise. If it was a legal park, it would be for the jury to say whether or not the deer retained so much of their original wild character as was con **[792]**-sistent with their inclosure in such a place, and with the exercise of such acts or ownership as were necessary to enable the owner of the inheritance for the time being to enjoy them as part of his inheritance. It ought not to be placed in the power of a jury in this manner to destroy a franchise.

Cur. adv. vult.

Maule, J., now delivered the judgment of the court:—

This case was argued in Easter term, 1848, before lord chief justice Wilde, and my brothers Coltman and Cresswell, and myself. In the absence of the lord chief justice, I now proceed to pronounce the judgment, which has been prepared by him, and in substance assented to by us.

This was an action of trover brought to recover damages for the conversion of a number of deer.

The declaration contained two counts. The first count stated that the testator, in his life-time, was possessed of a certain number of bucks, does, and other descriptions of deer, being captured and reclaimed from their natural wild state, and confined in the close of the testator; and that the plaintiffs, after his death, were possessed as executors; and that the defendants afterwards converted the deer, &c. The second count stated that the plaintiffs, as executors, were possessed of the

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(*b*) *Winbroke* v. *Evans*, 11 Car.

like quantity of deer, which the defendant had converted,—to the damage of the plaintiffs.

The defendant,—except as to a certain number of bucks, does, and fawns,—pleaded, not guilty, to the whole declaration; and, secondly, that the testator was not possessed, nor were the plaintiffs, as his executors, possessed, of the deer, as alleged;—thirdly, that, except as to a certain number of bucks, does, and fawns, the deer alleged in the declaration were not captured, **[793]** reclaimed, and tamed, or kept confined in inclosed grounds, as alleged;—lastly, as to the excepted bucks, does, and fawns, the defendant paid the sum of 85l. into court.

Issue was joined on these pleas.

The cause was tried before the late Mr. Justice Coltman, at the sittings in Middlesex after Hilary term, 1847, when the jury found a verdict for the plaintiffs upon the issues—testator possessed—plaintiffs possessed—and that the deer were tame and reclaimed.

A rule nisi was afterwards obtained by the defendant, in the following Easter term, to shew cause why there should not be a new trial, upon the ground of misdirection, that there had been no sufficient verdict found by the jury, and that, if a sufficient verdict had been found, it was contrary to the evidence.

Several questions arose upon the trial,—first, whether the land called Eridge Park, in the county of Sussex, was an antient legal park,—secondly, whether it continued to be a legal park, or whether it had become disparked, by the addition of other lands to the original park, and by the removal, decay, or destruction of the fences, so as to destroy the evidence of the boundaries of such antient park; and whether the deer kept in such park had been tamed and reclaimed.

In support of the defendant's case, various antient documents were given in evidence, to establish that the place in question was an antient legal park, and that, from a very early period, down to the time of the death of the testator, there had always been a considerable herd of deer maintained in the park. And it was also proved that the place in question, consisting of upwards of seven hundred acres of land, was in many parts of a very wild and rough description. It also appeared by the evidence that certain lands had been added to the **[794]** original park; and there was some contrariety of evidence in regard to the state of the fences.

It was also proved that a considerable quantity of deer had the range of the park; and that some were tame, as it was called, and others wild. What in particular the witnesses meant by the distinctions of tame and wild, was not explained: but it rather seemed that their meaning was, that some were less shy and timid than others. It appeared that the deer very rarely escaped out of the boundaries; that they were attended by keepers, and were fed in the winter with hay, beans, and other food; that, a few years back, a quantity of deer had been brought from some other place, and turned into Eridge Park; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then inclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers; that the deer were usually killed by being shot; and that there was a regular establishment of slaughter-houses, for preparing and dressing them for use.

Such being the general effect of the evidence, the learned judge stated to the jury, that, by the general law, deer in a park went to the heir-at-law of the owner of the park; but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of them, and not to the heir of the owner of the park in which they were kept. And the learned judge left it to the jury, whether the place in question was proved by the evidence to have been an antient park, with the legal rights **[795]** of a park; and told them, that, if it had been an antient park, and the boundaries could not now be ascertained, that the franchise might be forfeited in reference to the crown, but that that would not affect the question between the parties relative to the deer,—that question being, whether the deer were tamed and reclaimed; which must be determined with reference to the state and condition of the animals, the nature of the place where they were kept, and the mode in which they had been treated: and the learned judge stated in writing the questions to be answered by the jury, which were,—first, whether they found for the plaintiffs, the executors, or for the defendant, Lord Abergavenny,—secondly, whether they found the place to be an antient park, with the incidents of a legal park,—thirdly, whether the boundaries could be ascertained by distinct marks.

The jury answered, that they found the place to be an antient park, with all the incidents of a legal park,—secondly, that the boundaries of the antient park could be ascertained. And the jury expressed a wish to abstain from finding for either plaintiffs or defendant; but, upon being required to do so, they found a verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed.

The rule came on for argument in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said. It was supposed that the jury had not found, in terms, for either plaintiffs or defendant, but merely had answered the questions put to them: but it appeared, upon inquiry, that the jury had been required to find a verdict for the plaintiffs or for the defendant, in addition to answering the questions; and that they accordingly returned a verdict for the plaintiffs.

[796] The second objection was, that the judge had misdirected the jury: and it has been contended, in support of that objection, that the judge must be held to have misdirected the jury, in having omitted to impress sufficiently upon them the importance of the fact of the deer being kept in an antient legal park.

But the judge did distinctly direct the attention of the jury to the fact of the deer being in a legal park, if such should be their opinion of the place, as an important ingredient in the consideration of the question whether the deer were reclaimed or not, when he directed them that the question whether the deer had been reclaimed, must be determined by a consideration, among the other matters pointed out, of the nature and dimensions of the park in which they were confined: and we do not perceive any objectionable omission in the judge's direction in this respect, unless the jury ought to have been directed that such fact was conclusive to negative the reclamation of the deer.

It has not been, on the part of the defendant, contended, in terms, that deer kept in a legal park, can, in no case, be deemed to have been tamed or reclaimed, although the argument seemed to bear that aspect: but the many cases to be found in the books, in which the question has been agitated, in whom the property was of deer in a park, seem quite inconsistent with such a position; because, in all such cases, the arguments proceeded upon the distinct fact that the deer were in a park, that is, a legal park; and the question was, whether deer continued to be wild animals, in which no property could be acquired, and which therefore, like other game and wild animals, being upon the land, passed with the estate, or whether, by reason of their being tamed and reclaimed, a property could be acquired in the deer, distinct from the estate, although remaining in the park, and which would pass in like manner as other personal property.

[797] The general position, therefore, to be found in all the books, that deer in a park will pass to the heir, unless tamed and reclaimed,—in which case they would pass to the executor,—seems to be inconsistent with the position, that deer cannot, in any case, be considered as tamed and reclaimed, whilst they continue in a legal park. Many authorities are cited upon that subject, the names of which it is not necessary to advert to.

The observations made in support of the rule, on the part of the defendant, were rather addressed to a complaint that the learned judge did not give so much weight to the fact of this being a legal park, as they thought belonged to it, than to any exception to what the judge really said upon the subject. There can be no doubt that the learned counsel on the part of the defendant, did not omit to impress upon the jury his view of the importance of the fact of the deer being found in an antient and legal park; and nothing is stated to have fallen from the judge, calculated to withdraw the attention of the jury from the observations of the counsel made in that respect, or to diminish the force which justly attaches to any of them.

It remains to be considered whether the arguments in support of the rule have shewn that the verdict upon the issue, whether the deer were tamed and reclaimed, was warranted by the evidence. In shewing cause, on the part of the plaintiff, against the rule, it was contended that the conclusion of the jury, that Eridge Park continued to possess all the incidents of a legal park, was not warranted by the evidence; because, it was said that the franchise had been forfeited by the addition of other lands to the antient park, and the destruction of the means of ascertaining the antient boundaries; and numerous authorities were referred to, relating to the requisites for constituting an existing legal park, and of the causes of the forfeiture of the **[798]** franchise. But the opinion which the court has formed upon the other parts of the case, renders it unnecessary to enter into the consideration of that question, or into an examination of the authorities referred to.

That it was proper to leave the question to the jury in the terms in which the issue is expressly joined, cannot be disputed: and the direction, that that question must be determined by referring to the place in which the deer were kept, to the nature and habits of the animals, and to the mode in which they were treated, appears to the court to be a correct direction: and it seems difficult to ascertain by what other means the question should be determined, whether the evidence in this case was such as to warrant a conclusion that the deer were tamed and reclaimed. The court is, therefore, of opinion that the rule cannot be supported, on the ground of misdirection.

It is not contended that there was no evidence fit to be submitted to the jury, and that therefore the plaintiff ought to have been nonsuited: but it is said that the weight of evidence was against the verdict.

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies* v. *Powell* (Willes, 46), are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times, from that which antiently prevailed, as pointed out by Lord Chief Justice Willes, cannot be overlooked. It is truly stated, that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in antient legal parks, or in the modern inclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole man-**[799]**-agement differing very little, if at all, from that of sheep, or of any other animals kept for profit. And, in this case, the evidence before adverted to was, that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed,—with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, as it is said—individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances, to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it: and, in this case, the court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence, and do not feel authorised to disturb the verdict: and the rule for a new trial must, therefore, be discharged.

Rule discharged (*a*).

[800] WARREN AND ANOTHER *v.* PEABODY. Dec. 4, 1849.

[S. C. 19 L. J. C. P. 43; 14 Jur. 150. See *Southampton Steam Colliery Company* v. *Clarke*, 1868-70, L. R. 4 Ex. 79; L. R. 6 Ex. 53.]

By a charterparty it was agreed that the ship should proceed to Baltimore, and there load a full cargo of produce, and proceed therewith to the United Kingdom, and deliver the

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(*a*) As to *Rotherfeld and Ererugg or Erugg*, vide Inquisit. post mortem, temp. Edw. III., vol. ii. fo. 119, 160, 161, 212, 214, 244, 292, 349. Abbrev. Rotul. Orig. in Scaccario, vol. i. fo. 225 b., vol. ii. fo. 27 b., 225 b., 229 a., 234 a. Calendarium Rotul. Patent. fo. 122 a., 129 b. fo. B. 119, et alibi.

same, on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn or other grain;" that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; and that not less flour or meal than naval stores was to be shipped.—The vessel arrived here with a cargo consisting of 769 hhds. of tobacco, 6047 bushels of bran, 2000 bushels of oats, 5000 oak-staves, and 3 barrels of flour.—The evidence shewed, that a quarter of indian corn or wheat weighing 480 lbs. would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of 16 cubic feet. It also appeared that oats were not a usual shipment from America: Held, that "other grain," in this charter party, must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude oats; and that the ship-owner was entitled to receive freight upon the supposition that 3000 barrels of flour, meal, or naval stores had been shipped, and, for the rest of the space, at the rate of 11s. per quarter of indian corn, or other grain of the average weight of 480 lbs. to the quarter.

This was an action of assumpsit. The declaration stated, that, on the 24th of February, 1847, by a certain charterparty of affreightment then made between the plaintiffs, owners of the good ship or vessel called the "Ayrshire," A1, of the measurement of 625 tons, or thereabouts, then lying in the port of London, whereof the plaintiff John Howe Brown was master, of the one part, and the defendant, therein described of London, merchant, freighter of the said ship, of the other part, it was mutually agreed by the said parties, amongst other things, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should, immediately on her then present inward cargo being discharged, and she was ballasted, sail and proceed to Hampton Roads, Chesapeake Bay, for orders, and from thence proceed to Norfolk or Baltimore, as ordered by the charterer's agent, and there load a full and complete cargo of produce, which the said merchant bound him-**[801]**-self to ship, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, should therewith proceed to Cork or Falmouth for orders, and from thence to a safe port of discharge in the United Kingdom, or so near thereunto as she might safely get, and deliver the same as was customary, on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for Indian corn or other grain:" That it was further agreed that the captain should await a return of post, at Cork or Falmouth, from London, without its being counted in the lay days; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted; the freight to be paid on unloading and right delivery of the cargo, in cash, less two months' interest at 5l. per cent. per annum: That, forty-five days, exclusive of Sundays, were to be allowed the said merchant, if the ship should not be sooner despatched, for loading the said ship at her port of loading, and unloading at her port of delivery, and twenty days on demurrage, over and above the said laying days, at 8l. per day: That the vessel, upon her return, was to be addressed to H. & C. Toulmin, London, to whom the commission on that charterparty was due, ship lost or not lost, and with whom the original charterparty was deposited: That the penalty for non-performance of the agreement, was 2500l.: That the vessel was to be consigned to the freighter's agents; the cargo to be sent alongside, and taken from alongside the said vessel, at the expense and risk of the said freighter; the vessel to be properly prepared, at the owner's expense, to take her cargo of grain and other produce; and the captain to sign bills of lading, without prejudice to the charter: **[802]** That it was further agreed, that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; that the barrels of naval stores were not to measure more than of flour, and to pay freight accordingly; and that not less flour or meal than naval stores, was to be shipped: Mutual promises: Averment, that the said ship, within a reasonable time after the making of the said charterparty, and immediately after discharging her then inward cargo, to wit, on the day and year first aforesaid, was ballasted, and was tight, staunch, and strong, and every way properly fitted, victualled, and manned, with all things needful and necessary for the voyage in the said charter-party mentioned: That thereupon the said master did afterwards, to wit, on the day and year last aforesaid, set sail in and with the said ship, and proceed to Hampton Roads, Chesapeake Bay, for orders, according to the said charterparty, and afterwards, to wit, on the day and year aforesaid, arrived there, and was there, to wit, on the day and year aforesaid, ordered by the charterer's agent to proceed, and did then, to wit, on the day and year aforesaid, proceed, to Baltimore, and there load on board the said ship, a certain quantity, to wit, 600 tons, of produce, to wit, tobacco, oats, bran, and spars, and, being so loaded, proceeded therewith, to wit, on the day and year aforesaid, by order of the said charterer, direct to a safe port of discharge in the united kingdom, to wit, the port of London, and there, to wit, on the day and year aforesaid arrived, and there, to wit, on the day and year aforesaid, made a right and true delivery of the said several articles so on board of the said ship, to and for the defendant, according to the terms of the said charterparty: That although, by reason of the premises, a large sum of money, to wit, the sum of 3000l., became due and payable to the plaintiffs, as and for the freight of the said vessel, for the voyage aforesaid, according to **[803]** the terms of the said charterparty, to be paid as in the said charterparty is mentioned and agreed; yet the defendant had not paid to the plaintiffs the said sum of money, or any part thereof, but to pay the same, or any part thereof, to the plaintiffs, the defendant had wholly refused, and still did refuse so to do, contrary to his said promise and undertaking: That the plaintiffs were, to wit, on the day and year last aforesaid, ready and willing to receive on board the said ship, and carry, according to the terms of the said charterparty, a full and complete cargo, as mentioned in the said charterparty,—whereof the defendant, afterwards, to wit, on the day and year last aforesaid, had notice: Yet that the defendant did not nor would, although often requested so to do, to wit, on the day and year last aforesaid, ship on board the said vessel a full and complete cargo of produce, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture; but wholly neglected and refused so to do, and, on the contrary thereof, shipped on board the said ship or vessel a much smaller quantity, to wit, 600 tons less than the said ship could reasonably stow and carry as aforesaid,—and thereby, and by reason thereof, the said ship returned to the United Kingdom with an incomplete cargo, and the plaintiffs lost and were deprived of the gains and profits, amounting to a large sum of money, to wit, 2000l., to which they would otherwise have been entitled under and by virtue of the said charterparty.

Plea, payment into court of 1920l., and no damages ultra.

Replication, damages ultra.

The cause was tried before Wilde, C. J., and a special jury at the sittings in London after Michaelmas term, 1848.

It appeared that the "Ayrshire" took on board at Bal-**[804]**-timore a cargo consisting of 769 hogsheads of tobacco, 6047 bushels of bran, 2000 bushels of oats, 5000 oak-staves, 3 barrels of flour, and a few other articles.

The plaintiff, upon the authority of *Cockburn* v. *Alexander* (ante, vol. 6, p. 791), claimed to be entitled to freight upon the supposition that 3000 barrels of flour, meal, or naval stores, in the proportion provided for by the charterparty, had been put on board, and that the rest of the space had been occupied by Indian corn or other grain of the same average weight, viz. 480 lbs. per quarter: or, in other words, that he was entitled to receive freight at 5s. 6d. per barrel for 3000 barrels of flour, &c., and at the rate of 11s. for every 10½ cubic feet beyond 18,756 feet, the space which it was computed that the 3000 barrels would have occupied,—10½ cubic feet being the space which it was proved that each quarter of grain (exclusive of oats, which it appeared had only within a year or two become the subject of importation to this country from America) would occupy.

On the part of the defendant, it was insisted, that, under the terms of the charterparty, he was at liberty to fill up that portion of the ship which would remain unoccupied after the loading of 3000 barrels of flour, meal, or naval stores, with oats (as to which, it was proved that the average weight of American oats per quarter was 272 lbs., that the quarter would occupy a space of 16 cubic feet, and that oats were more compressible than wheat by 22½ per cent.); and, therefore, that the damages should be assessed at 11s. per 16 cubic feet for all beyond the space occupied by the flour, &c.,—in which event, enough had been paid into court.

A verdict was taken for the plaintiff, damages 748l. 10s., subject to the opinion of the court as to the proper construction of the charterparty (post, 805 (*a*)): it being agreed to refer it to a gentleman named (one of the jury), to [805] settle the amount when the court had ascertained the principle upon which the freight was to be computed; and also to say what sum should be deducted in respect of the cost which the owner would of necessity incur in preparing the vessel, by lining, &c., to receive a cargo of grain, and also in respect of oats being more susceptible of compression than wheat or any other grain.

Channell, Serjt., in Hilary term last, accordingly obtained a rule nisi to enter a verdict for the defendant, or to reduce the damages.

S. Martin, Byles, Serjt., and Barstow, now shewed cause. The true construction of this charterparty (*a*) is that upon which the verdict is founded. The owner was bound to take on board any description of produce that might be offered to him: but he was only bound to deliver it upon payment of freight at and after the rates stipulated for, viz., at 11s. per quarter of 480 lbs., that is, by estimating it at 11s. for each portion of the vessel beyond that occupied by the 3000 barrels of flour or meal, which a quarter of grain weighing 480 lbs. would fill. The parties contemplated, not the specific gravity of the grain, but the space it would occupy in the ship: the owner was to receive the same amount of money, whether one description of grain was put on board, or another. [Maule, J. Why mention weight at all, if the freight was to be estimated upon the amount of space to be occupied?] In *Capper* v. *Forster* (3 N. C. 938, 5 Scott, 129), it was laid down, upon the authority of *Thomas* v. *Clarke* (2 Stark. N. P. C. 450), that, where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight speci-[806]-fied for each, which articles are not provided by the charterer, the freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated. That was followed by *Cockburn* v *Alexander* (ante, vol. vi. p. 791). There, a ship was chartered to proceed to Port Phillip, and there load, from the freighter's factors, "a full and complete cargo of wool, tallow, bark, or other legal merchandise,"—the quantity of bark, not to exceed one hundred tons, and the quantity of tallow and hides, not to exceed eighty tons,—and was to proceed therewith to London, and deliver the same, "on being paid freight as follows—for wool, 1½d. per lb. pressed, and 1½d. and one eighth of a penny per lb. unpressed, gross weight; tallow, 3l. per ton; bark, 4l. per ton; and hides, 2l. per ton,—the latter not to exceed twenty tons, without consent of the captain, &c.: one third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash, or by approved bills, at two months following." And it was held, that the freighter was at liberty to load the ship with an assorted cargo of any "legal merchandise;" but that the owners were entitled to be paid freight upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz. one hundred tons of bark, sixty tons of tallow, and twenty tons of hides, and the residue of wool, pressed or unpressed. The court there decided, in effect, that the stipulated rates were to guide in all events, that the freight of enumerated goods was not to be charged upon a quantum meruit, and that *Capper* v. *Forster* gave the proper measure for estimating the freight in such cases. [Maule, J. The ground upon which the court proceeded, in *Cockburn* v. *Alexander*, was, that [807] the parties had provided for the measure of freight in all possible events: the owner was to deliver the cargo, "on being paid freight as follows."] The case is distinctly within *Capper* v. *Forster*. [Maule, J. It certainly is difficult to say that anything is established, if the doctrine laid down by Lord Tenterden (Abbott on Shipping, 8th edit. p. 411), and adopted by this court in *Capper* v. *Forster*, and confirmed by the subsequent case of *Cockburn* v. *Alexander*, may not be said to be established.] The words "at the rate of" override the whole sentence. The parties evidently had not oats in their contemplation: it was an unusual shipment from the place in question, and it does not fill the description of grain of the weight of 480 lbs. to the quarter. [Maule, J. Like a measurement ton.] Yes.

Channell, Serjt., in support of the rule. [Maule, J. No doubt, under the terms here used, "indian corn or other grain," is to be understood any grain, the produce of America, as to which there was a reasonable expectation of its being made the subject of exportation thence to this country. The main question is, whether oats are to be

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(*a*) The instrument in this case called a charter-party, was a memorandum of charter not under seal.

considered as "grain" within the meaning of this charterparty.] Primâ facie "grain" includes all cereals: and it was proved here, that, though not a very frequent shipment from Baltimore, oats had occasionally been brought from that port. This case is not governed by *Cockburn* v. *Alexander*. The cargo there was not in any sense a compliance with the charterparty: and a great portion of it was brought from a place other than that contemplated. It may be that the freight for oats is not expressly stipulated for here. [Maule, J. It is difficult, after the case of *Cockburn* v. *Alexander*, to say, that the clause providing for the delivery of the cargo, **[808]** on payment of freight "at and after the rate of, &c.," does not mean that freight is to be paid, at and after the rates specified, for the whole cargo, whatever it may consist of.] At all events, the defendant is entitled to a deduction, in respect of the cost of lining and preparing the ship for a cargo of grain. [Maule, J. We all think that a proper item of credit: the amount will be settled by the referee.]

Maule, J. This case turns upon the interpretation of a charterparty, which certainly is not without difficulty. It frequently happens that instruments of this sort are prepared in anticipation of a state of circumstances which never arises; and. consequently, they are sometimes of difficult application to the case which has arisen. The charterparty in the present case provides that the "Ayrshire" shall proceed to Norfolk or Baltimore, and there load a full and complete cargo of produce, and proceed therewith to a port in the united kingdom, and deliver the same, on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn, or other grain." The ship arrived at her destination without a full cargo, the freighter being unable to furnish a full cargo. The owner, no doubt is entitled to compensation for this breach of contract. The cargo the freighter engaged to furnish, was, "a full and complete cargo of produce;" which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. That being what the parties contemplate and describe, they proceed to stipulate for the rate of compensation which the owner is to receive, which they say is to be as mentioned above. Now, that enumerates and specifies certain articles of produce, and the respective prices to be paid for them: it applies the rate, in terms, to all produce: the owner **[809]** engages to deliver the cargo at the port of destination, "on being paid freight at and after the rate," &c. A somewhat similar clause was contained in the charterparty in *Cockburn* v. *Alexander*, where the freighter engaged to ship a full cargo consisting of wool, tallow, bark, or "other legal merchandise," on payment of freight as follows,—giving a specific rate of freight only for wool, tallow, bark, and hides: and we there adhered to the previous decision of this court in *Capper* v. *Forster*, that other legal merchandise, besides the articles enumerated, was not to be carried gratuitously, or upon a quantum meruit, but that this was to be taken to be an express provision (difficult, perhaps, of application,) for regulating the amount of freight to be paid for merchandise of any kind. That was the construction put by this court upon the clause of the charterparty in *Cockburn* v. *Alexander*: and I am unable to discover any substantial difference between the two cases; nor do I see any sufficient reason for dissenting from the doctrine there laid down. I therefore think that the clause in question provides a rate of freight which is to be paid for any description of produce shipped under this charterparty. It is manifest that the intention of the parties was, that the cargo should be delivered only on payment of some freight: and, unless the construction I have mentioned is put upon the charterparty, no freight at all would be provided for in respect of any but the actually enumerated articles. Taking it, then, to be a clause by which the parties intended to regulate the amount of freight to be paid for all descriptions of goods coming within the general term "produce," it helps us towards the construction of another part of the instrument, which depends upon the nature of the trade at the loading port. We think,—not without some doubts crossing the minds of some members of the court,—that the clause, when speaking of "indian **[810]** corn or other grain," must be construed to mean other grain exclusive of oats, which are a description of grain but recently the subject of exportation from America to England. But, as this clause was intended to regulate the freight, not for grain only, but for every description of goods,—for which purpose it was necessary that it should ascertain a precise or reasonably precise rate of payment,—we think there is sufficient reason for excluding oats, as not being within the probable intention of the parties when speaking of "other grain." The relation in which oats, according to the evidence given in the cause, stand to other produce, confirms us in this view. With respect to indian corn, which weighs about 480 lbs. per quarter, and wheat, 11s. per quarter is to be paid. But oats being a grain to which that is not applicable, and not having long been imported from that place, we think they are like any other produce to be brought, the freight of which is not regulated by that stipulation, but that they are to be paid for after a rate to be deduced from the rate of 5s. 6d. per barrel for flour or meal, and 11s. per quarter of indian corn or other grain of the average weight of 480 lbs. per quarter. The proper mode, therefore, of estimating the damages, will be, to assume that the stipulated number of barrels of flour was put on board, and the residue of the vessel filled up with other goods, at an amount of freight calculated upon the rule which the parties have laid down, viz. 5s. 6d. per barrel of flour, and 11s. for every 480 lbs. of indian corn or other grain. That, I believe, is the calculation upon which the verdict is founded; and therefore the rule will be discharged, except as to one item for which it is conceded the defendant is entitled to credit, viz. the expense to which the owner would have been put if he had prepared the vessel for the reception of a full cargo of wheat,—which amount, it is agreed, shall be settled out of court.

[811] CRESSWELL, J. I entirely concur in the opinion expressed by my brother Maule upon the construction of this charterparty. The owner, on the one hand, contracted to take on board a full and complete cargo of produce, and on the other to receive a certain rate of freight. It appears clearly that the intention of the parties was, that the cargo of "produce" should be delivered on payment of freight at and after the rates mentioned, viz. at and after the rate of 5s. 6d. per barrel of flour, &c., and 11s. per quarter of 480 lbs. for indian corn or other grain; which, I take it, must mean such other grain as came within the description of weighing 480 lbs. per quarter: otherwise, you would be giving three or four rates of freight, which never could have been intended. Oats may be taken to come within the description of "produce," though only very recently become the subject of importation from Baltimore; but they are not included in the description of grain weighing 480 lbs. per quarter. I therefore think this rule must be discharged,—subject to the inquiry alluded to by my brother Maule.

V. WILLIAMS, J. For the reasons already assigned, I concur in thinking that oats do not fall within the description of grain for which freight was to be paid at the rate of 11s. per quarter, and that the case is governed by the decision of this court in *Cockburn* v. *Alexander*.

TALFOURD, J. I am of the same opinion. The result of our decision will be, that the verdict will be reduced by such sum as the referee may ascertain as the expense of lining and preparing the ship for a cargo of grain.

Rule discharged accordingly.

[812] FRANCOIS VANDER DONCKT *v.* THELLUSSON. Dec. 7, 1849.

[S. C. 19 L. J. C. P. 12.]

The law of a foreign country on a given subject, may be proved by any person who (though not a lawyer or a person, who, by reason of his having filled any public office, may be presumed to be acquainted with the law) is, or has been, in a position to render it probable that he would make himself acquainted with it.—Therefore, an hotel-keeper in London, a native of Belgium, who stated that he had formerly carried on the business of a merchant and commissioner of stocks in Brussels, was permitted to prove the law of Belgium on the subject of the presentment of a promissory note made in that country payable at a particular place.—A promissory note described in the body of it as "payable on the last day of October. At A. B.'s,"—must, by the law of England, be presented at the place named; and the latter words are not to be treated as a mere memorandum, because separated from the former by a full point.

Debt, on two foreign promissory notes.

The first count stated that the defendant, theretofore to wit, on the 25th of March, 1843, in parts beyond the seas, to wit, at Brussels, in the kingdom of Belgium, according to the law of the said kingdom of Belgium in that behalf, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff the sum of 2000 francs at the end of the month of July, 1843, for value received,—which period had elapsed before the commencement of the suit: Averment, that the said sum of 2000 francs in the said promissory note mentioned, at the time of the making of the said note, and when the same became due, was, and is, of great value, to wit, of the value of 80l., of lawful money of Great Britain: whereby, &c.

The second count was upon a similar note, dated the 31st of July, 1843, for 500 francs (or 20l.), and payable three months after date.

There was also a count upon an account stated.

The defendant pleaded,—first, that he did not make the said promissory notes in the first and second counts mentioned respectively, or either of them, in [813] manner and form as in those counts respectively alleged; concluding to the country.

Secondly, to the first and second counts, that the promissory notes in the said first and second counts mentioned respectively, were respectively made beyond the seas, at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere; that the plaintiff and the defendant respectively were, before and at the time of the making thereof respectively, domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and the said promissory notes respectively were made as and for promissory notes within the true intent and meaning of the laws of the said kingdom of Belgium; that, by the laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, every promissory note made within the said kingdom of Belgium must bear date of some certain day in the said note named, and that any writing purporting to be a promissory note, and not having such date as aforesaid, is by the said laws wholly ineffectual to charge the maker thereof; and that the promissory notes in the first and second counts mentioned respectively, did not, nor did either of them, nor did they or either of them at any time, bear date of any certain day in the said notes respectively named: verification.

Thirdly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made in a certain place in the said kingdom of Belgium, to wit, at Brussels, and not elsewhere, and the plaintiff and defendant respectively were, before and at the time of the making thereof respectively domiciled within the said kingdom, to wit, at Brussels aforesaid, and the said promissory notes respectively were made as and for promissory notes within the true intent and meaning of the said [814] laws of the said kingdom of Belgium; that, by the laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, there must appear on the face of every promissory note made within the said kingdom of Belgium, the name of some person or persons to whose order such promissory note is made payable, and that any writing purporting to be a promissory note, and not bearing upon the face of it the name of some person or persons as last aforesaid, is by the said laws wholly ineffectual to charge the maker thereof; and that there does not, nor did there at any time, appear on the face of the promissory notes in the first and second counts of the declaration mentioned respectively, or on the face of either of them, the name of any person or persons to whose order respectively the said notes respectively were or are payable: verification.

Fourthly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere, and that, before and at the time of the making of the said notes respectively, the plaintiff and defendant were respectively domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and that the said promissory notes were respectively made as and for promissory notes within the true intent and meaning of the laws of the said kingdom of Belgium; that, by the said laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, there must be named, or appear, in and upon every promissory note made within the said kingdom of Belgium, the name of some certain place at which the same is made payable, and that any writing purporting to be a promissory note, in or upon which there shall not be named, or appear, the name of [815] some such place as aforesaid, shall not be available to charge the maker thereof; and that there is not, nor was there at any time named, nor was there, nor did there appear, in or upon the said promissory notes, or either of them, the name of any such place as last aforesaid: verification.

Fifthly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere, and that, before and at the time of the making of the said notes respectively, the plaintiff and defendant were respectively domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and the said promissory notes were respectively made as and for promissory notes according to the true intent and meaning of the laws of the said kingdom of Belgium; that, by the laws of the said kingdom of Belgium at the time of the making of the said notes respectively and thence hitherto in force, there must be expressed in and upon every promissory note made in the said kingdom of Belgium, the consideration or value which was given for the same, in money or merchandise, in account, or in whatever other manner, and that any writing purporting to be a promissory note in or upon which there shall not be expressed such consideration or value as last aforesaid, shall not be available to charge the maker thereof; and that there is not, nor was there at any time expressed in or upon the said notes, or either of them, any such value or consideration as aforesaid: verification.

The plaintiff replied to the second plea, that, at the time of the making of the said notes respectively, the promissory notes in the said first and second counts mentioned respectively did, and each of them did, bear date of a certain day in the said notes respectively **[816]** named, that is to say, &c. To the third, that, at the time of the making of the said notes respectively, there did appear on the face of the promissory notes in the first and second counts of the declaration mentioned respectively, and on the face of each of them, the name of a person to whose order respectively the same were respectively payable, to wit, the name of the plaintiff. To the fourth, that, at the time of the making of the said notes respectively, there was, and now is, and there appeared, and now appears, in and upon the said promissory notes, and each of them, the name of a certain place at which the said promissory notes were, and each of them was, made payable, to wit, Brussels aforesaid, in the said kingdom of Belgium. And to the fifth, that, at the time of the making of the said notes respectively, there was, and now is, expressed upon the said notes respectively, and each of them, the value which was given for the same respectively, and for each of them, to wit, value received in cash.

The defendant rejoined, traversing the matters alleged in each of these replications. Issue thereon.

The cause was tried before Parke, B., at the spring assizes at Kingston, in 1849. The two notes were produced. The one declared on in the first count was made payable "chez M. Legrelle," not stating where. The other was as follows:—

"Bruxelles, le 3 Juillet, 1843.

"Bon pour frs. 500.

"A trois mois de date, je payerai à l'ordre de Mons. F. Vander Donckt la somme de cinq cent francs, valeur recue comptant.

"Accepte, bon pour cinq cent francs, payable à la fin d'Octobre, 1843. Chez M. Legrelle. "C. Thellusson."

[817] On the part of the defendant, it was objected, that there was a variance between the declaration and the proof,—the declaration describing the notes as payable generally, and the notes themselves, when produced, appearing to be payable at a particular place, viz., the house of M. Legrelle; and that there was no averment or proof of presentment of the notes there.

The plaintiff called a witness named De Keyser, who stated that he was a native of Belgium; that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London; and that he was well acquainted with the Belgian law upon the subject of bills and notes.

On the part of the defendant, it was objected that M. De Keyser was not an admissible witness to prove the foreign law, he neither being a lawyer, nor a person who was bound, by reason of his holding any office, to have a knowledge of the law of Belgium.

The learned judge, however, overruled the objection.

The witness then stated, that, by the law of Belgium, it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment.

Under the direction of the learned judge—who told them, that, if they believed the law of Belgium to be as stated by De Keyser, they must find for the plaintiff,—the jury returned a verdict for the plaintiff.

Willes, in Easter term last, moved for a new trial, on the ground of improper reception of evidence, and misdirection. In order to qualify a person to give evidence of the law of a foreign country, it is essential either that he be a professional man, or that he hold some office which makes it his duty to have a know-**[818]**-ledge of such law. In the case of *The Queen* v. *Dent* (1 Carr. & K. 97), it was ruled by Wightman, J., on an indictment for bigamy, that it is not essential that a witness who is called to prove the law of Scotland as to marriage, should be at all connected with the legal profession. But, in *The Sussex Peerage case* (11 Clark & Fin. 85, 134), Lord Lyndhurst, C., in deciding upon the admissibility of the evidence of Dr. Wiseman, as to the law of Rome regarding marriage, says: "He comes within the description of a person peritus virtute officii. I ought to say at once that it is the universal opinion both of the judges and the lords, that the case (*The Queen* v. *Dent*), as represented to have been decided by Mr. Justice Wightman, is not law." And his lordship there (11 Clark & Fin. 124) explains the case of *Ganer* v. *Lady Lanesborough* (Peake's N. P. C. 25), where a Jewess was permitted to give parol evidence of her having been divorced before the Rabbi at Leghorn, according to the custom of the Jews there,—on the ground that that was not giving evidence of foreign law. [Maule, J., referred to *Lindo* v. *Belisario* (Hagg. Con. Rep. 216), where that matter was much discussed. V. Williams, J. I suppose my brother Parke thought this was a question of mercantile usage, rather than of law.] He did not so put it. The witness was called to give evidence upon a pure question of law, and one which was long the subject of difference between the courts of King's Bench and Common Pleas in this country (*g*). In *Baron de Bode's case* (8 Q. B. 208, 246), evidence being offered to prove the law of inheritance at a particular time in Alsace, one of the witnesses called for that purpose,—a French lawyer, **[819]** practising in Alsace,—stated, on cross-examination, that the feudal law had been put an end to in Alsace, de facto, "by the torrent of the French revolution," and that there was a decree of the French National Assembly to that effect, of the 4th of August, 1789; and he said that he had learned this fact in the course of his legal studies: and this was held, by Lord Denman, and Williams and Coleridge, JJ.,—Patteson, J., dissentiente,—to be admissible evidence, though no other proof was given of the contents of the decree. That case shews the strictness with which the rule has been construed.

As to the second note, if the place of payment, "chez M. Legrelle," forms part of the contract, there is a variance; if not, the issue is wrong. [Cresswell, J. It is not of necessity to be paid there. Country banknotes in England are commonly expressed to be payable at some banker's in London, but they are not the less payable at the local bank.]

Wilde, C. J. As to the first point,—the admission of a witness unconnected with the law, to prove the state of the law of Belgium on the subject of bills of exchange,—we think the point one of sufficient importance to justify the court in granting a rule. As to the other point, however, we think the rule ought not to go. The fourth plea alleges that "there must be named, or appear, in and upon every promissory note made within the kingdom of Belgium, the name of some certain place at which the same is made payable, and that any writing purporting to be a promissory note, in or upon which there shall not be named, or appear, the name of some such place as aforesaid, shall not be available to charge the maker thereof; and that there is not, nor was there at any time named, nor does there appear, in or upon the said promissory notes, or either of them, the name of any such place as last **[820]** aforesaid;" and that allegation is traversed by the replication. It does not follow, that, because the Belgian law requires a place of payment to appear on the bill or note, that necessarily restricts the presentment and payment to that place. The issue is to be

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(*g*) See *Fayle* v. *Bird*, 6 B. & C. 531; 9 D. & R. 639, 2 C. & P. 303; *Gibb* v. *Mather* (*in Error*), 2 C. & J. 254, 2 Tyrwh. 189, 8 Bingh. 214, 1 M. & Scott, 387.

disposed of by an inspection of the instrument: and, when produced, it shews that a place of payment is named.

A rule nisi having been granted accordingly,

Lush now shewed cause. The plaintiff was not bound to prove the foreign law: the allegation that the notes were made according to the law of Belgium was immaterial, and altogether unusual. [Maule, J. According to the law of England, it would be necessary to aver that the notes were made payable at Legrelle's, and to shew a presentment there. Cresswell, J. The notes are described in the declaration as payable generally: upon their production at the trial, they appeared to be payable at a particular place. That is a variance. Maule, J. The objection fails, if the foreign law was competently proved; for, the evidence shewed, that, by the Belgian law, instruments in this form are, in effect, payable generally. Confine yourself for the present to the consideration of the note in the second count,—whether "Chez M. Legrelle" was part of the contract, or a mere memorandum.] As to that, the court will judge, from an inspection of the note, where the contract closes. Unless it is payable that the words "Chez M. Legrelle" were intended to form part of the note, the court will incline to exclude them, and treat them as a mere memorandum. The full stop which precedes those words must be taken to mean something. If it be left in doubt, the court will incline to sustain the contract.

Willes, contrà. Unless the full stop is to have effect given to it,—for which there is no authority whatever, **[821]**—the words "Chez M. Legrelle," which precede the signature, must be taken to form part of the note. The courts never regard punctuation, which is an arbitrary arrangement, not unfrequently destructive of the sense. The maxims "Apices juris non sunt jura," and "Nimia subtilitas in jure reprobatur: et talis certitudo certitudinem confundit," are peculiarly applicable to such a case as this. [Maule, J. I fear we shall hardly escape from the application of these maxims, whichever way we may decide. I think we must hear the other point.]

Lush. The witness De Keyzer was clearly competent. It was not necessary that he should be a lawyer. [Maule, J. In *The Sussex Peerage case*, it is to be observed, the House of Lords was sitting as a Committee of Privileges only, and not as a court of justice, properly so called. In *The Banbury Peerage case* (12 Howell's State Trials, 1183), *The Berkeley Peerage case*, and *The Queen's case*, where the Lords were sitting under their original jurisdiction, the common law judges were called upon to consider certain points of law which were submitted to them. Their opinions are considered authorities to a certain extent, and are often cited.] This was simply a question of commercial usage. The witness had been a merchant and stock-broker at Brussels,—a person who must be conversant with money securities: and he proves the custom of merchants as to bills and notes. There is nothing in *The Sussex Peerage case* to shew that a foreign merchant is not admissible for the purpose of speaking to a matter of commercial usage. The language of Lord Langdale, M. R., in that case, very much strengthens this view. "The witness," he says (11 Clark & Fin. 85), "is in a situation of importance; he is engaged in the performance of important and responsible public duties; **[822]** and, connected with them, and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is in the nature of that of a judge. It is impossible to say that he is incompetent." A British consul clearly would be admissible upon a question of commercial law. [Maule, J. The difficulty is, that you are seeking, by evidence of local usage, to impose upon a written instrument a construction different from the obvious meaning of its terms,—a somewhat dangerous doctrine.] The court cannot judicially know that there is any written law upon the subject in Belgium. [Maule, J. The court is not at liberty to have recourse to usage to construe a written instrument, the words of which have no technical meaning. If De Keyser is not competent to prove the law of Belgium, you say he was competent to prove usage. There is no doubt about that. But, is proof of usage admissible in contradiction of a written instrument?] It is the fact of the law-merchant of this country putting upon the words of the contract a construction different from their natural meaning, which raises the difficulty. [Maule, J. Construing the words without reference to the law-merchant, they would mean, "I will pay at the place indicated, if you choose to come and ask for the money there."] In no case has it ever been held that a lawyer must necessarily be called to speak to foreign law.

Willes, in support of his rule. The simple question is, whether this hotel-keeper is a competent witness to prove the Belgian law. In Best's Principles of Evidence (§ 344, p. 384), it is said : "The use of witnesses being, to inform the tribunal of facts, their opinions are not, in general, receivable as evidence." "The rule in ques-**[823]**-tion (§ 345, p. 386) is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witness, wherever the circumstances are such as to rebut this presumption, the rule naturally ceases—'cessante ratione legis cessat ipsa lex.' Thus, on questions of science, skill, trade, and others of the like kind, persons conversant with the subject-matter, called by foreign jurists experts, are permitted to give their opinions in evidence. This rests on the maxim, 'cuilibet in suâ arte perito, est credendum;' and the true rule on the subject seems correctly stated by the late Mr. Smith (1 Smith's Leading Cases, 286), that 'the opinion of witnesses possessing peculiar skill, is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance ; in other words when it so far partakes of the nature of a science or art, as to require a course of previous habit or study, in order to attain a knowledge of it.' A large number of instances of the application of this principle are to be found in the books." "It is on this principle also, that the evidence of professional or official persons is receivable in proof of foreign laws, who, from the very nature of the subject, can only speak to their judgment or belief." In *Ganer* v. *Lady Lanesborough*, the question arose as to the marriage customs among the Jews,—a people who, however much favoured in antient times, are now without laws or courts apart from the ordinary courts of the country of their domicil. [Maule, J. It is difficult to say that the evidence there did not involve a matter of law.] The line must be drawn somewhere : and it would be safer to draw it so as to exclude all except professional men, and persons who, by virtue of their office, may be said to be peritos. [Cresswell, J. Would Baron Roth-**[824]**-schild be supposed to know anything about the law of England as to bills of exchange ?] As a matter of fact, probably he is peritus. The learned judge here decided on the authority of *The Queen* v. *Dent*, altogether disregarding the fact of that case having been overruled by *The Sussex Peerage case*.

Maule, J. We must take it to be the law of England, that, in order to prove the law of a foreign country, there must be some special ground for believing that the person who is offered is more than ordinarily capable of speaking upon the subject. In the case of *The Queen* v. *Dent*, a witness was called who stated that he was acquainted with the law of Scotland, but it did not appear that he was, or ever had been, connected with the law, or in any situation which made it necessary that he should have made himself acquainted with the Scotch law. The members of the Committee of Privileges in the House of Lords, in *The Sussex Peerage case*, thought that the ruling of my brother Wightman in that case was erroneous. We bow to that decision. The question, then, is, whether the witness who gave evidence of the Belgian law in this case, falls within the principle of exclusion which is implied in the opinion of the lords and the judges in *The Sussex Peerage case*. Unless he does, he was clearly admissible ; for, it is upon that ground only that he is said to be inadmissible. The ground of exclusion relied on is, as in *The Queen* v. *Dent*, that there is a total absence of any peculiar means of information in the witness on the subject upon which he is called to speak. It appeared that he is now carrying on the business of an hotel-keeper, but that he had formerly been a merchant and stock-broker at Brussels. Whatever the line of business he now follows, if he was an expert before, he can hardly be said to be less so now. The question is, **[825]** whether he is a person having special and peculiar means of knowledge of the law of Belgium with regard to bills of exchange and promissory notes,—one whose business it was to attend to, and make himself acquainted with, the subject. I think, that, inasmuch as he had been carrying on a business which made it his interest to take cognisance of the foreign law, he does fall within the description of an expert. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject,—though they have not filled any official appointment, such as judge, or advocate, or solicitor,—be deemed competent to speak upon it ? Persons who have practised as physicians are frequently examined, and no inquiry is ever made as to whether or not they have a regular diploma. All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required.

For these reasons, I am of opinion that this rule must be discharged.

CRESSWELL, J. I am of the same opinion. It is clear from the learned baron's notes, that he had considered *The Sussex Peerage case*, and that it occurred to his mind that nothing that passed there shewed that this witness was inadmissible. He thought,—and I entirely agree with him,—that the circumstance of Mr. De Keyser having, as a merchant and stock-broker, been conversant with the Belgian law with regard to bills, essentially distinguished the present case from that observed upon in the House of Lords.

V. WILLIAMS, J. I am of the same opinion. It must be taken, upon the evidence of this witness, that it was part of his business as a merchant and broker in Belgium, to acquire a correct notion of the law of that **[826]** country regarding bills of exchange. He was, therefore, an admissible witness; though, it might turn out that his evidence, like that of many experts and scientific persons, was very little worth (*a*).

TALFOURD, J. I am of the same opinion. Foreign law is matter of fact: any person who can satisfy the court that he has had the means of knowing it, is an admissible witness to prove it (*b*). One who has been long in the habit of attending as a special juryman in the city of London, would, no doubt, be well qualified to speak as to the law of England on many subjects connected with commerce. As to the admissibility of this person's evidence, I think there can be no doubt, whatever may have been the weight it was entitled to.

Rule discharged (*c*).

[827] STEBBING v. SPICER. Dec. 5, 1849.

[S. C. 19 L. J. C. P. 24.]

In assumpsit on a promissory note made by the defendant, payable to J. H., and indorsed by J. H. to the plaintiff,—it appeared that there were two persons of the same name, father and son, and there was no evidence to shew to which of them the note had been given; but it appeared that the indorsement was in the handwriting of J. H. the son:—Held, that, although primâ facie the presumption would be that J. H. the father was meant, that presumption was rebutted by the son's indorsement.

Assumpsit on a promissory note made by the defendant, payable to John Holland, and indorsed by John Holland to the plaintiff.

Pleas,—1, that the defendant did not make the note,—2, that the said John Holland did not indorse it.

(*a*) The French Code de Commerce, which, without the modifications it has undergone in France, has continued to regulate the commercial transactions of Belgium ever since the year 1814, when the political severance of the two countries took place, contains the following provision as to negotiable promissory notes (liv. 1, tit. viii. sect. ii. art. 188)—"Le billet à ordre est daté. Il énonce la somme à payer, le nom de celui à l'ordre de qui il est souscrit, l'époque à laquelle le paiement doit s'effectuer, la valeur qui a été fournie en espèces, en marchandises, en compte, ou de toute autre manière."

The witness De Keyser, who was, in effect, called to place a construction upon a written law, made no distinction between bills and notes. With respect to the former the Code de Commerce, No. 110, instead of requiring, as in the case of a note, the statement of "l'époque à laquelle le paiement doit s'effectuer," has "l'époque et le lieu où le paiement doit s'effectuer." As the same clause says, "La lettre de change est tirée d'un lieu sur un autre," the words "et le lieu oû le paiement doit s'effectuer," might be reasonably regarded as relating merely to the "town" in which the payment was to be made.

As to the mode of proving the written law of a foreign country, see *Boehtlinck* v. *Schneider*, 3 Esp. N. P. C. 58; *Clegg* v. *Levy*, 3 Campb. 166: *Millar* v. *Heinrick*, 4 Campb. 155. See also *Fremoult* v. *Dedire*, 1 P. Wms. 429.

(*b*) Vide post, 967, n.

(*c*) See *Earl Nelson* v. *Lord Bridport*, 8 Beavan, 527, 547. And see Broom's Legal Maxims, 2nd edit., 720-725.

At the trial before Cresswell, J., at the sittings in London after Michaelmas term, 1848, it appeared that there were two John Hollands, father and son, who were both in desperate circumstances. It was proved that the handwriting of the indorsement was that of John Holland the son. There was no evidence to shew whether the note had been given to the father or to the son.

On the part of the defendant, it was submitted that the onus probandi was on the plaintiff, that the presumption, according to the authority of *Sweating* v. *Fowler*, which was cited from Byles on Bills, p. 57, was, that the note was given to the father, and that there was no evidence to encounter that presumption.

The learned judge ruled that it was incumbent on the plaintiff to shew that the bill was given to the son, and not to the father, and that there was no evidence at all of that. The jury accordingly found for the defendant.

Bramwell, in Hilary term, 1849, obtained a rule nisi for a new trial, on the ground of misdirection.

Byles, Serjt., and Griffiths, now shewed cause. The issue to be tried was, whether the John Holland who was the payee of the note, had, by his own hand, or by **[828]** the hand of another person, indorsed it to the plaintiff. There was no evidence whatever to prove the affirmative. Where there are two persons, father and son, bearing the same name and surname, and one is named, without distinguishing between senior and junior, it will be assumed that the father is meant, and not the son. The authorities upon the subject are distinct. In *Gregory's case* (*a*), it is said: "If speech be of J. S. generally, it shall be intended of the father, or of the eldest son; for, they are the most worthy." So, in *Metcalfe's case* (11 Co. Rep. 39 a.): "If the father and son are of one name, viz. J. S., if J. S. is named generally in a writ, count, or other record, it shall be intended of the father; for, he is the more worthy." In *Wilson* v. *Stubs* (Hob. 330), a capias utlagatum issued against one Ralph Stubs, and under it Ralph Stubs the younger was arrested: and the court held that "Stubs the younger might have his action of false imprisonment; for, that the defendant being named Ralph Stubs, without addition, shall never be accounted the younger, but always the elder of the two of that name." And, in *Lepiot* v. *Browne* (1 Salk. 7), Holt, C. J., said: "If father and son are both called A. B., by naming A. B., the father, primâ facie, shall be intended; but, if a devise were to A. B., and the devisor did not know the father, it would go to the son." That is, that, if there be evidence to encounter the presumption of law, it may be rebutted (*c*). Again, in *Sweeting* v. *Fowler* (1 Stark. N. P. C. 106), it was held, that proof of a promissory note payable to Henry Sweeting generally, was primâ facie evidence of a promise to Henry **[829]** Sweeting the father, and not to Henry Sweeting the son. There being no evidence here, to shew that John Holland the son was the party meant, the direction of the learned judge was perfectly correct. The objection, indeed, might be put higher. Suppose there was but one John Holland, it was not enough merely to produce a note indorsed "John Holland," without shewing some connection between him and the person named in the declaration: *Jones* v. *Jones* (9 M. & W. 75). There, in an action by indorsee against the maker of a promissory note, the defendant pleaded,—1, that he did not make the note,—2, that he made it for the accommodation of the plaintiff. There was an attesting witness to the contract, who, on being called at the trial, stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that Hugh Jones was a common name in the neighbourhood where the note was made. It was held that there was no evidence to go to the jury, of the identity of the defendant with the maker of the note; and that the second plea could not be called in aid for that purpose. [Cresswell, J. I think that case has been overruled (*b*). Talfourd, J., referred to *The King* v. *Peace* (3 B. & Ald. 579), where, upon an indictment for an assault upon Elizabeth Edwards, it was held to be sufficient to prove that an assault was committed upon a person bearing that name, although it appeared that there were two persons,—mother and daughter,—of the same name.] The judgment of Lord Denman in *Sewell* v. *Evans*

(*a*) 6 Co. Rep. 20 a., citing the Year Books, 37 H. 6, 29 b. (T. 37 H. 6, fo. 29 b., pl. 10), 21 H. 6, 8 (by mistake, ut videtur, for 21 H. 6, 26, *Grey* v. *Botley*, H. 21 H. 6, fo. 26, pl. 9), 13 H. 4, 4 (*Combe's case*, M. 13 H. 4, fo. 4, b. pl. 8).

(*c*) It would be a case of latent ambiguity.

(*b*) See *Greenshields* v. *Crawford*, 9 M. & W. 314, 1 Dowl. N. S. 439. And see *Barker* v. *Stead*, ante, vol. iii. p. 946.

and *Roden* v. *Ryde* (4 Q. B. 626), to some extent, confirms *Jones* v. *Jones* (see *Hunter* v. *Roberts*, ante, vol. vii. p. 861).

[830] Bramwell and Gosnell, in support of the rule. The ruling of the learned judge in this case proceeded entirely upon the citation of *Sweeting* v. *Fowler* from Byles on Bills, p. 57, where the case is incorrectly stated, without the qualification found in the report in Starkie—"but, A. B., the son, although styled in the declaration A. B. the younger, bringing the action, and being in possession of the note, is entitled to recover upon it." In *Jarmain* v. *Hooper* (6 M. & G. 827, 7 Scott, N. R. 663), in trespass quare domum fregit against the sheriff and A., the sheriff justified under a fi. fa. issued against the goods of the plaintiff by A.: to this plea the plaintiff replied, that the fi. fa. did not issue against the goods of the plaintiff. It appeared that A. had obtained judgment against Joseph Jarmain, who was the son of the plaintiff, and thereupon issued a fi. fa. against Joseph Jarmain, without any further description; under which writ, the goods of Joseph Jarmain the elder were taken: and it was held, that the writ afforded no justification to the sheriff. The writ might have meant either father or son. [Maule, J. The existence of the writ de indemptitate nominis proves that.] In *Curtis* v. *Rickards* (1 M. & G. 46, 1 Scott, N. R. 155), it was held that the production by the plaintiff of an I O U signed by the defendant, but not addressed, is primâ facie evidence that it was given to the plaintiff by the defendant; and that, if the latter wishes to rebut the inference arising from its production by the plaintiff, he should shew that it had been in the hands of some other party. [The court here interposed.]

Maule, J. It appears to the court that this case is governed by *Sweeting* v. *Fowler*, as reported in Starkie. There was evidence to go to the jury, that the John Holland whose handwriting appeared on the back of the **[831]** note, was the party to whom it was payable. If he was the payee, it was quite the regular course for him to indorse the note: and it would be quite out of the way and wrong (*a*), if he were not. It seems to us that the existence of the handwriting of John Holland the son on the back of the note, as indorser, coupled with the fact that one party to the note dealt with it as the son's, was some evidence to go to the jury that the son, and not the father, was the payee. We therefore think there must be a new trial.

The rest of the court concurring,

Rule absolute.

Dimes *v.* Wright and Another. Dec. 5, 1849.

[S. C. 7 D. & L. 292; 19 L. J. C. P. 137.]

An attorney's bill is not in compliance with the 6 & 7 Vict. c. 73, unless it furnish reasonable information, shewing in what court and in what cause each item charged for has been transacted.

Assumpsit on a solicitor's bill.

Plea,—no signed bill delivered, pursuant to the provisions of the statute 6 & 7 Vict. c. 73, s. 37.

The cause was tried before Wilde, C. J., at the sittings in London after last Easter term. It appeared that one of the defendants was entitled to certain property in right of his wife; that, one of the trustees having become bankrupt, it became necessary to remove him, and to appoint another in his place: and that an application was made to the court of review for that purpose. The bill commenced as follows:—

"*In the Matter of Wright and Another.*

"1846, Jan. 7. Instructions for petition to the court of review, that P. be appointed trustee, &c., in the place of the bankrupt.

[832] "Jan 26. Attending petitioner's solicitor, on his bringing copy petition to me, with a request that I would appear and consent to an order thereon."

Then came charges for searching for affidavits, for making office copy, &c., and then the following items:—

"Fee to Mr. H. and clerk.

"Attending him.

(*a*) Vide *Williams* v. *The East India Company*, 3 East, 192; *Doe d. James* v. *Price*, 1 Mann. & R. 683; 5 Mann. & R. 281 (*c*); 2 N. & M. 591 (*a*); 6 N. & M. 40 (*a*); Vin. Select. Jur. Quæst. lib. 2, cap. 2.

"28th. Attending court: petition called on, and directed to stand over till Tuesday, the bankrupt undertaking not to receive or deal with the property in the meantime."

Lower down was the following:—

"In Chancery. *Wood* v. *Wright*.

"Feb. 3. Attending court: petition called on, and directed to stand over generally, to be amended, the bankrupt and Mr. K. undertaking by their counsel not to receive or deal with the trust property without the order of the court."

It was objected, on the part of the defendant, that this bill was not a sufficient compliance with the 37th section of the 6 & 7 Vict. c. 73, inasmuch as it did not distinctly state the name of the cause and of the court in which the business had been transacted.

A verdict was taken for the plaintiff, for 103l., subject to a motion to enter a nonsuit, or a verdict for the defendant, if the court should be of opinion that the bill was an insufficient one.

Humfrey, in Trinity term last, accordingly obtained a rule nisi. He cited *Ivimey* v. *Marks* (16 M. & W. 843).

Cockburn and Carrington now shewed cause. *Martindale* v. *Falkner* (ante, vol. ii. p. 706) and *Sargent* v. *Gannon* (ante, vol. vii. p. 742) are **[833]** distinct authorities to shew that a solicitor's bill sufficiently complies with the statute, and with the rule which the decisions of the courts have engrafted upon it, if a statement of the court and cause appears therein by reasonable inference. Here, by reasonable and necessary inference, every person looking at this bill, with the knowledge which clients may be fairly expected to have, must at once see that the business could only have been transacted in the court of review. Coltman, J., in the case last cited, says: "It appears to be established by the cases, that there are two requisites to make an attorney's bill of costs a compliance with the statute, viz. that it should contain the name of the cause, and also that of the court in which the business charged for has been transacted. At the same time, it appears to me, that, in ascertaining whether or not these two essentials concur, we are bound to apply every reasonable and fair intendment to the language of the bill; for, though I agree that the act ought to be so construed as to give the client the benefit intended, yet we are not to shut our eyes to the attorney's claim to have equal justice meted out to him also." Applying that principle here, this bill clearly gives the clients all the information the statute intended to secure to them.

Mellor, in support of the rule. In *Martindale* v. *Falkner*, Maule, J., says: "The statute requires the attorney to deliver to his client a bill of his fees, charges, and disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums,—a provision evidently calculated and intended to secure due information being given to simple people, to enable them at once to see, by a plain and intelligible statement, with what they are charged; and one that would have been unnecessary, if the bill had **[834]** been a document addressed to persons skilled in law and the practice of the courts. The object of this provision appears, from the subsequent part of the clause, to be, to enable the client to apply to the court, or to a judge of the court, in which the business, or the greatest part thereof, has been transacted, to have the bill taxed. The intent of the statute clearly was, to enable the client conveniently to get the bill taxed, and, for that purpose, to inform him where he is to apply to obtain such taxation; and that object would not be conveniently effected, unless the bill shewed distinctly where the business had been done." And the court of Exchequer in *Ivimey* v. *Marks* sustain that view,—holding that the attorney is bound to specify in his bill, as well every court, as the name of every suit, in which the business charged for was done; and that such bill is an entire bill, and, if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge, or be advised, where he should refer the whole bill for taxation. Looking at this bill, it would be impossible even for a lawyer to discover where some of the business charged for was transacted. This case is quite within the principle laid down by the court of Queen's Bench in *Lewis* v. *Primrose* (6 Q. B. 265, 13 Law Journ., N. S., Q. B. 269). "Why," says Lord Denman, in that case, "is the client to be forced to ask questions? And, how can we say that he is told in respect of what business the charge is made, when he is not told where the business is done?" In *Sargent* v. *Gannon*, one court only was referred to.

Maule, J. I think this rule may be made absolute without affecting to overrule or to qualify any case [835] upon the subject. I think an attorney's bill fails to be a compliance with the statute, unless every item contained in it shews, by such expressions as are calculated to furnish reasonable information, in what court and in what cause the business charged for has been transacted. Whether a bill which does not expressly shew the court and the cause where the business has been done, would be a compliance with the statute, is, perhaps, a thing which is not yet altogether settled. It is, however, settled, that, if the bill is deficient in that information which is essential to enable the party charged to know the court and the cause, with respect to any of the items, it is insufficient. Now, this bill begins with "Instructions for petition to the court of review;" and then follow some items which may be taken to be in that matter,—winding it up with what may be called the alia enormia of an attorney's bill, "letters and messengers, &c." Then comes another petition,—"Jan. 26. Attending petitioner's solicitor, on his bringing copy petition to me, with a request that I would appear and consent to an order thereon." This "petitioner's solicitor" is evidently somebody else; but, the bill does not say who. Then come some other items, as to which I have no idea where the business was done. I suppose it was either in the court of Chancery or the court of review. The bill ought to point out in which. That being so, consistently with all the cases, I think we may hold that this bill was not properly delivered.

Cresswell, J. I am of the same opinion. The case is not governed by *Martindale* v. *Falkner*. I have tried in vain to satisfy myself as to the court and cause in which some of the business was done. The item of the 26th of January relates to another and a different petition from that referred to in the item of the 3rd. [836] The petitioner in the latter, is a different person. The two petitions, also, I find, were of different lengths; for, one copy is charged 2l., the other 3l. 10s. No mention is made where the search for affidavits took place, or where the attendance when the petition was called on. All is left in uncertainty.

V. Williams, J. I am of the same opinion. A portion of the bill seems to be for business done in some court, but it does not shew, with reasonable certainty, either court or cause. The bill is clearly no compliance with the statute.

Rule absolute, at the plaintiff's election, to enter a verdict for the defendant on the second issue.

Russell *v.* Briant. Dec. 7, 1849.

[S. C. 19 L. J. C. P. 33; 14 Jur. 201. Approved, *Lyon* v. *Knowles*, 1863-64, 3 B. & S. 563; 5 B. & S. 751. Discussed, *Kelly's Directories, Limited* v. *Gavin*, [1901] 1 Ch. 374; [1902] 1 Ch. 631.]

No one can be considered as an offender against the provisions of the dramatic copyright act, 3 & 4 W. 4, c. 15 (extended to musical compositions by the 4 & 5 Vict. c. 45, s. 20), so as to be liable to an action at the suit of the author or proprietor, unless he, by himself, or his agent, actually takes part in the representation which is a violation of the copyright.—Therefore, one who merely lets a room to the offender, is not liable, even though he supplies the benches and lights, or sells a ticket of admission,—himself deriving no other profit than that arising from the letting of the room.

This was an action upon the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21, for an unauthorised representation or performance of the plaintiff's musical composition.

The first count of the declaration stated, that, after the passing of the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, the plaintiff had, and still hath, the sole liberty of representing and performing, or causing and permitting to be represented and performed, at any [837] place or places of dramatic entertainment in any part of the United Kingdom of Great Britain, &c., a certain dramatic piece or musical composition, called, to wit, "The Ship on Fire"; yet that the defendant, well knowing the premises, but contriving, &c., to wit, on, &c., did wrongfully and unjustly cause to be represented and performed the said dramatic piece or musical composition, at a certain place of dramatic entertainment within that part of the United Kingdom, &c., to wit, at "The Horns Tavern" Kennington, in the county of Surrey, without the consent in writing of the plaintiff first had and obtained, contrary to the form of the said statutes; whereby the defendant became liable, for each such representation and performance, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the plaintiff, the author or proprietor of such musical composition as aforesaid; yet that the defendant had not paid the same damages, or any part thereof, contrary to the form of the said statutes, &c.

The second count was for causing to be represented and performed at the same place, a certain other musical composition of the plaintiff, called "The Gambler's Wife."

Plea, not guilty; whereupon issue was joined.

The cause was tried before Wilde, C. J., at the sittings in London, after Michaelmas term, 1847. It appeared that the plaintiff was the author and proprietor of certain musical compositions called "The Ship on Fire," and "The Gambler's Wife"; that the defendant was the landlord of the Horns Tavern, at Kennington, adjoining to which is a large assembly-room; that, early in the year 1846, this room had been hired by one Henry Smith, for several nights,—viz. for the 5th, 6th, and 13th of March,—for the purpose of giving **[838]** public vocal and musical entertainments, for which he paid the defendant 5l. per night; that these entertainments consisted of songs with a piano-forte accompaniment, and remarks and gesticulation illustrative of the songs; that the defendant furnished the platform, benches, and lights, and allowed placards, describing the intended performances, to be stuck up in and about the tavern; that bills or programmes of the entertainment were circulated by Smith, and tickets or cards of admission sold by him, and also by a servant of the defendant at the bar of the tavern,—one ticket being sold by the defendant himself.

It further appeared, that the plaintiff, having heard of the proposed entertainments, the announcement of which included the two compositions above mentioned, caused the following letter to be addressed to the defendant:—

"Bartlett's Buildings, Holborn,
"February 23rd, 1846.

"Sir,—Mr. Henry Russell has instructed me to give you notice that the under-mentioned songs ('The Ship on Fire,' 'The Gambler's Wife,' &c. &c.), with the music belonging to the same, are the exclusive property of Mr. Russell, who has the sole right of publicly singing and performing such songs and music. Mr. Henry Smith having circulated bills announcing his intention to sing and perform these songs and music, I give you notice, that, not having obtained Mr. Russell's consent, he is liable to penalties under the statute 3 & 4 W. 4, c. 15; and that, if you cause, or permit, Mr. Smith to sing such songs, or perform such music, at your house, as advertised by him, you will be liable to the same penalties.—Yours, &c.

"N—— B——,
"Attorney for Mr. Russell.

"To Mr. Briant."

[839] It was also proved, that, at the entertainment given by Smith on the 13th of March,—Smith himself being the only person who took part in the performance,—the two songs in question were sung by him, in the manner above mentioned; and that about six hundred persons, each of whom paid 6d. for admission, were present.

On the part of the defendant, it was submitted that there was no evidence to go to the jury, to shew that the defendant represented, or caused to be represented, the musical compositions in question, so as to bring him within the statutes.

The learned judge, without, however, expressing any opinion upon the point, declined to nonsuit the plaintiff: and he left it to the jury to say whether the defendant caused the two songs to be represented or performed on the evening of the 13th of March.

The jury found that he did: and thereupon a verdict was entered for the plaintiff, damages 40s.

Lush, in Trinity term, 1847, obtained a rule nisi for a nonsuit (*a*)[1] or a new trial. He admitted that he could not contend that the songs in question were not musical compositions within the meaning of the statutes: but he insisted that the place where the performance was exhibited, was not a "place of dramatic entertainment" within the statutes,—the meaning of which must be confined to tragedy, comedy, opera, farce, and, since the case of *Lee* v. *Simpson* (ante, vol. iii. p. 871), pantomime, which necessarily involve something represented by action; for which he referred to Johnson's Dictionary, where "Dramatic" is defined to mean "represented by action; not narrative."

[840] Locke and Wise shewed cause in Michaelmas term, 1848 (*a*)[2]. The statute 3 & 4 W. 4, c. 15, an act to amend the laws relating to dramatic literary property, in s. 1 enacts that "the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee or such author, shall have, as his own property, the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain, &c., any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of the passing of this act, or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof." And the 2nd section enacts, "that, if any person shall, during the continuance of such sole liberty as aforesaid, contrary to **[841]** the intent of this act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act,—to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom, &c., in which the offence shall be committed; and, in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same." The provisions of that statute are extended to musical compositions, by the 5 & 6 Vict. c. 45, the 20th section of which enacts that the provisions of that act, and of this act, "shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure, and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books (*a*)[3]; and the provisions hereinbefore enacted **[842]** in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or

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(*a*)[1] Vide post, p. 849.

(*a*)[2] The judges present were, Wilde, C. J., Maule, J., and V. Williams, J.

(*a*)[3] S. 3. For the life of the author and seven years afterwards, or, if the seven years shall expire before the end of forty-two years from the first publication, for forty-two years; or, forty-two years, where the publication takes place after the death of the author.

musical composition, as if the same were herein expressly re-enacted and applied thereto; save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book: Provided always, that, in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed, the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance." And the 21st section enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition, shall have and enjoy the remedies given and provided in the 3 & 4 W. 4, c. 15, during the whole of his interest therein, as fully as if the same were re-enacted in this act." Much less than the defendant was proved to have done in this case, has been held to be keeping "a house, room, &c., for public dancing, music, or other public entertainments of the like kind," within the 25 G. 2, c. 36, s. 2: *Gregory* v. *Tuffs* (6 C. & P. 271, 1 C. M. & R. 310); *Gregory* v. *Tavernor* (6 C. & P. 280); *Marks* v. *Benjamin* (5 M. & W. 565). In the last-mentioned case, it appeared that music, dancing, &c., had occasionally taken place at the defendant's house (a public-house); that no money was **[843]** taken by him for admissions, but that the rooms were let to persons who sold tickets, and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice: and yet it was held that there was evidence to go to the jury, of a keeping of the house by the defendant for the purposes mentioned in the statute. So, in *The King* v. *Glossop* (4 B. & Ald. 616), in a conviction of the defendant for causing to be acted, at a certain place called the Cobourg Theatre, for gain and reward, a certain entertainment of the stage, called Richard the Third, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of Richard, that another person was the stage-manager, and that the defendant engaged one J. S. to perform, and gave him a cheque for the amount of his benefit: and it was held that this was sufficient to warrant the justices in drawing the conclusion that the defendant caused the play of Richard the Third to be performed. Again, in *Parsons* v. *Chapman* (5 C. & P. 33), proof that the defendant was acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, was held sufficient proof that he caused the performances. Here, there was abundant evidence that the defendant caused or permitted the piratical representation complained of. He not only let the room, but he provided all the accessories,—such as lights, benches, &c.; and he even personally interfered in furthering the performance, by selling a ticket. [Wilde, C. J. In *Planché* v. *Braham* (8 C. & P. 68, 4 N. C. 17, 5 Scott, 242), it was held that the word "represent," in the 3 & 4 W. 4, c. 15, means, the bringing forward on a stage or place of public representation; and that, if even the words of one song be taken from a piece which is protected by s. 1 of that **[844]** act, and be sung on a stage, or any place of theatrical entertainment, that will be a "representing" within the provisions of s. 2 of that statute; and that the question what is a "representing," is one that is proper to be left to the jury.] Every man is held to be liable for the consequences that might reasonably be expected to result from his acts: *The King* v. *Moore* (*a*). The entertainment in question was clearly a "dramatic entertainment," and the place a "place of dramatic entertainment," within the words and meaning of the statute: *Lee* v. *Simpson* (ante, vol. iii. p. 871).

Upon the evidence, the jury could not have come to any other conclusion than they did: therefore, the verdict cannot be impeached, even though there was some inaccuracy in the direction of the learned judge: *Gascoyne* v. *Smith* (M'Clel. & Y. 338); *Taylor* v. *Aston* (11 M. & W. 401, 416); *Moore* v. *Tuckwell* (ante, vol. i. p. 607); *Hughes* v. *Hughes* (15 M. & W. 701).

Lush and Fitzpatrick, in support of the rule. The argument on the part of the plaintiff, assumes that the thing complained of was an illegal act. It is only illegal inasmuch as it is an infringement or violation of a private right,—like the infringement of a patent. None of the cases cited have the slightest bearing upon the question. The offender here,—using that term in the sense in which it is used in the statute, as

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(*a*) 3 B. & Ad. 184. See the observations upon this case, in *Rich* v. *Basterfield*, ante, vol. iv. p. 783.

explained by the lord chief justice in *Lee* v. *Simpson*, was Smith, and Smith only, for whose sole profit the representation took place. If the defendant is liable for the acts of Smith, where is that sort of liability to stop? Is the proprietor of a theatre to be held responsible, if, during [845] the term, his lessee chooses to perform therein a piece in which some third person has an exclusive copyright? [Maule, J. Add to your proposition, that he knows when he grants the lease that the lessee intends to represent pieces in which others have copyright.] Be it so; still he would not be responsible. In *Holman* v. *Johnson* (Cowp. 341), it was held that an action lay for goods sold abroad, which are prohibited here, if the delivery of them be complete abroad; though the vendor at the time of the sale, knew that they were intended by the vendee to be smuggled into England. The case would be different, if the defendant were party to an express contract for doing the illegal act; as in *Cannan* v. *Bryce* (3 B. & Ald. 179) and *The Gas-Light and Coke Company* v. *Turner* (c). [Maule, J. Here, the defendant concurs in, and helps, the entertainment. Suppose a man lets a room with a printing-machine and types, knowing that the tenant is about to pirate a work in which a third person has copyright, would not the former be liable? Would he not be concurring in the piracy?] Clearly not. In the case supposed, there is no contract for the doing of an illegal act. [Maule, J. The defendant disregards the notice sent to him by the plaintiff's attorney.] He had then let the room to Smith: and he could not justify the breaking his contract with him, merely because Smith might possibly contemplate doing something that would render him (Smith) liable to an action. [Maule, J. Suppose the defendant had contracted with Smith, that he, the defendant, would perform the principal part in a certain dramatic entertainment, and that, after the first night's performance, the defendant had received notice from the author, that the [846] performance was an infringement of his copyright,—could the defendant have persisted in performing it, because he was under a contract with Smith?] Certainly not: he would there be an actor. The statute means to charge two classes of persons only,—those who actually take part in the representation,—and those who employ others for that purpose. [Maule, J. All who concur in causing a thing to be done, are persons who cause it to be done.] According to the natural and only consistent meaning of the statute, the person "causing" the representation, is he who, for himself, or as agent for another, seeks to derive profit from it: this is clear, from the latter part of the section, which gives the author the option of claiming the amount of the profit or advantage arising from the representation. Here, the defendant derives no profit from the representation; nor had he any knowledge, at the time he let the room, that any thing would be done therein, to violate or invade the rights of another. If the statute had intended to embrace persons so situated, it would not have been left to inference; it would have been clearly and unequivocally expressed. Some reliance seems to have been placed upon the word "permitting" in the 5 & 6 Vict. c. 45, s. 20: but that word does not occur in that part of the clause which affects to deal with the offence.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:

This is an action founded on the statute 5 & 6 Vict. c. 45, ss. 20, 21, by which the provisions of the dramatic copyright act, 3 & 4 W. 4, c. 15, are extended to musical compositions.

The 2nd section of the latter act provides, in effect, that, if any person shall, during the continuance of the [847] copyright, without the consent in writing of the proprietors thereof, represent, or cause to be represented, any dramatic production, at any place of dramatic entertainment, "every such offender" shall be liable, for every such representation, to the payment of 40s., or to the full amount of the benefit arising therefrom, or the loss sustained by the proprietor of the copyright (whichever shall be the greater damages), to be recovered by such proprietor, with double costs of suit.

In the present case, the plaintiff, as the proprietor of a certain musical composition, sought, under these enactments, to recover damages from the defendant; and the declaration charged him with having represented, and caused to be represented, at a certain place of dramatic entertainment, a musical composition called "The Ship on

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(c) 6 N. C. 324, 8 Scott, 609,—affirming the judgment of this court, 5 N. C. 666, 7 Scott, 779.

Fire." The defendant pleaded not guilty; and, the cause having come on for trial before the lord chief justice at Guildhall, the plaintiff recovered a verdict, with leave reserved for the defendant to move to enter a nonsuit (*a*).

A rule having been obtained accordingly, the point upon which the argument ultimately turned, on shewing cause, was, whether, at the trial, there was any evidence for the jury, to shew that the defendant either represented or caused to be represented the musical composition in question. And we are of opinion, after consideration, that there was no such evidence; and that therefore the rule must be made absolute for entering a nonsuit.

It appeared, at the trial, that "The Ship on Fire" had been represented at the Horns Tavern at Kennington, of which the defendant was the landlord; and that a room in that tavern had been hired from the defendant by one Smith, for the purpose of public **[848]** evening musical entertainments; that, after the performances, consisting of "The Ship on Fire," and other musical compositions, had been continued for some nights, notice was given to the defendant, by the plaintiff, that he was the proprietor of the copyright of "The Ship on Fire," and required that its representation should be discontinued: that the defendant, after this notice, had some communication with Smith, who avowed his resolution of continuing the representation, notwithstanding the notice; and that the representation was accordingly continued by him, without any opposition on the part of the defendant, in the room at the Horns Tavern. It was also proved, that the defendant furnished the platform and the lights for these performances, and allowed bills of them to be put up in the tavern, and tickets of admission to be advertised to be sold at the bar; and that he had himself sold one of such tickets.

But we are of opinion that those facts afforded no evidence that the defendant represented, or caused to be represented, the musical composition in question, within the meaning of the statute: for, we think,—having regard to the object of the act, and the language of the 2nd section,—that no one can be considered as an offender against the provisions of it, so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright. And, if it were to be held, that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the legislature.

On these grounds, we are of opinion that the rule must be made absolute.

Rule absolute.

[849] Locke, for the plaintiff, on a subsequent day (Dec. 4), observed that the learned judge had not reserved the defendant leave to move for a nonsuit, and therefore that the result of the decision of the court would be, that there must be a new trial.

Lush, for the defendant, agreed that this was so.

Maule, J. There was no evidence that could properly be submitted to the jury to affect Briant: there ought, therefore, to have been a nonsuit. If, however, the point was not reserved, we can only grant a new trial.

Rule absolute, for a new trial.

THOMPSON *v.* THE WESLEYAN NEWSPAPER ASSOCIATION. Dec. 10, 1849.

[S. C. 19 L. J. C. P. 114.]

By the deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, it was, amongst other things, provided that it should not be lawful for the directors to contract any debts, in conducting the affairs of the company, beyond the sum of 100l. at any one time, except in the case of the purchase-money for a certain newspaper, of which the board of directors might leave unpaid any part, not exceeding 1000l., and might issue "a promissory note," or accept "a bill of exchange," on behalf of the company, for such balance:—Held, that the substance of the authority was, that the directors might contract a debt to the

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(*a*) Sed vide post, p. 849.

amount of 1000l., and secure it by a negotiable instrument; and that the directors, having contracted a debt to that amount, were not precluded from giving security for it, with its legal accretions, by several notes or bills, instead of a single note or bill.

This was an action of assumpsit on two bills of exchange.

The first count of the declaration stated, that, "whereas the Wesleyan Newspaper Association were and are constituted under and by virtue of a certain deed of settlement, bearing date, to wit, the 1st of [850] March, 1847; and whereas the directors for the time being of the said association were and are authorised by the said deed of settlement to accept the bills of exchange hereinafter mentioned;" and it then proceeded to state, that afterwards, to wit, on the 4th of June, 1847, a certain person, designated in the said bills of exchange as hereinafter next mentioned as Ed. Healey, and whose name is otherwise unknown to the plaintiff, by the said name and description of Ed. Healey, made two bills of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay to the said Ed. Healey, or his order, 107l. 1s. 9d., value received, four months after the date thereof, which period had elapsed before the commencement of this suit; that thereupon certain persons designated and described in and upon the said bills of exchange as J. Hiley and J. Ware, and then being two of the directors of the Wesleyan Newspaper Association, for and on behalf thereof, by the said names, designations, and descriptions aforesaid, according to and in pursuance of the said statute, accepted the said bill, by writing their said names across the same, and stating that they accepted the same for and on behalf of the said association,—and which said acceptance then was and is countersigned and subscribed by one Edward Brewtnall, then being the managing director, and an officer of the said association, appointed by the said association to act for them in that behalf; and the said person so designated as aforesaid as Ed. Healey then indorsed the same to the plaintiff; and the said defendants then promised the plaintiff to pay the amount of the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement.

The second count was similar in form, upon a bill for 52l. 2s. 11d., bearing date the 4th of June, 1847.

Pleas,—first, to the first count, that the directors [851] for the time being of the said Wesleyan Newspaper Association were not authorised by the said deed of settlement to accept the said bills of exchange in the said first count mentioned;—Secondly, that the said persons so designated and described in and upon the said bill in the said first count mentioned, as J. Hiley and J. Ware, did not accept the said last-mentioned bill for and on behalf of the said Wesleyan Newspaper Association, nor were they, at the time of the said acceptance thereof, directors of the said Wesleyan Newspaper Association;—Thirdly, that the said last-mentioned bill was not expressed to be accepted by the said persons so designated and described as last aforesaid, on behalf of the said Wesleyan Newspaper Association;—Fourthly, that the said acceptance of the said last-mentioned bill was not countersigned by the said Edward Brewtnall, nor was the said Edward Brewtnall an appointed officer in that behalf of the said Wesleyan Newspaper Association.

There were similar pleas to the second count.

The cause was tried before Maule, J., at the second sitting at Westminster, in Easter term, 1848. It appeared that The Wesleyan Newspaper Association was a joint-stock company, completely registered under the statute 7 & 8 Vict. c. 110; that the bills of exchange in question had been accepted on behalf of the company in part-payment of the purchase-money for a newspaper, for which they had agreed to give 2000l.,—1000l. to be paid in cash, and the remaining 1000l. by a promissory note; that the note had accordingly been given, but that the directors, to accommodate the payee, who was unable to negotiate it, afterwards consented to divide the amount into smaller bills,—the whole amounting, with interest for the time they had to run, to 1022l.; and that the bills declared on were two of those substituted bills.

[852] The deed of settlement of the association was put in by the plaintiff. The 55th clause provided that "it should not be lawful for the directors to contract any debts, in conducting the affairs of the company, beyond the sum of 100l. at any one time, except in the case of the purchase-money for the said newspaper,—of which purchase-money the board of directors might leave unpaid any part, not exceeding

1000l., and might issue a promissory note, or accept a bill of exchange, on behalf of the company, for such balance, and should cause such promissory note or bill of exchange to be made, drawn, indorsed, or accepted, in manner directed by the joint-stock companies registration and regulation act."

It was objected, on the part of the defendants, that, under the above clause, the directors were only authorised to accept one bill or note, and that, having exercised that authority, they were not warranted in accepting the substituted bills; and, further, that the sum to which their authority was limited, had been exceeded.

On the other hand, it was submitted, that the fair meaning of the 55th clause was, that the directors might accept to the amount of 1000l.; that the excess beyond the 1000l. was made up of interest; that, at all events, the objection as to the amount could not apply to the earlier bills (which these were); and that a bonâ fide holder for value, having no knowledge, or means of knowledge, of the mode of issuing the bills, was not to be affected by any irregularity.

It was also objected, on the part of the defendants, that the bills were not countersigned by the secretary, pursuant to the 45th section of the 7 & 8 Vict. c. 110.

A verdict was found for the defendants on the first and fifth issues, and for the plaintiff upon all the others: and leave was reserved to the plaintiff to move to enter **[853]** the verdict for him on the first and fifth issues also; and leave was likewise reserved to the defendants to enter a verdict for them on the fourth and eighth issues, which raised the objection last urged by them at the trial.

Rules nisi were obtained accordingly, in Easter term, 1848, by Byles, Serjt., for the plaintiff, and by Talfourd, Serjt., for the defendants,—the latter was, however, abandoned upon the argument.

Talfourd, Serjt., and Gray, in Easter term last, shewed cause against the plaintiff's rule. The only question is, whether the directors of this association had authority, under the 7 & 8 Vict. c. 110, and the deed of settlement registered pursuant thereto, to accept these bills. The 44th section of that act (vide ante, p. 671) regulates contracts generally that are entered into by and with joint-stock companies. And the 45th applies to bills of exchange: it enacts, "with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon, that, if the directors of the company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid, shall be countersigned by **[854]** the secretary or other appointed officer of the company on whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received, by or on behalf of the company, may be indorsed in the name of the company by any officer authorised by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or indorsed as aforesaid, shall, immediately after the making, accepting, or indorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or indorsed, and such last-mentioned officer shall enter the same in proper books, to be kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay or be liable to pay in respect of such bill or note." By the terms of the deed of settlement, the directors were not to contract any debts exceeding in the whole 100l., except for one particular and specified purpose; and, as to that, their authority was, to "issue a promissory note or accept a bill of exchange on behalf of the company" for that amount. Having once done that, their authority was at an end. Even if this had been an ordinary partnership, such an authority would not be presumed. *Greenslade* v. *Dower* (7 B. & C. 635, 1 M. & R. 640) is exactly in point: there, A. and B. agreed to take a farm, and pay C., the former occupier, for certain articles, by bills at three months, and C. afterwards, without the knowledge or consent of A., took from B. bills for the amount, payable at six and twelve months, accepted by himself in his own name and A.'s; and it was held, that [855] A. could not be sued on these bills. Lord Tenterden says: "The agreement signed by Coleman was, that the amount of the valuation should be paid, partly in cash, and partly by bills at a certain date; and the only question is, whether Coleman ever authorised Dower to pay by bills at a longer date. Willoughby (the drawer) knew the terms of the original agreement, and, as he, with that information, took bills not drawn according to those terms, he took them at his own peril." So, here, the party taking these bills, had the means of informing himself whether or not they were drawn and accepted in conformity with the authority given to the directors by the deed of settlement (7 & 8 Vict. c. 110, s. 18). The directors of a company incorporated by act of parliament for making a cemetery, being impowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be requisite to be done and transacted for the direction and management of the affairs of the company, are not thereby authorised to raise money, for the purposes of the undertaking, by accepting or indorsing bills of exchange: *Steele* v. *Harmer* (14 M. & W. 831). In *Ridley* v. *The Plymouth, &c., Grinding and Baking Company*, and *The Kingsbridge Flour-Mill Company* v. *The Plymouth, &c., Grinding and Baking Company* (2 Exch. 711), it was held that persons seeking to render joint-stock companies, completely registered under the 7 & 8 Vict. c. 110, liable on contracts made with the directors, must shew their authority to bind the company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorised particular individuals to make contracts binding on the company,—even where the company is shewn to have the benefit of [856] the goods (*a*). Parke, B., there says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint-stock company, until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company, to ascertain the objects of the company; for the deed must specify them, and also who the directors are; and any person may find, in that deed, the duties of the directors, and their powers, as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority." Here, the directors having once exercised the authority given to them, by signing the promissory note for 1000l., they could not exercise it again; and clearly not to a greater extent.

The case of *Thompson* v. *The Universal Salvage Company* (1 Exch. 694) is almost identical with the present. In an action against a joint-stock company upon a promissory note, the declaration stated, that the company was completely registered, that one Samuel Price and one Christopher Lund, then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay to the plaintiff, or his order, 32l. 4s. 9d., the balance of the plaintiff's account due from the company; which note was then signed by Samuel Price and Christopher Lund, and was then made by them and in their own names, and on behalf of the company, and then was and is expressed by them to be made on behalf of the company, and was then countersigned by the secretary of the company; and thereupon the company, in consideration of the premises, then promised the plaintiff to pay him [857] the amount of the note according to the tenor and effect thereof: and the count was held bad on general demurrer,—although the note appeared to be drawn in the form required by the 45th section of the statute; because there was no allegation that the two directors had authority to make the note. The finding, therefore, that the bills were accepted for and on behalf of the association, does not affect the question upon these issues, or entitle the plaintiff to judgment on the whole record. It is said that the plaintiff, being a holder for value, was under no obligation to inquire into the authority of the directors to accept. That clearly is a fallacy; for the plaintiff, upon obtaining judgment against the association, may proceed to execution against any individual shareholder, in the manner pointed out by the 7 & 8 Vict. c. 110, ss. 66, 68; and therefore the court will look at this case as if it were an action originally brought against an individual member of the association. [Wilde, C. J. As amongst themselves, no doubt, the members are bound by the covenants in their

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(*a*) Sed vide *Smith* v. *The Hull Glass Company*, ante, p. 668.

deed of settlement; but, is the public bound to see that every regulation has been properly carried into effect?]

Byles, Serjt., and Willes, in support of the rule. It is submitted,—first, that the directors in this case duly exercised the authority conferred upon them by the deed, —secondly, that, the plaintiff being a bonâ fide holder for value, it is not competent to the defendants to dispute the extent of the authority of the directors, it being conceded that they had some authority. Even if the plaintiff be driven to rely on the 55th clause of the deed of settlement, what the directors did here was fully justified. That is merely an enabling provision; it is not to be construed with the strictness contended for on the other side. The rule of law is well settled, that private arrangements between partners **[858]** do not affect the interests of third persons, unless they have notice of the circumstances attending the transaction. *Greenslade* v. *Dower* has no application: it was the case of a farming partnership; and the party taking the bills had notice of the terms of the agreement. The Wesleyan Newspaper Association stands in the same position as any other principal, who is bound by the acts of his agent within the scope of such agent's authority, although it may have been irregularly exercised. Taking the whole of the deed of settlement together, it confers upon the board of directors a general power to manage the affairs of the company: and, as long as they continue to act substantially within the scope of the authority reposed in them by the deed, their acts bind the association, as being the acts of its accredited agents. Suppose the holder of this bill knows of the limitation of the authority, but is ignorant of the fact of the limits having been transgressed,—what then is his position? [Cresswell, J. He knows that no common-law authority existed.] In *Slark* v. *The Highgate Archway Company* (5 Taunt. 792), Gibbs, C. J., declined to receive evidence tending to shew that notes issued by the company, were issued for a purpose different from that for which they had authority to issue them,—thinking that, if the company were justified by their act in issuing notes payable to order, it could not have been intended that an indorsee for value should be bound to see to that of which he must necessarily be ignorant, viz. the reasons which induced the company to issue the notes. [Cresswell, J. Is not this like taking an overdue bill? The plaintiff takes it upon the faith of the person from whom he receives it. If it turns out that it is drawn in the way provided for by the act of parliament and the deed of settlement, he **[859]** has his remedy against the association; otherwise not.] What is there upon the face of either of these bills to shew a person to whose hands it might come, that the limit contained in the 55th clause had been exceeded?] [Coltman, J. Your argument would charge the company to the extent of 10,000l., provided each bill were less than 100l., in the hands of innocent indorsees.] Exactly so. [Wilde, C. J. On whom would rest the onus of shewing whether the particular bill sued upon, was within or beyond the prescribed limit?] A bonâ fide holder would have no means of ascertaining that, by going to the registrar's office, or consulting the act of parliament.

The allegation in the first count, which is traversed by the first plea,—that "the directors for the time being of the said association were and are authorised by the said deed of settlement to accept the bills of exchange hereinafter mentioned,"—might be expunged from the declaration, and enough would remain to entitle the plaintiff to judgment. This record finds that the parties who accepted, were authorised by the association to accept, and that the person who countersigned, had authority to countersign. What the record states must be assumed to be true. There is enough, therefore, to justify the court in giving judgment for the plaintiff on both these issues.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This was a motion, on the part of the plaintiff (pursuant to leave reserved to him at the trial of the cause), to enter a verdict on the first and fifth issues, which were similar issues, applying to the first and second counts of the declaration, and which raised the question whether the directors of the Wesleyan News-**[860]**-paper Association,—a joint-stock company completely registered under the statute 7 & 8 Vict. c. 110,—had authority to accept the two bills upon which those counts were framed.

It appeared in evidence, that the directors, on behalf of the company, had purchased a newspaper, and, in payment of part of the price, made and delivered a promissory note for 1000l. The payee, not being able to negotiate a note of that amount, asked them to give him, in lieu of it, bills of exchange for several smaller sums, amounting together to 1000l. and interest, calculated up to the time when they would become due. Two of such bills were accordingly accepted, and were indorsed to the plaintiff for value.

The pleas to the first count were,—first, that the directors were not authorised by the deed of settlement to accept the bill,—secondly, that the directors did not accept it,—thirdly, that the bill was not expressed to be accepted on behalf of the company,—fourthly, that the bill was not countersigned by the proper officer, as prescribed by the statute 7 & 8 Vict. c. 110. s. 45. A similar set of pleas was pleaded to the second count.

At the trial, the plaintiff having had the verdict on all the issues joined on these pleas, except the first and fifth, a cross-rule was obtained, on behalf of the defendants, to enter a verdict for them on the fourth and eight issues.

When the two rules came on to be argued, the counsel for the defendants in effect abandoned their cross-rule; and the argument was confined to the single question, whether the directors had authority, under the deed of settlement, to accept the bills.

The 55th clause stipulates that "it shall not be lawful for the directors to contract any debts in conducting the affairs of the company, beyond the sum of 100l. at any one time, except in the case of the **[861]** purchase-money for the said newspaper,—of which purchase-money the board of directors may leave unpaid any part, not exceeding 1000l., and may issue a promissory note, or accept a bill of exchange, on behalf of the company, for such balance, and shall cause such promissory note or bill of exchange to be made, drawn, indorsed, or accepted in manner directed by the said joint-stock companies registration and regulation act."

It was contended, on behalf of the defendants, that the directors had no authority to issue notes or accept bills, except the limited one conferred by this clause; and that the acceptance of the bills in question was not warranted by that authority,—first, because the authority had been exhausted by issuing the previous note for 1000l.,—and, secondly, because the special authority, in order to be properly exercised, should have been pursued in its exact terms; whereas, the acceptances on which the action was founded were a departure from those terms, both because they constituted several instruments, instead of a single one, and also because they exceeded, in the aggregate, the sum of 1000l., to which the authority was limited.

But we are of opinion that we are not bound to construe the authority so strictly. It cannot, we think, be regarded as a mere authority, to be exercised in the very terms in which it is given; for, it is, in fact, an arrangement between partners as to the mode in which a certain number of them shall conduct the business in which they have a common interest. The substance of the authority is, that they may contract a debt to the amount of 1000l., and secure it by a negotiable instrument. And, giving a reasonable construction to the authority, thus considered, we are of opinion that the directors, having contracted a debt to the amount of 1000l., were not prevented from giving security for it, with its legal accretions, by several notes or bills, instead of a single one.

[862] There are several other clauses in the deed, to which our attention was called by the counsel for the plaintiff, on the argument, as shewing that the requisite authority is conferred on the directors. But the opinion we have expressed as to the 55th clause, makes it unnecessary to discuss any other.

The rule, therefore, which has been obtained on behalf of the plaintiff, must be made absolute, and that obtained on behalf of the defendants, discharged.

Rules accordingly.

MUNROE AND ANOTHER v. BORDIER AND ANOTHER. Nov. 30, 1849.

[S. C. 19 L. J. C. P. 133; 14 Jur. 507.]

The purchaser or remitter in London, of a foreign bill, getting from the drawer, according to the usage in London, credit until the next foreign post day for the amount, and delivering the bill to the payee, who receives it bonâ fide and for value, the drawer is liable for the amount to the payee, although, in consequence of the purchaser or remitter's failure before the next foreign post day, the drawer never receives value for it.—The declaration stated that A. (the defendant) made a bill of exchange, and directed it to B., a merchant in France, requiring him to pay the amount to the order of C. (the plaintiff); that A. delivered the bill to D., who delivered it to C.; and that B. refused payment, &c. A. pleaded that he made and delivered the bill to D. for the use of C., on the faith and terms of being paid the price and value thereof according to the usage of merchants in that behalf, that is to say, on the next foreign post day; that neither C. nor any other person, then, or at any time before or since, paid him the said price or value of the bill, or any part thereof; that he never had any value or consideration for the making or delivery of the bill; and that C. always held and still held the same without any value or consideration whatever to him (A.) for the same. Replication, that, after the making of the bill, and before it became due, D., who appeared to be, and whom C. believed to be, the lawful holder, delivered the bill to him for a good and valuable consideration, and without notice of the premises in the plea mentioned:—Held, that the plea was no answer to the action; and that, even if it were sufficient to call upon C. to shew bona fides, he did so by his replication.

This was an action of assumpsit on two foreign bills of exchange.

The first count of the declaration stated that the de-[863]-fendants, on the 29th of October, 1847, at London, made their bill of exchange in writing, and then directed the same to certain persons in parts beyond the seas, to wit, certain persons carrying on business at, &c., in the kingdom of France, under the style and firm of Messrs. A. de Warn & Co., and thereby required the last-mentioned persons to pay to the order of the plaintiffs a certain sum of foreign money, to wit, the sum of 22,528 francs, 60 centimes, at five days after the date of the said bill of exchange, which period had elapsed, &c.; and the defendants then delivered the said bill to certain persons carrying on business in London under the firm of Coates & Co., to wit, one Ezra Jenks Coates and one John Hilliard, who then, to wit, on the day and year aforesaid, delivered the same to the plaintiffs; yet the said persons to whom the said bill was directed as aforesaid, did not pay the said sum of money in the said bill mentioned, or any part thereof, although the same was duly presented to them for payment thereof when it became due, at, &c., in the kingdom of France, that is to say, at London aforesaid; and the said bill was afterwards, to wit, on, &c., duly protested for non-payment thereof; and, by reason of the premises, the plaintiffs were put to expense, to wit, &c., for the charges of causing the said bill to be protested,—of all which premises, the defendants afterwards, to wit, on, &c., had notice, &c.

Third plea,—that the defendants made the bill, and delivered the same to the said persons in that behalf mentioned, for the use of the plaintiffs, on the faith and terms of being paid the price and value thereof, amounting to a large sum of money, to wit, 876l. 12s., according to the usage of merchants in that behalf, that is to say, on the foreign post-day which would be next after such delivery; but that, although that day had elapsed long before the commencement of this suit, neither the plaintiffs nor any other person, then, or at any time before [864] or since, paid to the defendants the said price or value of the said bill, or any part thereof; and the defendants never had or received any value or consideration whatever for the making or delivery of the said bill, and the plaintiffs always held, and now hold, the same, without any value or consideration whatever to the defendants for the same,—verification.

Replication,—that, after the said bill was so made and delivered by the defendants to the said persons carrying on business in London under the firm of Coates & Co., and before the said bill became due, and before the commencement of this suit, to wit, on the 29th of October, 1847, they, the said last-mentioned persons, who then appeared to be, and whom the plaintiffs then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the last-mentioned bill to the plaintiffs, for a good, sufficient, and valuable consideration, to wit, to the amount of the said bill; and the plaintiffs then received the same for such good, sufficient, and valuable consideration, and without notice of the premises in the said third plea mentioned,—verification.

To this replication the defendants demurred specially, assigning for causes,—that, either the said replication is an argumentative traverse of the allegations of the said third plea, being in effect an averment that there was a sufficient and valuable consideration for the bill, as between the plaintiffs as payees and the defendants as makers, or it sets up, by way of answer to the plea, a consideration between the plaintiffs and third persons, not parties to the bill, nor agents of or connected in interest with the defendants: and that the plaintiffs and the defendants being the immediate parties to the contract, as appears on the face of the bill, and it being admitted by the replication that there was no consideration in fact moving from the plaintiffs to the defend-**[865]**-ants, the supposed promise or undertaking of the defendants was nudum pactum, and no action would lie on the bill at the suit of the plaintiffs, against the defendants as makers.

The plaintiffs joined in demurrer.

Greenwood (with whom was Byles, Serjt.), in support of the demurrer. This case is governed by that of *Puget de Bras* v. *Forbes* (1 Esp. N. P. C. 117). There, the plaintiff was a foreigner, residing in Holland; and, having a large sum of money here in the funds, employed the house of Agassiz, Rougemont, & Co., as his agents, to sell it out, and to remit it to him in bills on Holland. Agassiz, Rougemont, & Co. applied to the defendants for the purpose, and, on the 17th of February, 1792, got from them bills on Holland, in favour of the plaintiff. It was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post day. In this case, the next post day was Tuesday, the 21st. On Monday, the 20th, the house of Agassiz, Rougemont, & Co. stopped payment; so that the defendants in fact had never received any value for the bills which they had so drawn on Holland in favour of the plaintiff; and they having ordered their correspondent abroad not to pay the bills when due, this action was brought against them as drawers of the bills. The plaintiff's case rested merely upon this—that the law-merchant knows no nudum pactum, and that the defendants should have received the money before they granted the bills; and that, in consequence of their not having then received it, and Agassiz, Rougemont, & Co. having failed, the plaintiff had lost the money of his which they had sold out of the funds. **[866]** The defendants relied on the custom of merchants in the remitting of bills, and that they had been guilty of no laches; that the custom of giving bills on Holland before the receipt of the money for them, was perfectly well known and established; and that they, therefore, should be allowed to go into that defence against the plaintiff, who was the payee of the bills. Lord Loughborough was of opinion "that it was competent for the defendants to go into this evidence, as against the payee of the bills, he being subject to all the equity the defendants could have had against his agents, Agassiz, Rougemont, & Co., if the bills had been drawn payable to themselves, who must be supposed to have been acquainted with the usage on bills; though his lordship said that such evidence would be inadmissible, had the action been brought by an indorsee for a valuable consideration." Here, the delivery of the bill to Coates & Co., alleged in the declaration, does not mean a delivery so as to make them the legal owners of the bill. Then, the plea alleges that the bill was delivered to Coates & Co. for the use of the plaintiffs, on the faith and terms of being paid the price and value thereof on the next foreign post day,—which, according to *Jefferies* v. *Austin* (1 Stra. 674), amounts to a defence: and this is admitted by the replication. [Coltman, J. The plea does not allege that the plaintiffs knew of the terms on which the defendants delivered the bill to Coates & Co. V. Williams, J. The question is, whether the plaintiffs can shew a good title.] A man may be a bonâ fide holder, and yet may not be able to sue upon the bill. In *Esdaile* v. *La Nauze* (1 Y. & C. 394), it was held, that, where a bill of exchange has been negotiated by means of a forgery of the name of the payee as an indorser, a court of **[867]** equity will restrain even a bonâ fide holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled; and that, where the original indorsement of the payee's name on a bill of exchange, is a forgery, a real indorsement by the payee after the bill has arrived at maturity, will not give the holder any title. Here, the contest is, between the immediate parties to the contract,—the drawers and the payees, and the plea shews that there was no consideration; which is not directly traversed by the replication.

Channell, Serjt., contrà. If this be a good plea, it is well answered by the replication. A similar replication was held good in *Arbouin* v. *Anderson* (1 Q. B. 498, 1 Gale & D. 403). [Cresswell, J. That case amounts to this,—that you have a right to treat the holder of a mercantile instrument payable to bearer, as the true owner. But, have you any authority to shew that a payee may treat an intermediate holder as the true owner?] Coates & Co. were lawful holders of the bill; and the plaintiffs, taking it from them bonâ fide, and without laches, also obtained a good title to it.

The only ground upon which the consideration is sought to be impeached is, that it moved towards Coates & Co., and not to the defendants. Coates & Co. were not, nor are they alleged to have been, the agents of the plaintiffs: the defendants themselves, by delivering the bill to them, enabled them to give the plaintiffs title. Neither of the cases cited on the other side is applicable here. In *Puget de Bras* v. *Forbes*, the bill was given to an agent of the payee. *Jefferies* v. *Austin* was a mere case of failure of consideration. And in *Esdaile* v. *La Nauze*, the **[868]** plaintiff sought to make title through a forged indorsement.

Greenwood was heard in reply.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

The first count of the declaration alleged that the defendants, on, &c., in London, made their bill of exchange in writing, and directed the same to certain persons in parts beyond the seas, to wit, to certain persons carrying on business in the kingdom of France under the style of A. de Wain & Co., and thereby required them to pay that their first of exchange, to the order of the plaintiffs, a certain sum of foreign money, to wit, 22,520 francs, 60 centimes, at five days after day, &c.; and that the defendants delivered the said bill to certain persons carrying on business in London under the firm of Coates & Co., to wit, to one Ezra Jenks Coates and one John Hilliard, who then delivered the same to the plaintiffs, &c.,—averring presentment to the drawees, non-payment, protest, &c.

There was a second count, in the same form, on another foreign bill.

The defendants pleaded,—thirdly, that they made the bill in the first count mentioned, and delivered the same to the said persons in that behalf in the first count mentioned, for the use of the plaintiffs, "on the faith and terms of being paid the price and value thereof, amounting to a large sum of money, to wit, 876l. 12s., according to the usage and custom of merchants in that behalf, that is to say, on the foreign post day which would be next after such delivery;" but that, although that day had elapsed long before the commencement of this suit, neither the plaintiffs nor any **[869]** other person, either then or at any time before or since, paid to the defendants the said price or value of the said bill, or any part thereof, and the defendants never had or received any value or consideration whatever for the making or delivery of the bill; and that the plaintiffs had always held, and did now hold the same, without any value or consideration whatever to the defendants for the same.

The plaintiff replied, that, after the bill in the first count mentioned was so made and delivered by the defendants to Coates & Co., and before the bill became due, and before the commencement of this suit, the said last-mentioned persons, who then appeared to be, and whom the plaintiffs then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the said bill to the plaintiffs, for a good, sufficient, and valuable consideration, to wit, to the amount of the said bill, and the plaintiffs then received the same for such good, sufficient, and valuable consideration, and without notice of the premises in the third plea mentioned.

Special demurrer, assigning for causes, that, either the replication was an argumentative traverse of the allegations of the third plea, being in effect an averment that there was a sufficient and valuable consideration for the bill as between the plaintiffs as payees and the defendants as makers, or it set up, by way of answer to the plea, a consideration between the plaintiffs and third persons, not parties to the bill, nor agents of, or connected in interest with, the defendants; and that, the plaintiffs and defendants being immediate parties to the contract, as appears upon the face of the bill, and it being admitted by the replication that there was no consideration in fact moving from the plaintiffs to the defendants, the supposed promise of the defendants was nudum pactum.

[870] The plaintiffs having joined in demurrer, the case was argued before us (*a*) at the latter end of last Easter term.

In support of the demurrer, the cases of *Puget de Bras* v. *Forbes* (1 Esp. N. P. C. 117), *Jefferies* v. *Austin* (1 Stra. 674), and *Esdaile* v. *La Nauze* (1 Y. & C. 394), were cited.

On the other hand, it was argued that none of those cases were applicable. And we are of that opinion.

(*a*) Wilde, C. J., Coltman, J., Cresswell, J., and V. Williams, J.

In the first, the bill was given to an agent for the payee, who was therefore responsible for the non-payment of the value to the drawer. The second was a mere case of a note given upon a consideration which failed, and was sued upon by the party to whom it was so given. And, in the third, the plaintiff had to make title by indorsement of the payee. A forged indorsement in his name was held, of course, to give no title. A good indorsement was afterwards made; but that was after the bill had become due, and therefore the holder, by virtue of that indorsement, was liable to all equities attaching upon the bill.

Having disposed of those authorities, the counsel for the plaintiffs argued, that, in the present case, Coates & Co. were not, and were not alleged to be, agents for the plaintiffs; and that the defendants, by placing the bill in the hands of Coates & Co., enabled them to confer upon the plaintiffs, by delivery of the bill, a title to sue upon it, without shewing any consideration moving from themselves to the drawers: but that, if the plea should be held to furnish any defence to the action, it was answered by the replication: and *Arbouin* v. *Anderson* (1 Q. B. 498, 1 Gale & D. 403) was cited as an authority.

We are of opinion, that, upon this record, the plain-**[871]**-tiffs are entitled to recover. The declaration avers a delivery by the drawers to Coates & Co., and by Coates & Co. to the plaintiffs, the payees. The plea does not allege that Coates & Co. were agents for the plaintiffs, or that the bill was delivered to them in that character. It alleges that the bill was delivered to Coates & Co. for the use of the plaintiffs, to whom, therefore, Coates & Co. might lawfully deliver it. But it goes on to say that it was so delivered upon the faith and terms of being paid the price and value on or before a certain day. It does not aver that the bill was not to be delivered to the plaintiffs until those terms had been fulfilled, or, that they were ever to be fulfilled by the plaintiffs, or that the plaintiffs had notice that such terms were to be fulfilled by Coates & Co., or that Coates & Co. had not given value for the bill: nor is it alleged that the bill was delivered to the plaintiffs before the expiration of the time within which the defendants say the price of the bill was to be paid. So that, even if it be assumed that the plaintiffs knew that Coates & Co. would have till the next foreign post day to pay the price of the bill, they would have a right to conclude, from the bill's remaining in their hands after that day, that the price had been duly paid. On the other hand, if they received the bill from Coates & Co. before the next foreign post day, they would know that the drawers gave credit to Coates & Co. for the money, by placing the bill in their hands and under their control in the meantime. Nor is it alleged that the plaintiffs took the bill without giving value for it. The negative is confined to value passing from the plaintiffs to the defendants.

Now, the writers upon foreign bills contemplate the existence of four parties,—the giver of value, or purchaser of the bill, or remitter, as he is often called,—the drawer,—the party to whom the bill is to be paid **[872]** abroad,—and the drawee. The ordinary course of dealing with reference to foreign bills, as described by them, begins by the sale of the bill by the drawer to some person other than the payee: it, therefore, does not contemplate that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee: see Beawes's Lex Mercatoria, Bills of Exchange, par. 6, p. 416, citing Marius, p. 22. And in par. 14, p. 418, he says: "In case of a remitter's failing before he has paid the value, and the person on whom the bill is drawn gets advice of this occurrence before acceptance, and therefore refuses to accept it, the bill, on its returning protested, shall be paid notwithstanding, with all charges, by the drawer, under proof by the possessor that he negotiated the said bill, and paid a just value for it." According to that rule, the plaintiffs would in this case be entitled to recover; for, the plea does not deny that they gave a just value for the bill. Again, in par. 15, Beawes states the law to be, that, where the drawer gives credit to the remitter, without advising his principal thereof, if the remitter does not pay the money, the drawer shall suffer the loss.

Here, it is not shewn by the plea, that the bill was handed to the plaintiffs before the next post day,—and, for the reasons above given, it seems to be immaterial whether it was handed over before or after that day,—nor that the drawers ever gave notice to the payees that the price had not been duly paid. They may, therefore, be considered to have given credit to the remitter.

It appears to us, then, that, on this declaration and plea, it must be taken that

Coates & Co. were the purchasers of the bill in question; and that the drawers placed it in their hands with a controlling power over **[873]** it, giving them credit for a certain time for the purchase-money; and that they delivered it to the payees, who received it bonâ fide, and for value; for, no fraud is alleged, and value as between Coates & Co. and the plaintiffs, is not denied.

Under such circumstances, we are of opinion that the plaintiffs acquired a good title to the bill, and may sue the drawers upon it, although they have never received value for it. Suppose the bill had been given to Coates & Co. for their accommodation, or a promissory note had been given to them, made payable to the plaintiffs, in order that they, Coates & Co., might borrow money upon it, or hand it over to the payees, in discharge of a debt, surely the payees, in either case, might sue upon the instrument, without proving the giving of value to the drawer or maker. The want of such value could not be relied upon as an answer to the action, on the ground of the contract between the immediate parties to the instrument being nudum pactum.

For these reasons, we are of opinion that the plea does not give a sufficient answer to the declaration; and, even supposing the plea to be sufficient to call upon the plaintiffs to shew that they took the bill bonâ fide, and for value, we think that they have done so by their replication. Our judgment on this demurrer must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Greenwood, for the defendants, in the following term (Jan. 24, 1850), moved for leave to add a plea to the first count, to the following effect:—That they, the defendants, made the said bill, and delivered the same to the said persons in that behalf mentioned, on the faith and terms of being paid the price and value **[874]** thereof, amounting to a large sum of money, to wit, 876l. 12s., according to the custom of merchants in that behalf, that is to say, on the foreign post day which would be next after such delivery: And the defendants further say, that the said persons to whom the said bill was so delivered as aforesaid, afterwards, and before the said next foreign post day, remitted the same to the plaintiffs for the purpose only, and with directions to the said plaintiffs, that they should collect and receive the amount thereöf from the persons on whom the same was drawn, at the maturity of the said bill, for the account of certain other persons, to wit, certain persons trading under the name and firm of Smith, Sumner, & Co., whose names and descriptions are not otherwise known to the defendants, and to be placed to the credit of those persons in account with the plaintiffs, and not otherwise; and that the plaintiffs received the same bill for that purpose, and on that account, and not otherwise: And the defendants further say, that, before the bill became due and payable according to the tenor and effect thereof, to wit, on the 1st day of November, 1847, the foreign post day next after the delivery of the said bill by the plaintiffs to the said persons as aforesaid, elapsed, and the said persons did not, nor did any other person or persons whatever, then, or at any other time, pay to the defendants the price and value of the said bill, or any part thereof; and that, before the bill became due, to wit, on, &c., the plaintiffs had notice that the price and value of the said bill was wholly unpaid to the defendants: And the defendants say that no value or consideration whatever was then, or at any other time, given by the plaintiffs for the said bill, either to the defendants, or to the said persons to whom the same was delivered by the defendants, and by whom it was remitted to the plaintiffs as aforesaid, or to any other person or persons whatever; and that the **[875]** plaintiffs became and were, and at the time of the maturity of the said bill, and from thence to and at the commencement of this suit continued to be, the holders of the said bill, under the circumstances, and in the manner, and for the purposes, and on the account, in this plea stated, and not otherwise,—verification. [Cresswell, J. The substance of your application is, to be permitted to amend after judgment. Have you any affidavit that the fact has only recently come to your knowledge?] No. [Cresswell, J. You do not say that Smith, Sumner, & Co. did not give value for the bill. The new plea would only invite another demurrer.]

Wilde, C. J. The plea upon which we have already pronounced an opinion, was in substance a plea of no consideration. The counsel for the defendants was, during the argument, invited to amend, but declined. The plea now proposed to be added is, in substance, a plea of no consideration also. If Coates & Co. were indebted to Smith & Co., and on account of that debt gave the bill to them, why should not Smith & Co., by their agents, the plaintiffs, sue on the bill? This is an attempt to plead another bad plea of no consideration. Besides, to allow this, would be improperly evading a wholesome rule of practice, which precludes amendments after judgment,—unless, perhaps, under very special circumstances (*a*)[1].

The rest of the court concurring,

Rule refused.

[876] Doe d. Cannon and Another *v.* Charles Rucastle and William Irving. Dec. 8, 1849.

[S. C. 19 L. J. C. P. 100. Referred to, *Warren* v. *Travers*, 1868, I. R. 2 Eq. 462; *In re Dixon's Trusts*, 1869, I. R. 4 Eq. 8.]

Testator devised as follows:—"I give and devise to my son Stephen, a small field at, &c., to hold to my said son Stephen for and during the term of his natural life: and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs-at-law:"—Held, that Stephen, the son, took an estate-tail.

Ejectment for messuages, land, &c., in the parish of Penrith, in the county of Cumberland.

The cause was tried at the Spring assizes for the county of Cumberland in 1848, when a special verdict was returned, which stated, in substance, as follows:—

At the time of the making of the last will and testament of Stephen Cannon the elder, and from thence until the time of his death, he was seised in his demesne as of fee, of and in a field, dwelling-house, barn, and granary, situate in the parish of Penrith, in the county of Cumberland.

Stephen Cannon the elder made and published his last will and testament in writing, on the 13th of November, 1796, whereby he devised as follows:—

"I give and devise to my son Stephen a small field at Freeridge Head, and all that dwelling-house, barn, and granary on the East side of Fryar Gate, to hold to my said son Stephen Cannon, for and during the term of his natural life; and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs-at-law."

The said Stephen Cannon the elder died on the 18th of April, 1797, so seised of the said field, dwelling-house, barn, and granary as aforesaid, without altering or in any way revoking his said will, leaving the said [877] Stephen, the devisee, his only son and heir-at-law, him surviving.

Stephen, the son, entered into the premises so devised to him as aforesaid; and, by an indenture of feoffment, bearing date the 31st of January, 1798, in consideration of 85l. then paid to him, with livery of seisin then duly made, enfeoffed William Drewry Rimington of the said field at Freeridge Head, being part of the premises so devised by Stephen Cannon the elder, as aforesaid,—to hold to the said William Drewry Rimington, his heirs and assigns, unto and to the use of the said William Drewry Rimington, his heirs and assigns, for ever; by virtue of which feoffment, the said William Drewry Rimington then entered into and became seised of the said field, according to the form of the said feoffment. [The title to the field was then traced (*a*)[2] to Charles Rucastle, one of the defendants.]

After Stephen the son had entered into the dwelling-house, barn, and granary so devised to him, he, by an indenture of feoffment, bearing date the 31st of January, 1798, with livery of seisin then duly made, enfeoffed Joseph Fawcett of the said dwelling-house, barn, and granary, to hold to him the said Joseph Fawcett, his heirs

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(*a*)[1] When the pleadings were ore tenus, the objections were taken and argued before the demurrer was entered: it was only upon refusal of the party to amend after argument, that his adversary demurred, and prayed the judgment of the court. See the Year-books, passim.

(*a*)[2] Quære, for what purpose?

and assigns, unto and to the use of him the said Joseph Fawcett, his heirs and assigns, for ever; by virtue of which last-mentioned feoffment, the said Joseph Fawcett then entered into and became seised of the said dwelling-house, barn, and granary, according to the form and effect of the said feoffment. [The title to the dwelling-house, barn, and granary was then traced (*a*) to the defendant William Irving.]

Stephen, the son and devisee of Stephen Cannon the elder, died on the 29th of April, 1831, leaving two children, the issue of his body, lawfully begotten,—Stephen Cannon, in the declaration mentioned, his **[878]** eldest son and heir-at-law,—and Thomas Cannon, in the declaration also mentioned, his second son.

The said Stephen Cannon, in the declaration mentioned, was born in the life-time of Stephen Cannon the elder, on the 18th of March, 1797. Thomas Cannon was born after the death of Stephen Cannon the elder, on the 8th of July, 1803.

Stephen Cannon and Thomas Cannon, in the declaration respectively mentioned, on the 5th of December, 1846,—being after the death of their said father,—and before the 12th of December, 1846, entered into and upon the said field, dwelling-house, barn, and granary devised by the said will of Stephen Cannon the elder aforesaid, then in the possession of the said defendants Charles Rucastle and William Irving; and the said lessors of the plaintiff then demanded possession thereof from the said Charles Rucastle and William Irving; which they refused to give.

The said tenements, with the appurtenances, are the same as those in the declaration mentioned.

The said Stephen Cannon and Thomas Cannon, in the declaration mentioned, did, on the 12th of December, severally demise to the said John Doe the said tenements, with the appurtenances. But, whether or not, upon the whole matters aforesaid, by the jurors aforesaid found, the said Charles Rucastle and William Irving are guilty of the trespass and ejectment within specified, the jurors aforesaid are altogether ignorant, &c., &c.

Cowling, for the lessors of the plaintiff. The first question is, what estate Stephen Cannon, the feoffor, took under the will of 1796. If an estate-tail, the defendants in this case are entitled to judgment; for, in that case, the only remedy of the lessor of the plaintiff would be by formedon, which is abolished by the 3 & 4 W. 4, c. 27, s. 36. So, if Stephen Cannon the **[879]** son, took an estate for life, with contingent remainders to his issue in the event of his decease, the contingent remainders being destroyed by the feoffment, the defendants would also be entitled to judgment. But it is submitted that Stephen, the son, took only for life, with a remainder to his sons, which became vested immediately on the birth of a son, and so the feoffment was too late. The will, at the outset, expressly confines the estate to an estate for life: it then goes on—"and, from and after his (Stephen's) death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them." This shews that no estate-tail was meant. It then concludes,—"and, in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I give and devise the same to my heir or heirs-at-law." [Cresswell, J. Lord Tenterden, in *Doe d. Atkinson* v. *Featherstone* (1 B. & Ad. 944), rebuked me for urging a similar argument, after the decision in *Jesson* v. *Wright* (2 Bligh, 1).] In this will, "issue" means "children" only, to the exclusion of grand-children. [Maule, J. "Issue," in the strictest sense, means all descendants.] In deeds, it always means children: in wills, it may mean either, according to the context. In *Doe d. Cooper* v. *Collis* (4 T. R. 294), it was held that "issue" is either a word of purchase or of limitation, as will best effectuate the devisor's intention: and therefore, where A. devised his estates to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and, after her decease, to the issue of her body and her heirs for ever, and she had one child living at the time of the devise, —it was held, that the second took only an estate for life, with remainders to **[880]** her children as purchasers. [Maule, J. There, there were words of inheritance superadded to the word "issue." Cresswell, J. Is it found that Stephen the son was heir-at-law of the testator?] Yes. In *Doe d. Davy* v. *Burnsall* (6 T. R. 3),—where the testator devised "all his estates to A. and the issue of her body, as tenants in common, but, in default of such issue, or, being such, if they should all die under twenty-one, and without leaving issue" then over,—it was held, that all the limitations subsequent

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(*a*) Quære, for what purpose?

to that to A., were contingent, and were consequently destroyed by a recovery suffered by A. There, however, there was no distinct devise for life, as here: primâ facie, the words would seem at once to give an estate-tail. [Maule, J. There, the words "die without issue" had the same effect as "heirs" in *Doe d. Cooper* v. *Collis.*] Lord Kenyon, in *Doe d. Davy* v. *Burnsall*, says: "In determining the present case, I proceed on the words of the will, giving legal effect to every word contained in it; and they all lead to this conclusion,—that this was a contingency with a double aspect; if M. Owstwick had any children, the estate was limited to them in fee; if she had no children, or, if she had any, and they died under twenty-one, and without issue, then it was to go to the lessor of the plaintiff. But all these rested in contingency, and the particular estate of freehold by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it." [Maule, J. "Issue" has two senses,—one, comprehending all descendants: and, if there be anything to shew that it does not mean that, then it means immediate issue—children.] In all cases, it is a question of intention, upon the whole of the will. Unless the word "issue" in this case is to be read "heirs," the [881] rule in *Shelley's case* (1 Co. Rep. 93 b.), which is not to be adopted unless necessary, cannot apply. The meaning of the word "issue" is clearly and lucidly explained in *Slater* v. *Dangerfield* (15 M. & W. 263). There, a testator devised lands to his grandson G. D., to hold the same unto and to the use of the said G. D. for the term of his natural life; and, from his decease, unto and to the use of all and every the lawful issue of the said G. D., their heirs and assigns, for ever, equally, as tenants in common, and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years: and the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter S. D. absolutely, for her own sole and separate use: and it was held, that, in the above devise "issue" was to be construed "children," and therefore that G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate-tail; and, consequently, that, on his death without issue, S. D. took under the residuary devise, notwithstanding a disentailing deed executed by G. D. in his life-time,—such a deed, executed under the 3 & 4 W. 4, c. 74, having no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail. Parke, B., in delivering the judgment of the court, says: "The question is one of those which are of very frequent occurrence, namely, whether the word 'issue' is to be treated as a word of limitation or a word of purchase. The general rule in such cases is clear and well established. The word 'issue,' in a will, primâ facie means the same thing as 'heirs of the body,' and is to be construed as a word of limitation; but this primâ facie construction will give [882] way, if there be, on the face of the will, sufficient to shew that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class, or at a particular time. Though, however, the rule thus stated, is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is one not more applicable to the word 'issue,' than it is to the words 'heirs of the body,' or indeed to any other words which can be suggested. In all cases, the primâ facie import of words used by a testator, is liable to be controlled or modified by the context. When it was once established that a devise to a man and his issue means the same thing as a devise to him and the heirs of his body, it might have appeared reasonable to hold that all the rules of construction applicable to the latter words were applicable to the former also, considering the great importance of abiding by general rules in the interpretation of wills, with the view of attaining as much certainty and uniformity of decision as the subject admits of. But the courts have been less reluctant to narrow the primâ facie meaning of the word 'issue,' than of the words 'heirs of the body,' and have done so in some cases, so nearly resembling the present, and so incapable of being distinguished from it on any satisfactory ground, than we, without deciding what the construction would have been, if the words 'heirs of the body' had been used, feel ourselves bound to take the same course, and to hold that the grandson, George Dangerfield, took an estate for life. The case of *Greenwood* v. *Rothwell* (5 M. & G. 628, 6 Scott, N. R. 670) is precisely in point. That was a [883] devise to J. G. for his life, and, after his decease, to all and every the issue of his body, as tenants in common, and the heirs of such issue. Under this devise, the court of Common Pleas decided that J. G. took an estate for life only. That case is a distinct authority for holding, that, where there is a devise to one for life, with remainder to his issue as tenants in common, with a limitation to the heirs general of the issue, the issue take as purchasers in fee. It would be impossible for us to decide, in the case before us, that the grandson took an estate-tail, without at the same time overruling the case of *Greenwood* v. *Rothwell*. All the circumstances there indicating that the word *issue* was used as a word of purchase, and not of limitation, occur also in the case before us, with the further circumstance, that, in the present case, the parties to take under the description of issue, are only to take when and as they attain the age of twenty-one years,—which brings the case very closely within the principle of *Merest* v. *James* (1 B. & B. 484, 4 J. B. Moore, 327), where a gift over, in case of the issue dying under twenty-one, was of itself held sufficient to shew that the word 'issue' was used in its limited, and not its general sense." [Cresswell, J. You read "issue" as "children," in both parts of the clause. If the testator had had two children born in his life-time, the remainder would have become vested in them as they were born.] Precisely so. A devise to A. and his issue, gives A. an estate-tail: so, if the devise is, to A. for life, and, after his decease, to his issue, A. takes an estate-tail, if there be a devise over. In this latter case, the court will imply an estate-tail, because otherwise the intention of the testator would be frustrated. [Maule, J. The rule in *Shelley's case* has been applied where the words "equally to be di-**[884]**-vided amongst them" have occurred.] Those cases proceed upon the ground that those words of division are to be rejected. In *Jesson* v. *Wright* (2 Bligh, 57), Lord Redesdale says: "The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe* v. *Goff* (11 East, 668), it has been held that the words 'tenants in common' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected." [V. Williams, J. All that Lord Redesdale means is, that the mere circumstance of the testator's attempting to restrain words having a definite legal meaning, will not deprive them of their proper effect.] There are two strong circumstances to prevent the word "issue" here being construed to mean "heirs of the body," viz. that the devise to Stephen, the feoffer, is expressly of an estate for life, and there is a devise over.

The two sons of Stephen, the feoffor, it is submitted, took an estate in fee, the condition of their dying in the life-time of their father, not having happened. In *Doe d. Roake* v. *Nowell* (1 M. & Selw. 327), the testator devised all his freehold estates to J. S. for life, and, on his decease, to **[885]** and among his children equally, at the age of twenty-one, and their heirs, as tenants in common; but, if only one child should live to attain such age, to such child and his or her heirs, at his or her age of twenty-one; and, in case J. S. shall die without issue, or such issue should die before twenty-one, then over: and it was held, that the children of J. S. took a vested remainder. Here, if there had been no devise over, on failure of issue of Stephen, the feoffer, living at the time of his death, the previous words would, by implication, have given the fee to him and his issue: but, as the estate was to go over in the event of Stephen's children not surviving him, having survived him, they take the fee. In *Doe d. Wight* v. *Cundall* (9 East, 400), under a devise of land to the two children of the testator's brother W. when they attained the age of twenty-one years, but the executor to account to them for the profits until the age of twenty-one, or day of marriage; but, if either should die before twenty-one, the survivor to be heir to the other,—it was held that the fee passed; which would go over to the survivor, in case one died under twenty-one, and would descend or be disposable if he died after attaining twenty-one. Lord Ellenborough, in giving judgment there, having referred to *Frogmorton d. Bramstone* v. *Holyday* (3 Burr. 1618), says: "The whole doctrine and effect of these words were there so fully stated, that it is unnecessary to add any further authority. But Lord Mansfield, in another case (*Goodtitle d. Hayward* v.

Whitby, 1 Burr. 234), mentions a case of *Tomkins* v. *Tomkins*, in Chancery, H. 17 G. 2, where the devise was 'to his brother, in trust for his eldest son, B., till he should attain twenty-one; and, if he should die before twenty-one, then a devise over:' the court held the age of twenty-one to be no limitation of [886] B.'s interest, but only a limitation of the trust during his minority, and that B. took the whole by implication. There are other authorities which might be cited, that a giving over on a dying before twenty-one, shews an intention, that, if the party attain twenty-one, he should have a fee absolute." This view is further supported by *Doe d. Bills* v. *Hopkinson* (5 Q. B. 223), and *Doe d. Comberbach* v. *Perryn* (3 T. R. 484), cited in Fearne's Contingent Remainders (10th edit. vol. i. p. 313).

Hugh Hill (with whom was Lewis), contrà, was not called upon.

MAULE, J. The devise to Stephen Cannon, the feoffer, by the will of 1796, clearly was of an estate-tail. It is well settled, that the word "issue" in a will, means "heirs of the body," unless there are words therein which are inconsistent with or control that construction. The rule in *Shelley's case* must therefore prevail. The devise, then, being to Stephen and the heirs of his body, gave him an estate-tail: and that estate-tail having been discontinued by the feoffment, it is conceded that the lessors of the plaintiff in this case are not entitled to recover.

CRESSWELL, J., and V. WILLIAMS, J., concurring,

Judgment for the defendants.

[887] BELL AND OTHERS, Assignees of George Geering, a Bankrupt, *v.* CAREY, Public Officer of the London and County Banking Company. Dec. 10, 1849.

[S. C. 19 L. J. C. P. 103.]

A plea of mutual credit by way of set-off, cannot be pleaded to a declaration by assignees, charging the defendants with having received a sum of money from the bankrupt for the purpose of meeting a certain acceptance, and neglecting so to apply it, whereby the bankrupt's estate sustained a damage,—the claim being for unliquidated damages.

This was an action of assumpsit. The declaration stated, that, before the bankruptcy of George Geering, to wit, on, &c., the said George Geering was a customer of, and kept an account with, the co-partnership called the London and County Banking Company, in the way of their business as bankers, of which the defendant was one of the public officers; that, before the bankruptcy, the said George Geering had accepted a certain bill of exchange, drawn, &c., for 175l. 2s. 3d., at two months, payable at the banking-house of the said co-partnership in London,—of all which premises, the said co-partnership, at the time of making the promise thereinafter mentioned, had notice; that, before the bankruptcy, and before the bill became due, to wit, on, &c., the said George Geering paid the said sum of 175l. 2s. 3d. to the said co-partnership, who then received the same for the purpose and to the intent that the said co-partnership should pay and retire the said bill when presented for payment, and the said co-partnership then promised to pay and retire the said bill when due and presented as aforesaid; that the said bill became due and was presented, before the bankruptcy of George Geering, for payment, to the said co-partnership; that they refused to pay and retire the said bill, whereby the said bill became dishonoured; and that, by reason of the non-performance of their promise by the said co-partnership, and their not returning the said [888] money, the said George Geering had, before his bankruptcy, been put to great loss and expense in his trade and business, in respect of the said bill,—to the damage of the plaintiffs, as assignees, &c.

Plea, mutual credit by way of set-off.

Demurrer and joinder.

Willes, in support of the demurrer (*a*). The question is, whether the deposit of a sum of money with a banker for the purpose of meeting an acceptance of the customer, becomes a debt within the statutes of set-off, or the 50th section of the bankrupt act

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(*a*) The point marked for argument, on the part of the plaintiff, was,—"that damages for non-payment of a bill of exchange according to contract, to which bill the defendants are not parties, is not a debt within the statutes of set-off."

6 G. 4, c. 16. It is submitted, that, if a man accepts a bill payable at a banker's, and, whilst the bill is outstanding, goes to the banker and gives him a sum to be specifically applied to the payment of that particular acceptance, and the banker receives the money under an agreement so to apply it, he cannot afterwards claim to retain the money, and set-off against it money due to him from the depositor. To be a debt within the statutes of set-off, it must be a sum payable by the terms of the contract to the customer. The case is substantially decided by *Hill* v. *Smith* (12 M. & W. 618). There, A. paid to a banking company a sum of money for the specific purpose of providing for a bill of exchange for that amount, drawn by A. upon the company's London bankers. A. was at that time indebted in a larger amount to the company, who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance, and, while it remained unpaid in the hands of the holder, A. **[889]** became bankrupt:—It was held that his assignees were entitled to recover from the company, in a special action of assumpsit, the whole amount of the bill. The observations of Parke, B., in that case, furnish all that is necessary for the purpose of the present argument. "The debts due to the bankrupt," says the learned baron, "and the damages to be recovered by him for the breach of contracts relative to the bankrupt's personal estate, and which affect its value, pass as personal estate to the assignees. We need not inquire further as to the description of contracts, the damages for the breach of which belong to the assignees, for this question is still sub judice (*a*); but, for this sort of contract, the assignees are undoubtedly entitled to recover, and stand in the place of the bankrupt himself as to his right to recover,—as they do with respect to his debts, for the recovery of which they had, by 1 Jac. 1, c. 15, s. 13, and have, by 6 G. 4, c. 16, s. 25, the like remedy that the bankrupt himself had. His rights to personal estate are their rights, and the damages due to him in respect of his personal estate, are due to them. What, then, is the amount of damages which the bankrupt would himself have recovered? A jury might, most properly, give the full amount of money placed in the defendant's hands, and misapplied; and the jury in this case did give that amount contingently, provided they were warranted by law in giving the damages sustained by the bankrupts: and we think they were warranted. When the defendants refused to perform their contract, they ought to have returned the money to the bankrupts; and, if they did not, the bankrupts might have treated it as money had and received to their use, and recovered the amount in indebitatus **[890]** assumpsit, if the defendants had not been their creditors; and the circumstance of their being so to an equal amount, is only material, as it would have given them a defence, in that form of action, under the statutes of set-off, which were enacted for preventing the necessity of cross actions. But it would have given a defence, in consequence of the form of action only—not on the merits; and the form of action being changed into one of special assumpsit, there would be no defence at all. This is laid down in *Thorpe* v. *Thorpe* (3 B. & Ad. 580), and in *Colson* v. *Welch* (1 Esp. N. P. C. 379), which was confirmed by the court on a motion for a new trial. The bankrupts would clearly have recovered the full amount against a wrong-doer not a creditor. Why should a wrong-doer be in a better position, when the law gives him no right of set-off under the statutes of set-off, or the mutual-credit clause in the bankrupt act?" [Cresswell, J. This looks like an action for unliquidated damages.] It may be said, on the other side, that the declaration does not sufficiently allege special damage. If special damage, however, be necessary, it is submitted that it is sufficiently averred.

Bramwell, contrà (*c*). If the meaning of this declaration is, that the bankrupt paid the 175l. 2s. 3d. into the bank, upon an understanding that the specific moneys should be transmitted to their agents in London **[891]** to meet the bill in question, there might be some difficulty in saying that the plea was a good one: but, if the meaning is, that the money was paid in to his account with the bank, that gave

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(*a*) Since decided—*Beckham* v. *Drake*, 2 House of Lords Cases, 579.

(*c*) The points marked for argument on the part of the defendants, were,—"That the declaration is, in effect, for money had and received to the use of the bankrupt, and so the debt due from the bankrupt to the company can be made the subject of set-off, under the statutes of set-off and bankruptcy: and that the declaration alleges no special damage, but only the receipt of the money, which is a debt due from the company to the bankrupt, and against which the company can set off their claim."

him a claim against the bank as for so much money lent; and though the bankrupt might have a right of action against the company for not appropriating the amount according to the terms of their contract, it would not be a claim entirely for unliquidated damages, and therefore it may be met by a set-off. [Maule, J. The money was deposited with the defendants for the specific purpose of applying it to the payment of the bankrupt's acceptance; and they have failed to do so. Does not that give rise to a claim for unliquidated damages?] The declaration does not state that the money was paid to, and accepted by, the defendants, as a consideration for their undertaking to pay the bill. The question turns upon the 50th section of the 6 G. 4, c. 16, which enacts, "that, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate: provided that the person claiming the benefit of such set-off, had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." Claims for money compensation may be liquidated, or unliquidated, and yet [892] susceptible of ascertainment; or they may be really unliquidated, and not matter of calculation at all. The intention of the 50th section clearly was, that the two former classes should be the subject of set-off. Supposing the position of these parties was reversed, would this demand have been provable? The certificate of the defendants could not have been defeated by changing the form of action. [Maule, J. The certificate may always be defeated, where the plaintiff has his election between trover and money had and received. Cresswell, J. If the company had neglected to pay the bill, but had returned the money, could the bankrupts have sued them for not paying the bill.] It is submitted that they could. [Cresswell, J. Would the demand in that action be provable against their estate, in the case above supposed?] Probably not. [Cresswell, J. Then that shews that the whole complaint in this action would not have been provable.] If this is in substance an action to recover back the money, it is in truth an action for moneys numbered. In *Groom* v. *West* (8 Ad. & E. 758, 1 P. & D. 19), a declaration by assignees of R., a bankrupt, stated that the defendant, in consideration that R. would sell and deliver to him sugars at the rate and price of, &c., agreed to pay him for the same, prompt two months, or an acceptance at seventy days, if required; that the goods were delivered to and received by the defendant before the bankruptcy, on the terms aforesaid, but that he did not, though required before the bankruptcy, pay, then or since, by an acceptance, nor did he otherwise pay; whereby R., before his bankruptcy, lost the use and benefit of such acceptance, and the benefit which would have accrued to him from having it discounted, and raising money on it for his own use in the way of his trade, and was put to [893] loss and inconvenience by not having such acceptance to negotiate, and his estate applicable to the payment of his just debts, was, by reason of the non-payment for the goods in manner aforesaid, diminished in value, to the damage of the assignees and creditors: to this there was a plea of set-off for a debt due from R. before the bankruptcy; to which the plaintiff demurred: and it was held, that the concluding averments of the declaration did not shew a special damage to the plaintiffs, but only a common pecuniary loss; that the case appearing on the declaration was one of mutual credit within the statute 6 G. 4, c. 16, s. 50; and that a set-off might be pleaded.

Maule, J. If the company have for a valuable consideration undertaken to perform a certain duty, and have neglected to perform it, they are clearly liable in damages, nominal or otherwise,—if any injury has resulted to the bankrupts from their breach of duty. In some respects the case resembles *Marzetti* v. *Williams* (1 B. & Ad. 415). In *Drake* v. *Beckham* (11 M. & W. 315), where A. agreed in writing with B. and C., on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account, during that period, without their consent; and B. and C. agreed to pay him wages after the rate of 3l. 3s. per week, so long as he should serve them faithfully, —it was held by the Exchequer Chamber, reversing the judgment of the court below (*c*),

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(*c*) *Beckham* v. *Drake*, 9 M. & W. 79.

that the right of action for a breach of this agreement, by dismissal of A. from the service, without reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his personal estate, whereof a profit might be made. **[894]** And it was ultimately held by the House of Lords (*a*), that the right of action did so pass,—on the ground that the contract contained a clause imposing a penalty for the breach thereof. Here, or in *Marzetti* v. *Williams*, you could not say that the damages, great or small, would be a demand provable under a fiat. *Hill* v. *Smith* is certainly very much in point. The case really sounds in damages. The plea is bad, and the plaintiffs are consequently entitled to judgment.

Cresswell, J. and V. Williams, J., concurred.

Judgment for the plaintiffs.

Doe d. Rogers *v.* C. Price and W. Price. Nov. 30, 1849.

[S. C. 19 L. J. C. P. 121.]

A lease was granted of a farm and tenement, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise were reserved and excepted "all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, &c., which should thereafter be opened and found." And the lease contained a covenant "not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood;" and a power of re-entry, for nonpayment of rent, or if the lessee, &c., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, &c., contained in the lease.—The assignee of the term having cut down and grubbed up certain saplings, wood, and underwood, for the necessary purpose of working a quarry on the demised premises:—Held, that the effect of the covenant was, that the tenant should not so cut any of the trees excepted, as that such cutting should amount to an excess of the right which it was intended that he should exercise; and therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone, was no breach of the covenant.

This was an action of ejectment, brought by the plaintiff as assignee of the reversion, to recover possession of a farm and premises called Graig Galva, **[895]** in the county of Glamorgan. The defendants were assignees of an unexpired term of ninety-nine years, granted by one Evan Jones to one Thomas Thomas, by an indenture of lease bearing date the 29th of July, 1835.

By that indenture, the lessor demised to the lessee the farm and tenement called Graig Galva, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, of 16l. a year, and to the payment of 2d. for every yard of paving-stone obtained, and of 3s. for every thousand of tile-stone,—payable on the 2nd of August in every year.

Out of this demise, there was, by the deed, a reservation and exception of all timber-trees, trees likely to become timber, saplings, and all other wood and underwood which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, and fossils whatsoever, which should thereafter be opened and found. And in the lease was contained a covenant on the part of the lessee, not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood; and then followed a proviso giving a power of re-entry, if the rent should be in arrear as therein mentioned, or if the lessee should commit any waste, spoil, or destruction, by any of the means or ways aforesaid, and should

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(*a*) *Beckham* v. *Drake*, ubi supra.

not perform and keep all and singular the covenants, provisoes, and agreements contained in the lease.

The cause was tried before Wightman, J., at the Glamorgan summer assises, 1848.

On the part of the lessor of the plaintiff, it was insisted that the defendants had incurred a forfeiture, by cutting down and grubbing up certain saplings, wood, and underwood, contrary to the covenant.

[896] It was conceded that the acts complained of had been done for the purpose of working a quarry on the demised premises. And it was submitted, on the part of defendants, that, if this amounted to a breach of covenant, the lease would be insensible, for the demise of the quarries would then be futile; and that all that the covenant in question was intended to provide against was, wilful waste.

A verdict was found for the plaintiff; leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that there had been no breach of covenant.

John Evans, in Michaelmas term, 1848, accordingly obtained a rule nisi. He referred to *Pomfret* v. *Ricroft* (1 Wms. Saund. 321), and the authorities cited in the notes there; and also to *Goodright d. Peters* v. *Vivian* (8 East, 190), where it was held, that, if trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises.

W. H. Watson, and Grove, in the last term, shewed cause. There is no such implied exception as is suggested on the part of the defendants, viz. that the lessee may cut down trees, underwood, and saplings, for the purpose of working the quarries. The word "waste" is not used in its strictest sense: the meaning of the covenant is that the lessee shall not cut the excepted trees, &c. The wood, underwood, and saplings, and so much of the land as is necessary for their support and nutrition, are excepted out of the demise. *Goodtitle d. Peters* v. *Vivian* has no application. [Maule, J. The only distinction I can see between **[897]** that case and the present is, that there the trees were not grubbed up.] In *Legh* v. *Heald* (1 B. & Ad. 622), it was held, that, by a lease of a tenement, described as containing nineteen acres, save and except all timber-trees, wood, underwoods, &c., six acres of the soil, which at the time of the lease were covered with growing wood, were not excepted, but passed to the lessee. Lord Tenterden said: "In the lease there was an exception of wood and underwoods; and it is said, that, by that exception, the soil on which the wood was growing was excepted, and, consequently, that it was in the plaintiff, and that he therefore was entitled to maintain trespass for any injury done to the surface; and *Whilster* v. *Paslow* (Cro. Jac. 487) was cited in support of that position. That was a lease of the site and demesne of a manor, 'exceptis et semper reservatis omnibus boscis, subboscis, &c.; and it was held that the soil itself was excepted, though it was said, that, by an exception of timber-trees, no soil is excepted but that in which they grow. The distinction is somewhat nice." Parke, J., said: "The general proposition is, that, if there be a grant of a manor, with an exception of woods, the soil itself on which the wood grows, is excepted; but a distinction is taken between an exception of wood and underwood, and an exception of all timber-trees; for, in the first, the soil itself on which the wood and underwood grow, is excepted; but, in the latter case, no soil is excepted, but only nutriment out of the land sufficient for vegetation and growing of the trees excepted: *Whilster* v. *Paslow*." And Taunton, J., added: "It is clear, in point of law, that, under the term wood, used in a grant as synonymous with the latin word boscus, the trees and soil on which they grow will pass; and the word wood, or boscus, there denotes land covered **[898]** with wood: Co. Litt. 4 b.; *Whilster* v. *Paslow*. In *Liford's case* (11 Co. Rep. 49 b.), 'a difference was taken between a wood, which may be demanded in a præcipe by the name of so many acres of wood, and trees growing out of any wood, which cannot be demanded in a præcipe by any name but by the name of land and pasture, &c. where they grow; for, if such a wood, whereof a præcipe lies, is parcel of my manor of G., and I lease my manor, excepting woods, thereby the soil itself is excepted; and, in a præcipe brought of the manor, an exception ought to be of so many acres of wood; but, in such case, if I except all my trees which grow out of any wood but upon land and pasture, there, by the exception of the trees, the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for, without that, the trees which are excepted, cannot subsist.' The doctrine there laid down, is not inconsistent with *Pincomb* v. *Thomas* (Cro. Jac. 524): there, one let a tenement, a close whereof was a wood, and commonly known by the name of a wood; and in the lease was an exception of all saleable woods now growing, or which shall grow hereafter, which have been sold by the lord of the premises, with free entry, egress, and regress, for felling, marking, and carrying off the same, at all convenient times; and the question was, whether the soil of the wood passed to the lessee: it was holden that the soil did not pass, but the timber only. That clearly was, because the right of entry would not have been needed if the whole soil had been reserved. That case turned, therefore, upon the particular language of the gift. Here, the language of the exception is, 'all timber-trees and other trees, and wood and underwoods,' not woods. The word wood, as here used, is not synonymous with the latin word **[899]** boscus; it imports only the timber or material itself, and, consequently, does not include the soil." The trees gone, the soil belongs to the lessee: if so, by grubbing them, he is guilty of waste; for, he changes the nature of the land. In *Phillipps* v. *Smith* (14 M. & W. 589), Alderson, B., delivering the judgment of the court, says: "The principle upon which waste depends, is well stated in the case of *Lord Darcy* v. *Askwith* (Hobart, 234), thus,—'It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he may not destroy the stock or breed of anything, because it disinherits and takes away the perpetuity of succession, as, villeins, fish, deer, young spring of woods, or the like.' Thus, the destruction of germens, or young plants destined to become trees (Co. Litt. 43), which destroys the future timber, is waste; the cutting of apple-trees in a garden or orchard, or the cutting down a hedge of thorns (Co. Litt. 53 a.), which changes the nature of the thing demised; or the eradicating, or the unreasonable cutting, of white-thorns (Viner's Abr. Waste (E.)), which destroys the future growth, are all acts of waste." In Co. Litt. 54 b., it is said: "A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee, for such mines as were open at the time of the lease made, may dig and take the profits thereof: but he cannot dig for any new mine that was not open at the time of the lease made, for, that should be adjudged waste. And, if there be open mines, and the owner make a lease of **[900]** the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine: but, if there be no open mine, and the lease is made of the land, together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof otherwise those words should be void." It is said, on the other side, that there is an implied exception in the covenant not to commit waste, viz. except it be done for the purpose of working the quarries. No such exception, however, can be imported into this lease. The demise is, not of a quarry simply, but of a messuage or tenement, together with the quarries.

Assuming, then, that there has been a breach of covenant, the only remaining question is, whether the covenant is annexed to the reversion, under the statute 32 H. 8, c. 34, so as to entitle the lessor of the plaintiff to maintain ejectment. The authorities shew that it is: *Spencer's case* (5 Co. Rep. 16 b. (2nd resolution), 1 Smith's Leading Cases, 22); *Mayor of Congleton* v. *Pattison* (10 East, 130); *Kingdon* v. *Nottle* (1 M. & Selw. 355); *Jones* v. *King* (4 M. & Selw. 188); *Vernon* v. *Smith* (5 B. & Ald. 1); *Vyryan* v. *Arthur* (1 B. & C. 410, 2 D. & R. 670); *Sampson* v. *Easterby* (*h*); *Easterby* v. *Sampson* (6 Bingh. 644, 4 M. & P. 601); *Raymond* v. *Fitch* (2 C. M. & R. 588, 5 Tyrwh. 985); *Hemingway* v. *Fernandes* (13 Simons, 228).

John Evans, and Gray, in support of the rule. It clearly was the intention of the parties to this demise, that the lessee should do that which has been done here. It was not possible that he could enjoy the subject-matter of the lease, viz. the quarries, without grubbing **[901]** up a portion of the underwood. In *Doe d. Jones* v. *Crouch* (2 Campb. 449), it was held that a covenant in a lease, to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded. One of the main objects of the

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(*h*) 9 B. & C. 505, 4 M. & R. 422. And see 4 M. & R. 426 (*c*), 429 (*c*); 5 M. & R. 200; 2 N. & M. 45; ante, vol. v. p. 464.

demise was, to enable the lessee to get at the stone. Where a man grants a thing, he impliedly grants everything that is necessary to the enjoyment of the thing granted. The covenant not to commit waste "by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood," is not inconsistent with, nor does it necessarily limit, the privilege conferred by the grant. That covenant would be left to its full operation upon all the rest of the farm. The whole deed must be read together, and a reasonable interpretation given to every part of it.

Goodright d. Peters v. *Vivian* is a distinct authority upon the other point.

Cur. adv. vult.

Wilde, C. J., now delivered the judgment of the court.

The lessor of the plaintiff in this case sought to recover possession of certain premises in the county of Glamorgan, under a power of re-entry contained in a lease of the premises in question; the lessor being seised of the reversion of the premises, and the defendant being the assignee of an unexpired term of ninety-nine years, granted by Evan Jones to Thomas Thomas.

The lessor claimed to be entitled to enforce the right of re-entry, upon the ground of forfeiture, by reason **[902]** of a breach of one of the covenants contained in the lease.

The lease was dated the 29th of July, 1835: and the lessor thereby demised a certain farm and tenement called Graig Galva, and the quarries of paving and tilestone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, of 16l. a year, and to the payment of 2d. for every yard of paving-stone obtained, and of 3s. for every thousand of tile-stones; both reservations being payable on the 2nd of August in every year. And by the lease there was reserved and excepted out of the demise, all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, and fossils whatsoever which should thereafter be opened and found: and the lease contained a covenant not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood; and then followed a proviso, giving a power of re-entry, if the rent should be in arrear as therein mentioned, or if the lessee should commit any waste, spoil, or destruction, by any of the means or ways aforesaid, or should not perform and keep all and singular the covenants, provisoes, and agreements contained in the lease. The habendum was, of the lands, and also the quarries of paving and tile-stones, for ninety-nine years.

The lessor insisted that a forfeiture had been incurred, by the cutting down of certain saplings, wood, and underwood, contrary to the covenant: and it was admitted between the parties, that the acts complained of had been done for the necessary purpose of working **[903]** a quarry on the demised premises: and, although various other questions were raised and argued between the parties, the great and material point in contest was, whether the cutting down, for the purpose of working the quarries, —which was admitted to have taken place in this case,—was a breach of the covenant; and it will not be necessary, for the purpose of deciding the case, to consider any other question.

That question depends upon the true construction of the covenant of which the lessor contends a breach has been committed: and, in considering the true construction, the first point to be ascertained is, the object and intention of the parties, as it is to be collected from the entire deed; and then to consider if the covenant can be construed to have such a meaning as will, regard being had to all the words of it, effectuate the intention of the parties.

The words of the covenant in question are peculiar, and therefore may probably have been used for a purpose applicable to the special circumstances of the case. The covenant is not to be construed as if it were simply that the lessee should not commit waste; for then it would not include the trees excepted, and would apply to cases in which there would be a remedy without the covenant: nor is it to be construed as a general unqualified covenant not to cut down the trees excepted,—which would apply to all trees excepted, though absolutely necessary to be cut down, to enable the lessee to get any stone, and would be inconsistent with the power to get stone: nor is it to be construed as a covenant not to cut trees excepted, so as to amount to waste, in the strict technical sense of that word. The first and second of these constructions would be contrary to the manifest intent of the parties; and each of them would apply to part of the words of the covenant only, **[904]** requiring the rejection of other words of equal importance; and the third would make it wholly inoperative.

It being clear that none of these constructions can prevail, some other is to be sought: and it seems to us that the right construction of the two parts of the covenant not to commit waste by cutting trees, &c., is to be attained by allowing the first part of it to restrain the second, and the second to expound the first: so that its effect shall be, that the tenant shall not so cut any of the trees excepted, as that such cutting shall amount to an excess of the rights which it was intended the tenant should exercise. Such an excess, by cutting trees demised, is waste in its strict sense; and, where it is committed on trees excepted, we think it is sufficiently analogous to waste, to bring it within the meaning of that word as used in this covenant,—in which the word waste cannot be strictly construed.

This construction of the covenant will account for the peculiar language in which it is expressed, will give a reasonable sense to all the words of the covenant, and will prevent any inconsistency or discrepancy between different parts of the lease.

It follows, that cutting trees in a manner necessary to a reasonable exercise of the power to get stone, is no breach of the covenant; and therefore a nonsuit must be entered.

Rule absolute accordingly.

[905] VINCENT *v.* THE BISHOP OF SODOR AND MAN AND OTHERS.

Nov. 12, 1849.

Certain estates were settled, by deed, to the use of such person or persons, in such parts, shares, &c., as S. S. should, by deed, as therein mentioned, or by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, "to be by her signed and published in the presence of, and attested by, two or more credible witnesses, direct or appoint."—S. S. made a will, which was signed and sealed by her in the presence of two witnesses, to whom she at the time declared it to be her last will and testament. The attestation clause was thus:—"signed and sealed in the presence of A. B., C. D.:"—Held, that this was a sufficient "publication," and consequently that the power had been well executed.

The following case was sent by Vice-Chancellor Wigram for the opinion of the judges of this court:—

Prior to, and in contemplation of, the marriage then intended, and shortly after solemnized, between the Rev. John Ireland, clerk (and afterwards Dean of Westminster), deceased, and Susanna Short, spinster, also deceased, by indentures of lease and release and settlement,—the release and settlement bearing date the 28th of January, 1794,—a certain freehold estate held for certain lives still in existence, and limited in its creation to the lessee, his executors, administrators, and assigns, was conveyed to the trustees of the said settlement, their executors, administrators, and assigns, to certain uses in favour of the said John Ireland and Susanna Short, and their issue, which have since failed; and, after the determination thereof, to the uses following, that is to say, to the use of such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents and purposes, and under and subject to such powers, provisoes, and limitations, as the said Susanna Short should, at any time or times during, and notwithstanding, her intended coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and **[906]** delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, to be by her signed and published in the presence of, and attested by, the like number of witnesses,—and which deed or deeds and will she was thereby authorised to make and execute, notwithstanding her said intended coverture,—direct or appoint; and in default of, and subject to, such direction or appointment, to the use of the said John Ireland, his executors, administrators, or assigns, for their own use and benefit, and to no other use and intent or purpose whatsoever.

The said Susanna Ireland, formerly Susanna Short, made and executed her last will and testament in writing, or appointment in writing in nature of a will, dated the 17th of February, 1826, whereby she devised the said estate comprised in the said settlement, after the death of her said husband, to certain of her relations in her said will named. And she appointed her executors, and concluded her said will in the words and figures and form following, that is to say,—

"I appoint for executors of this my will, the Rev. Thomas Vowler Short, the Rev. William Short (my two nephews), and Ralph Barnes, Esq., attorney-at-law, executor.
"Feb. 17th, 1826. "SUSANNA IRELAND (L.S.).

"Signed and sealed in the presence of
"Humphrey Pritchett, Apothecary, 13 Great
Queen St. Westminster.
"Mary Eames, housekeeper to Mrs. Ireland."

The said Susanna departed this life on the 1st of November, 1826, and in the lifetime of her said husband, without having altered or revoked her said will,—which has been duly proved, pursuant to an order of Her Majesty in Council, made on the 4th of March [907] 1847, confirming a report of the Judicial Committee of the Privy Council, in a case of appeal from a sentence of the Prerogative Court of the Archbishop of Canterbury.

The said John Ireland has also departed this life.

In a suit which is depending in the court of Chancery between the executors of the said John Ireland, and the executors of the said Susanna Ireland, and other persons interested in their respective estates, it has become necessary to determine whether the said will of the said Susanna Ireland is a valid exercise of the power of appointment of the said estate, which was so given or limited to her by the said release and settlement of the 28th of January, 1794, as aforesaid.

Humphrey Pritchett, one of the attesting witnesses to the said will of the said Susanna, departed this life on or about the 16th of August, 1828, leaving Mary Eames, the other attesting witness to the said will, him surviving,—who is still living.

Certain witnesses were examined in the said appeal, and their testimony has been made evidence in this cause; and, by the testimony of two of such witnesses, the handwriting of the said Humphrey Pritchett was proved.

The said Mary Eames, one of such witnesses, deposed as follows:—

"Third. To the third article.—I lived as housekeeper with Mrs. Ireland, the deceased in this cause, from the 19th of March, 1817, until her death, on the 9th of December, 1826. During that period, I acted as housekeeper to her husband, the late Dr. Ireland, and herself; and I always attended upon the deceased, and was her confidential servant. Between Christmas, 1825, and the 17th of February, 1826, the deceased said to me several times, that she should make her will, and that the dean (meaning her husband, Dr. Ireland, who [908] was Dean of Westminster,) wished her to make her will. The said deceased suffered from dropsy; and, after Christmas, 1825, she was under the impression that she should not live very long. Immediately prior to the said 17th of February, the deceased said to me, 'Eames, I shall make my will; but I cannot write it all at once,'—from which I infer (though I have no further knowledge of the fact,) that she was occupied more than one day in so doing, exclusive of the said 17th of February. At about ten o'clock in the morning of that day, I went to the deceased, in the drawing-room of the deanery-house, Westminster, where she and the dean were then residing, to receive orders for her dinner: and she then said to me,—'Eames, I have a right to make my will, under my marriage-settlement;' adding,—'Do not go out of the way this morning, as I shall want you to sign it.' At about between 12 and 1 o'clock that day, Mr. Pritchett, the deceased's medical attendant (and who was in attendance on her as such at that time), called on the deceased, and saw her in the drawing-room. I thereupon went in the drawing-room to the deceased and Mr. Pritchett. The deceased had told me in the morning at 10 o'clock, that she should want me to sign her will when Mr. Pritchett came; and that was the reason why I then went up to the drawing room. I went into the drawing-room at the same time that Mr. Pritchett did so: and the deceased, thereupon, addressing both of us, said,—'I wish you to sign my will, as I have the power of making my will under my marriage-settlement, or words to that effect. Mr. Pritchett then sat down; and I stood at the table. The deceased, who was sitting at the table, with her will before her, then finished her will, by writing two or three lines at the end of it. I think she must have written as much as two or three lines; for, it took her some little time to do it. As soon as [909] the deceased had finished writing, she said to Mr. Pritchett and me,—'Look, and see me sign my will.' She then wrote her name at the end of her will. She then put her finger on the seal on the will, and said to us,—'This is my last will and testament.' I have left out one word; for, what she thus said to us was,—'I declare this to be my last will and testament.' The deceased then asked Mr. Pritchett to sign her will; and he did so. Then she asked me to sign her will; and I signed it after Mr. Pritchett: and, as I was doing so, Mr. Pritchett asked me to name that I was Mrs. Ireland's housekeeper; and I did so, by adding the words,—'Housekeeper to Mrs. Ireland,'—to my signature on the will. As soon as this was done, the deceased folded up the will, and inclosed it in a piece of writing paper, and sealed it up, and wrote on the paper thus inclosing it, 'My will,' and placed it in her writing-desk; saying to me, as she did so,—'When I am dead, Eames, tell the dean where to find my will.' Mr. Pritchett then asked the deceased how she was, and, finding that she had had nothing at that moment to say to him about her health, took his leave. I remained with the deceased a short time afterwards, and she gave me some domestic orders, after which I also left her, and went down stairs. No one was present on the occasion, besides the deceased, Mr. Pritchett, and myself. The deceased was of perfectly sound mind at the time, and perfectly capable of making her will. She, at that time, and at all other times of my acquaintance with her, until within a fortnight of her death, used to manage her household affairs, and to settle her weekly bills with me in the most correct manner possible: and I then, and at all other times of my acquaintance with her, considered her perfectly capable of managing her own affairs. There was some sealing-wax on the will before I saw it; and, when the deceased sealed it, as I [910] have deposed, she put a little more sealing-wax on it, using for that purpose a small taper which stood on the drawing-room mantel-piece; and, in the sight of Mr. Pritchett and myself, she made the impression of her initials on the sealing-wax, with a small seal hanging to her watch, but rather larger, perhaps, than the seals which ladies use at the present day. She then put her finger on the seal on the will, and said to Mr. Pritchett and myself, 'I declare this to be my last will and testament,' as I have already deposed. The will now produced to me by the examiner, marked with the letter A. (the same being the articulate script, marked A., propounded in this cause), is the very will of which I have been deposing. The same was executed by the said deceased on the aforesaid 17th of February, 1826, the day of the date thereof, in my presence, as I have now deposed. The name and addition, 'Mary Eames, housekeeper to Mrs. Ireland,' appearing subscribed on the said will as those of an attesting witness thereto, are my name and addition, and of my handwriting and subscription.

"Fourth. To the fourth article,—I have seen the deceased write and subscribe her name on very many occasions. I saw her write as often as three or four times a week, on an average, during the whole period of my being in her service. I am well acquainted with her handwriting. I have now inspected her aforesaid will. The whole body, series, and contents of it appear to me to be of her handwriting; and I have no doubt that they are so. The names 'Susanna Ireland' subscribed thereto appear to me also to be of her handwriting and subscription; and I should have known them to be such, independently of having seen the deceased subscribe the same, as I have deposed. The date thereof 'February 17th, 1826,' &c., appear to [911] me also to be respectively of the handwriting of the deceased; and I have no doubt that they are so."

The same witness, examined on the interrogatories:—

"First.—It is nineteen years since the death of Mrs. Ireland, the deceased in this cause. She did die in the same year in which she signed the paper in question in this cause. She lived for near nine months after having signed that paper. At the time I affixed my name to that paper, I did not know that it was of a testamentary nature. I first mentioned that I had signed such a paper, to a young woman, then my fellow-servant, named Frances Goodall. I mentioned it to her at the time, as we were together in the deceased's house. The deceased published the paper or script propounded, as her last will, by saying to Mr. Pritchett and myself (as deposed in chief,) 'I declare this to be my last will and testament,' as she put her finger on the seal of it, as pre-deposed. Those were the words made use of by her, signifying her publication of it. I did not see the deceased write that paper. I saw her write only two or three lines at the conclusion of it, as I have deposed. I did not, at the time I put my name to it, know its contents; but, on the following day, the deceased told me 'that she had left her money to her own family.' I can recollect that the deceased, on the occasion of her signing the paper in question, said to Mr. Pritchett and myself, —'You look and see me sign my name.' She so expressed herself before she subscribed her name to the said paper; and immediately afterwards she repeated the same thing, by saying to us,—'You have seen me write my name,' as she asked us to sign the will as witnesses. My fellow subscribing witness, Humphrey Pritchett, was present when she so expressed herself.

"Second. The paper propounded in this cause was sealed in my presence. It was sealed by the deceased. **[912]** Sealing-wax was affixed on it as a seal, before the deceased subscribed her name; and, again, after she had done so, she made a fresh seal on it, and impressed the initials of her name on the wax with her seal. She made the fresh seal by putting more sealing-wax on the will, on the same place where the sealing-wax had been previously affixed. She then sealed the will, by putting her finger on the seal, and saying to Mr. Pritchett and myself,—'I declare this to be my last will and testament,' as I have deposed in chief. The said Humphrey Pritchett was present when the paper was so sealed. I have now been again shewn the said paper. The interlineation 'and sealed,' appearing in the attestation clause, was written in my presence by the deceased, before I and my fellow subscribing witness signed our names to the said paper. I remember perfectly well that the deceased said,—'Oh! I have omitted putting sealed,' and that she put in the words 'and sealed,' as they now appear in the said will. She did that after she had signed, sealed, and published the will herself, and before Mr. Pritchett and I signed it. When she asked us to sign it, she read over the words 'signed in the presence of' (appearing on the said will) to Mr. Pritchett, for him to tell her if they were correct; and thereupon it was discovered that she had omitted the word 'sealed.'"

The question for the opinion of the court is,—whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the said power of appointment so limited or given to the said Susanna Ireland by, and contained in, the said indenture of release and settlement of the 28th of January, 1794.

The case was argued in Hilary term last.

Malins (with whom was Crowder), for the plaintiff. By the terms of this power, its execution is to be by **[913]** will signed and published, and attested, by two or more credible witnesses. Whether "publication" is or is not capable of definition, it is, at all events, something so substantial, that, if the power requires that the will shall be published, not only must it be published, but the publication must be attested: and, not only must the prescribed formalities be complied with, but the fact of their having been complied with must appear upon the face of the instrument. In *Wright* v. *Wakeford* (4 Taunt. 213), a power to trustees, with the consent of the cetteux que trust, testified by writing under their hands and seals, attested by two or more credible witnesses, to make sale of lands, was held (by Heath, Lawrence, and Chambre, JJ., against the opinion of Sir James Mansfield, C. J.,) not to be well pursued by an instrument only sealed and delivered in the presence of the two witnesses. And that decision was followed by the court of King's Bench in *Doe d. Mansfield* v. *Peach* (2 M. & Selw. 576), and *Wright* v. *Barlow* (3 M. Selw. 512). And the rule being considered to be so settled as to be beyond judicial interference, the legislature interposed to remedy, to some extent, the inconvenience that was found to arise from it; and, by the 54 G. 3, c. 168, s. 1,—reciting that "whereas powers, authorities, and trusts are, in many cases, required to be executed by deeds or instruments signed by or under the hands of the persons executing the same, or persons consenting to, or directing, acts respecting such powers, authorities, and trusts, are frequently required to signify such consent or direction by deeds or instruments signed by them, or under their hands, and it has been the ordinary practice, in the memorandum of attestation of deeds, to express the facts of sealing and delivery only: and whereas doubts have **[914]** arisen respecting the validity of deed or instruments so attested and requiring signature, although the same may have been actually signed by the person whose signature is required thereto, and the titles of many purchasers, and of other persons claiming under such instruments, may be defective, for want of the insertion of the word 'signed,' or some word to that effect, in the memorandum of attestation thereof:

and whereas it is expedient that the titles of purchasers and other persons should not be disturbed, merely on account of the omission to express the fact of signature in the memorandum of attestation of any such deed or other instrument already made,"—it is enacted "that every deed or other instrument already made with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person whose consent or direction may be necessary to be so signified, shall (if duly signed and executed, and in other respects duly attested,) be, from the date thereof, and so as to establish derivative titles, if any, of the same validity and effect, and no other, at law and in equity, and provable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof, or the presumption, of signature." But, down to the present hour, where a power is to be exercised by deed or instrument inter vivos, attended with the three formalities of signature, sealing, and delivery, an attestation of two of them only is insufficient. This doctrine, it must be conceded, has in some instances worked injustice, which has very properly been remedied by the 13th section of **[915]** the recent wills act, 7 W. 4 & 1 Vict. c. 26 (*a*). If "publication" means nothing, why should the legislature enact that no publication shall in future be required, beyond what is there prescribed? Whatever publication may be, it is at all events essential,—at least, so Sir V. Gibbs seems to have thought, in *Moodie* v. *Reid* (7 Taunt. 355),—that the fact of the paper being a testamentary paper, should be communicated to the attesting witnesses. That the will in this case was signed, is clear; and there is no doubt that it was published in fact: but there is no attestation of the latter requirement. In *Buller* v. *Burt* (cited 4 Ad. & E. 15), a married woman impowered by settlement to dispose of personal property, by any deed "sealed and delivered in the presence of and attested by two or more credible witnesses," executed an instrument purporting to be a disposition of part of that property in favour of the defendant: the deed was attested thus,—"Signed and sealed at Cotton aforesaid, this 13th day of September, 1813. A. B., C. D.:" and it was held that this was not a due execution of the power. *Wright* v. *Wakeford*, *Wright* v. *Barlow*, and *Buller* v. *Burt*, were all cases of deeds: *Moodie* v. *Reid* was the first case in which the question arose upon a will. The form of the power in that case is not to be distinguished from that now under discussion. The court, therefore, cannot hold the power to have been well executed here, without distinctly overruling that case. *Mackinley* v. *Sison* (8 Sim. 561) is identical with *Wright* v. *Wakeford*. In *Doe d. Hotchkiss* v. *Pierce* (6 Taunt. 402), this court adhered to *Wright* v. *Wakeford* and *Doe d. Mansfield* v. *Peach*. There, the attestation noticed the signing, but omitted the sealing, which was **[916]** required by the power to be attested; and the power was held not to be well executed; and the case was considered to be not within the act. In *Stanhope* v. *Keir* (2 Sim. & Stu. 37. And see *Doe* v. *Keir*, 4 M. & R. 101), where a power was to be executed by a will, signed and published in the presence of, and attested by, three witnesses,—it was held that a will concluding with this declaration, "This is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, the publication not being attested. In *Allen* v. *Bradshaw* (1 Curteis, 110), a power in a feme covert, to dispose of personal property by will "to be signed and published, in the presence of, and to be attested by, two or more credible witnesses," was held not to be sufficiently exercised by a writing purporting to be her will, and to be signed, but omitting to state that it was published by her in the presence of two witnesses: and in *George* v. *Rielly* (2 Curteis, 1), a power in a married woman to dispose of personalty by will "to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses," was held not to be duly exercised by an instrument signed and sealed in the presence of two witnesses, the attestation clause being—"Witnesses to the execution hereof:" and, in both these cases, evidence aliundè that publication had taken place, was held to be inadmissible. *M'Queen* v. *Farquhar* (11 Ves. 467) and *Warren* v. *Postlethwaite* (2 Coll. C. C. 108), which may be relied on for the defendants, are altogether distin-

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(*a*) "That every will executed in manner hereinbefore required, shall be valid without any other publication thereof."

guishable from the present case: there, no attestation was required; and it was held that the mere circumstance of there being an attestation clause specifying certain things, did not exclude evidence that other **[917]** things were done besides those which were attested. [V. Williams, J. The attestation in those cases gave an imperfect history of the transaction.] *Ward* v. *Swift* (1 C. & M. 171), *Simeon* v. *Simeon* (4 Sim. 555. See 1 P. & D. 679), and *Lempriere* v. *Valpy* (5 Sim. 108), all proceeded upon the principle that delivery of a will is tantamount to publication, and therefore that an attestation of the former was also an attestation of the latter. That shews how tenaciously the courts adhered to *Moodie* v. *Reid* and *Stanhope* v. *Keir*. These two last-mentioned cases were cited and commented upon in *Burdett* v. *Doe d. Spilsbury* (6 M. & G. 386, 7 Scott. N. R. 66, 10 Clark & Fin. 340), and not a syllable of objection, not a shade of doubt or suspicion, was thrown upon their authority; for, the observations there made upon *Stanhope* v. *Keir*, by Erskine, J., are not to be understood as impugning its authority, but merely as an expression of that learned judge's regret that so technical a rule had ever been established. The only remaining cases are, *Mackinley* v. *Sison* (8 Sim. 561) and *Bartholomew* v. *Harris* (15 Sim. 78). *Mackinley* v. *Sison*, it is very difficult to deal with. The power there was to be exercised by deed, or by will signed and published in the presence of, and attested by, two witnesses: two points were there discussed,—first, whether there was a sufficient reference to the property over which the power was to operate,—secondly, whether the power was well executed in point of form. The first was the main point: the second was disposed of very shortly, without much consideration, and without reference to any of the authorities. It is impossible, therefore, to impute to the Vice-Chancellor an intention to overrule the cases now relied on. If he did so intend, he clearly **[918]** came to an erroneous conclusion. In *Bartholomew* v. *Harris*, a will, in order to be a good exercise of a power, was required to be signed and published by the donee, in the presence of, and attested by, two or more credible witnesses: the donee made a will, which was signed by him, and was attested thus:—"We, the undersigned, attest to have seen the above testator sign the above will:" and it was held that this was, in effect, an attestation to the publication, as well as the signature of the will, and, consequently, that the power was well exercised. There, however, the whole was one contemporaneous act; and it must have been presumed that the testator had communicated to the witnesses the fact that the document the execution of which they were attesting, was his will. It is not contended on the other side that signing is publication; but it will be said that signing and sealing together amount to a publication. If, as was held in *Buller* v. *Burt*, an attestation of the signing and sealing does not attest the delivery of a deed, how can it amount to a publication of a will? *Mackinley* v. *Sison* is not to be considered as having been acquiesced in by the House of Lords in *Burdett* v. *Doe d. Spilsbury*. In the latter case, they, in effect, confirmed *Moodie* v. *Reid* and *Stanhope* v. *Keir*.

Humphrey, for the defendants. By the terms of this power, it is the will only that is required to be attested. The case of *Burdett* v. *Doe d. Spilsbury* is almost identical with the present; the only difference being, that, here, the will was not required to be sealed. Maule, J., there says: "The will, on the face of it, professes to be signed, sealed, and published. Considering this case independently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of, and attested by, three witnesses,—which are all the **[919]** conditions imposed by the instrument conferring the power; for, I cannot doubt that the substantive to which the participle 'attested' is to be referred is, the *will*, which *is* mentioned, not signature, execution, &c., which *are not* mentioned." In *Wright* v. *Wakeford*, the consent was to be testified by writing under hand and seal, and the deed was only sealed and delivered. In *Doe d. Mansfield* v. *Peach*, the power was to be exercised by writing under hand and seal, to be duly executed in the presence of, and attested by, two witnesses; and the attestation stated only that the deed was sealed and delivered in the presence of the witnesses. In *Wright* v. *Barlow*, the language of the power, and the attestation, were the same as in *Doe d. Mansfield* v. *Peach*. In *Doe d. Hotchkiss* v. *Pierce*, the power was to be exercised by deed or writing under the donee's hand and seal, and attested by two or more credible witnesses; and it was held to be ill pursued by a will apparently under the donee's hand and seal, which seal an attesting witness believed was affixed before execution and attestation,—the attestation not noticing the sealing as well as the signing. There was the omission of a specific ceremony in that case. In *Moodie* v. *Reid*, the attestation was general, nothing being mentioned except signing. In *Stanhope* v. *Keir*, there was no evidence of the execution: and that case is clearly not consistent with *Burdett* v. *Doe d. Spilsbury*. In *Hougham* v. *Sandys* (2 Sim. 95), the power was to be exercised by the donee, by any writing under her hand and seal, attested by one, two, or more credible witnesses, and the deed was signed and sealed, but the attestation contained the words sealed and delivered only; and the Vice Chancellor (Sir L. Shadwell) held the power not to be well executed. That, therefore, was precisely **[920]** like the case of *Wright* v. *Wakeford*. In *Buller* v. *Burt*, the words of the power were, "by any deed signed and delivered in the presence of and attested by two or more credible witnesses;" and a deed thus attested—"Signed and sealed at, &c. A. B., C. D.,"—was held not to be a due execution of the power. In *Waterman* v. *Smith* (9 Sim. 629), a power given to a husband and wife, was to be exercised by them, by any deed or writing under their hands and seals, to be by them executed in the presence of and attested by two witnesses; and it was held that a deed which was signed as well as sealed and delivered by the husband and wife in the presence of two witnesses, was not a good execution of the power, because the attestation clause did not extend to the signature as well as to the sealing and delivery,—Sir L. Shadwell, V. C., observing that the case was not distinguishable from *Wright* v. *Barlow*. In *Simeon* v. *Simeon*, a power over personal property, was required to be executed by a will signed and published in the presence of, and attested by, two witnesses: the donee professed to execute the power, by a will which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign the will in their presence, and the witnesses, at different times, signed an attestation that the testatrix had signed and delivered the will in their presence: and it was held, that, though delivery was equivalent to publication, the power was not well executed. In *Ward* v. *Swift*, premises were conveyed to A. and his wife, after other uses, to such uses as M. S., by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be, her will, or by any codicil to be by her duly executed and published under her hand and seal, in the presence of, and attested by, three or more credible **[921]** witnesses, notwithstanding her coverture, &c., should direct, limit, or appoint, &c.: M. S. signed, sealed, and delivered, as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof, I have set my hand and seal hereto, this 5th day of August, 1801, in the presence of the underwritten: Signed, sealed, and delivered this 5th day of August, 1801, as the last will and testament of the said testatrix, M. S., who, in her presence, and the presence of each other, have put our names as witnesses thereof. H. F., J. G., R. F.:" and it was held that the power was well executed. *Lempriere* v. *Valpy* turned upon a different point: but the Vice Chancellor (Sir L. Shadwell), adverting to *Moodie* v. *Reid*, and the case there cited, says: "But, even admitting those cases to be law, it appeared, by the evidence in this cause, as well as by the written attestation, that the will was produced and delivered by Mrs. Lempriere. In *Moodie* v. *Reid*, lord chief justice Gibbs says: 'If the act of the testatrix, in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also; because they attest that by which she publishes it.' His lordship also says, 'I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will.' And, consistently with what the lord chief justice is reported to have said, my opinion is, that the will in this case, by having been first signed and then delivered to the witnesses by Mrs. Lempriere, in order that they might attest it, has been duly signed and published by her, within the terms of the power." What substantial difference is there between signing and sealing, and delivery? Delivery is not essential in the case of a will. Here, the testatrix seals the will, as an additional **[922]** ceremony, to shew that her mind is complete; and the witnesses attest that this was done in their presence. If delivery, which is no part of a will, is an attestation of the publication, why should not sealing be so? especially where sealing is not required by the terms of the power? *Mackinley* v. *Sison*,—which was a decision by the same learned judge who decided *Hougham* v. *Sandys*, *Simeon* v *Simeon*, *Lempriere* v. *Valpy*, and *Waterman* v. *Smith*,—is a distinct authority to shew that this power was well executed. There, the power was to be executed by deed, or by will signed and published in the presence of, and attested by, two witnesses; and its execution was by will which was expressed to be signed and sealed only, and attested by three witnesses. His honor says: "The father's will requires that the power shall be exercised by his daughter, either by a deed or instrument in writing to be by her sealed and delivered in the presence of, and to be attested by, two or more witnesses, or by her last will and testament in writing, or any writing purporting to be, or being in the nature of, her last will and testament, to be by her signed and published in the presence of, and to be attested by, the like number of witnesses. Now, I find no legal definition or explanation of the meaning of the term 'publication,' and, therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence." The language of the power in that case is almost identical with that of this power. In *M'Queen* v. *Farquhar* (11 Ves. 467), where the power was to be executed by deed, to be signed and sealed in the presence of witnesses, and the attestation was only of sealing and **[923]** delivery, though the deed purported to be signed, sealed, and executed,—it was presumed that the signature was in the presence of the witnesses. Here, it was proved that the will was signed and sealed and delivered by the testatrix as and for her last will; and the 13th section of the 7 W. 4 & 1 Vict. c. 26, is a legislative declaration that this amounts to a publication. In *Curteis* v. *Kenrick* (3 M. & W. 461, 9 Sim. 443), it was held that delivery is equivalent to publication of a will. There, a married women had power, under her marriage-settlement, to appoint certain lands to uses, by her last will and testament, "signed and published in the presence of, and attested by, three or more credible witnesses:" she made a will, containing a devise of all her property real and personal, but not referring to the power: the attestation clause stated the will to be signed, sealed, and delivered by the testatrix in the presence of three witnesses whose names were subscribed: and it was held that the power was well executed. It being suggested by counsel in that case that "it is impossible to define what the mere delivery of a will is," Parke, B., answers,—"Something whereby the party acknowledges that the instrument is a complete act containing his final mind—that it is no longer ambulatory." Sealing is surely a more solemn act of the same character. In stating the grounds of the decision in that case, Lord Abinger says (3 M. & W. 472): "The law has given no definition of the meaning of the word published, when applied to a will. It certainly cannot mean that the whole contents of the will should be made known to the witnesses. If it mean any thing less than that, there is no reason why delivery should not be publication. Delivery is a publication to those who are **[924]** present, of the completion of the instrument, the signing and delivery of which they are called upon to attest. If this case, therefore, were original, we should be disposed to think that delivery was equivalent to publication. But there is sufficient authority to be found for this opinion: first, that of Lord Chief Justice Gibbs, in *Moodie* v. *Reid;* next, that of the Vice-Chancellor, in the case of *Simeon* v. *Simeon*, and also in the case of *Lempriere* v. *Valpy*; and last, though not least, that of Lord Lyndhurst, and the other members of this court, in *Ward* v. *Swift*." *Bartholomew* v. *Harris* is also an authority to shew that here the power was well executed. The view now suggested is strengthened by the cases as to publication of awards. In *Brooke* v. *Mitchell* (6 M. & W. 473), where an order of reference required that the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day,—it was held, that the award was "published," and "ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of, and attested by, a witness. *Miller* v. *Brown* (2 Hagg. Eccl. R. 209), shews the expansive signification of publication. There, a widow having, after the death of her husband, delivered a will, made during coverture, to her executor, for safe custody,—it was held that such delivery, coupled with other recognitions, amounted to a republication, rendering it a new will, of which the executors were entitled to a general probate. Publication is the result of those acts which the law, or the power, requires for the due execution of the will. In *White* v. *The Trustees of the British Museum* (6 Bingh. 310, 3 M. & P. 689), it was held that a will of lands subscribed by three wit-**[925]**-nesses, in the presence, and at the request, of the testator, was sufficiently attested, within the statute of frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. Tindal, C. J., delivering the judgment of the court, saying,—"When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge, in fact, though not in words, to the three witnesses, that the will was his." In *Warren* v. *Postlethwaite* (2 Coll. C. C. 108), a married woman, having power under her marriage-settlement, to dispose of personal estate by a will to be signed and published by her in the presence of two or more credible witnesses, made her will, in pursuance of the power, and signed her name at the foot of it: then followed the signature of three witnesses; and, below those signatures was a memorandum in the handwriting of the testatrix, to the effect that the will had been signed and sealed by her in the presence of the above three witnesses. Upon the examination of the witnesses, after the death of the testatrix, two of them deposed to the testatrix having signed the will in the presence of all the witnesses, but the third stated her belief that the will had been signed before the witnesses entered the room. It was held, that, coupling the memorandum with the testimony of the witnesses, there was sufficient evidence of signing in the presence of the witnesses, or two of them, to satisfy the requisition of the power in that respect; and that the testatrix calling the witnesses to attest her will, sealing it, and declaring it to be her act (which **[926]** circumstances were given in evidence), thereby published her will within the meaning of the power. The rule "expressio unius est exclusio alterius" cannot apply to the attestation. As to the ceremonies attending the execution of deeds, there is no substantial difference between sealing and delivery. Shep. Touchst. 54, 57. This case falls precisely within the principle upon which *Burdett* v. *Doe d. Spilsbury* was decided by the House of Lords. Even the judges who in that case thought that the judgment of the Exchequer Chamber ought to be affirmed, regretted the existence of *Wright* v. *Wakeford* and the class of cases which followed it. Mr. Baron Parke prefaces his opinion with these remarks:—"If the question proposed by your lordships had now arisen for the first time, I feel little doubt that I should have answered it by stating to your lordships that the power was well executed; and that on the ground, that, where the donor of a power requires an instrument to be executed with certain formalities in the presence of, and to be attested by, credible witnesses, he does not require the witnesses to sign a memorandum of attestation expressing that all the formalities were complied with, but simply to put their names to the instrument as witnesses: and, if there had been a special verdict, and writ of error, in the case of *Wright* v. *Wakeford*, and I had been called upon by your lordships to give an opinion on the propriety of that decision, before it had been confirmed by others, I should probably have given my humble advice to your lordships, that it ought to be reversed. The decision, however, in the case of *Wright* v. *Wakeford* not having been reversed, but, on the contrary, followed in others, none of which have been questioned before the highest tribunal, and, having been recognised by an act of parliament, the statute 54 G. 3, c. 168, I think myself bound by the authority of that and the **[927]** subsequent cases; and, feeling so bound, I regret that I have to answer the question proposed by your lordship, in the negative." If even an attestation of publication be necessary, as is urged on the other side, here that ceremony is sufficiently attested.

Malins was heard in reply.

The following certificate was afterwards sent:—

"This case has been argued before us; and we are of opinion that Susanna Ireland's will (or appointment in the nature of a will) was a due execution of the power of appointment limited or given to her by, and contained in, the indenture of release and settlement of the 28th day of January, 1794.

"THO. WILDE. C. CRESSWELL.
"W. H. MAULE. E. V. WILLIAMS."

May 5, 1849.

On the 19th of the same month, Sir James Wigram, V. C. after hearing an argument upon the above certificate, said: "In this case, a power was given which might be executed by deed, which I need not refer to, and which also might be executed by will, which was required to be signed and published by the donee, in the presence of, and attested by, two or more credible witnesses. The donee has executed, or attempted to execute, this power, by will, which is signed and sealed in the presence of, and attested by, the requisite number of witnesses, publication not being expressed either in the attesting clause or in the body of the instrument. The cause came on before this court, and a case was sent for the opinion of the court of Common Pleas; a certificate [928] has been returned, in which all the learned judges concur in favour of the valid execution of the power; but, unfortunately, no reason is assigned for the opinion they have given. If the case of *Wright* v. *Wakeford*,—which I mention as the representative of a class of cases,—had never been decided, I should not, I think, have had much difficulty in deciding this case in favour of the valid execution of the power. Again, taking *Wright* v. *Wakeford*, and the class of cases which it represents, as a sound decision, I should not, I think, have had much difficulty in applying *Wright* v. *Wakeford* to the present case, if it were not for the subsequent decision of the House of Lords in *Burdett* v. *Doe d. Spilsbury*, and for the decision of the Vice-Chancellor in the cases of *Mackinley* v. *Sison* and *Bartholomew* v. *Harris*. These cases appear to me to have introduced a difficulty as to the proper decision to be come to in the present case, which would not have existed independently of those cases. If the principle on which *Wright* v. *Wakeford* was decided be this, that the instrument creating the power requires that the attesting witnesses should actually narrate upon the instrument executing the power, what acts of the donee they attest, and that the court, in requiring such a narrative, were merely executing the express direction of the donor, there might not be much difficulty in applying the principle to the present case: but, if that be the principle, it is difficult to see how the court can dispense with the narrative in the case of a general attestation, any more than in the case of a particular attestation. If, however, the language of several of the judges who assisted in the House of Lords in *Burdett* v. *Doe d. Spilsbury*, and the language of the noble and learned lords who gave their opinions in that case, is to be taken as an exposition of the law, it will be difficult to escape from the conclusion, that, in the case of a general clause of attestation, they thought the narrative might be dispensed [929] with, to the extent, at least, of holding that a jury might presume that the witnesses saw those acts done which the donee of the power, in the instrument executing the power, expressed an intention to do, although there be no evidence that the witnesses were cognisant of the contents of the instrument containing the power. Indeed, it would be difficult to escape from the conclusion, that they were of opinion that the witnesses might be examined to prove what acts of the donee they did, in fact, attest,—that is, in the case of a general attestation. Another difficulty has always occurred to me upon the case of *Burdett* v. *Doe d. Spilsbury*; but which difficulty, looking at the high authority of those who advised on, and decided, that case, I cannot consider as well founded. It is said in that case, that the attesting clause may be read in connection with what was called a testimonium clause. That argument supposes the witnesses to have read, or been informed of the contents of, the testimonium clause, which, however, is part of the will, and not of the attesting clause, and of which the attesting witnesses are never presumed to know the contents: and to this must be added the observation, that the testimonium clause in that case of *Burdett* v. *Doe d. Spilsbury*, mentioned only 'signing and sealing,' and not publishing. The word 'publish' was, indeed, used by the testatrix in that case, Mrs. Skinner, at the beginning of her will; and the witnesses, therefore, must, in that case, have been presumed to have read or known the contents of the whole will: but, at the time the testatrix made use of the word 'publish' she clearly did not do the act which the donor of the power required, for, the substance of the will follows the clause in which the word 'publish' occurs. Mr. Justice Maule, in addressing the House, suggested, that, according to the true construction of the will in *Burdett* v. *Doe d. Spilsbury*, all that the donor required was, that the will [930] should be attested, and not the formalities,—which, he said, would distinguish the case of *Burdett* v. *Doe d. Spilsbury* from *Wright* v *Wakeford*. And the noble and learned lords who gave their opinion in the case, appear to me not to have disapproved of, but to have been disposed to adopt, the distinction suggested by Mr Justice Maule; but they distinctly disclaimed putting their decision on that ground. The cases of *Mackinley* v. *Sison* and *Bartholomew* v. *Harris* appear to me to be important authorities in support of the certificate in the present case: but it will be difficult to reconcile those cases with the case of *Moodie* v. *Reid*, and other cases, in which it has been held that the publication is to be a distinct act, and not, as the Vice-Chancellor appears to have thought in *Mackinley* v. *Sison*, a thing to be inferred from the mere fact that the deed required the witnesses to attest something. I have not, in the present case, the advantage of knowing on what grounds the learned judges who have sent me their certificate, have decided the present case. I find myself in this difficulty,—all the opinions given in *Burdett* v. *Doe d. Spilsbury* appear to me to profess to save whole *Wright* v. *Wakeford.* I do not even except Mr. Justice Maule, who evidently felt disposed to think that case ought to be excepted In *Burdett* v. *Doe d. Spilsbury*, the word 'publish' was found in the instrument executing the power; and stress was laid upon that circumstance. In this case, the word 'publish' is not found in the instrument executing the power; and I am left in doubt whether the certificate has been founded on the distinction suggested by Mr. Justice Maule, to which I have already adverted; or whether it has been given upon the authority of *Mackinley* v. *Sison* and *Bartholomew* v. *Harris;* or whether it has been given upon the ground,—strongly insisted on in the argument before me,—that the seal of the donee (a formality not re-**[931]**-quired by the donor) was to be deemed a publication; or whether they have proceeded upon any ground which has not been suggested in argument. Considering that this is a case to be determined by a court of law, it is of very great importance that I should know upon what ground the court of law has proceeded. I cannot, with any satisfaction to myself, confirm the certificate, without knowing the reasons upon which it is founded: and I do, though with great reluctance, decide that this case should be sent again to a court of law. I wish the parties, however, distinctly to understand that I do not myself do this upon the ground that I think the certificate may not be supported. The law is really in such a state of uncertainty, that, for me to confirm it in the present instance, would not be adopting the opinion of the court of law, but would be giving an opinion of my own. The case must go to some other court."

The case was accordingly sent for the opinion of the barons of the Exchequer, and was argued on the 3rd of May, 1850, by Malins, for the plaintiff, and Humphrey, for the defendants; and on the 8th of July, that court certified,—as the court of Common Pleas had done,—that the power was well executed.

In stating the reasons which induced the court to come to this conclusion, Alderson, B., said:—"The attestation clause is as follows,—'Signed and sealed in the presence of Humphrey Pritchett (described) and Mary Eames,' described also. The question is, whether this is sufficient. It depends upon the state in which the law was left by the case of *Burdett* v. *Doe d. Spilsbury*, in the House of Lords. We are unable to see how, after that decision, the law, previously considered to be established by the well-known case of *Wright* v. *Wakeford*, can be considered in force. It seems to us that it was by the decision of *Burdett* v. *Doe d. Spilsbury*, overruled. If that be so, it is quite clear this **[932]** power was well executed. But we are embarrassed by certain dicta of the noble lords by whom the decision of *Burdett* v. *Doe d. Spilsbury* was pronounced,—in which they say they do not mean to overrule *Wright* v. *Wakeford*, but to leave its authority untouched, and confine their decision to the case where the attestation is general, and omits altogether all mention of formalities required by the power to be attested. But, even if this case be so, we still think this power was well executed. It is conceded that the attestation need not follow the words of the power literally; for, when the power given is to be exercised by signing and publishing a will, by having an attestation of both these formalities, it would clearly be well executed if the attestation expressed that it was signed and delivered: and this was expressly so determined by the court in a case of *Ward* v. *Swift*, and by the Vice-Chancellor Shadwell in *Simeon* v. *Simeon.* Now, what is the principle which governs those decisions? We think it is this,—that, if the attestation expresses, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it would be sufficient; but that, when the framer of the power requires two or more such acts to be done, then, if the attestation expresses only the doing of one of them, even though all persons would clearly infer the other act had also taken place, it would not be sufficient; for, in this latter case, it is clear, the framer of the power really intends something more than the act expressed in the attestation, because he has expressly added the other act. Thus, in this case, he requires both signing and publishing. The signing, therefore, in the presence of witnesses, though it might naturally and reasonably be also called a publishing, will not alone do; for, he expressly says the will is to be signed in the presence of [933] witnesses, and also published. But here it is both signed and sealed in their presence. Now, if sealing in the presence of witnesses be naturally and reasonably to be considered as a publication,—and we think it may be so considered,—then we have enough in this attestation to fulfil the whole power; for, it is signed in the presence of two witnesses, and it is published also, if being sealed in the presence of witnesses amounts to a publication, as both these acts are stated here in the attestation. We therefore think, for these reasons, that this power was well executed, and shall certify accordingly."

The cause came on again, before Vice-Chancellor Knight Bruce, on the 27th of March, 1851, when the counsel for the defendants asked for the confirmation of the certificate of the court of Exchequer, and for the costs of the suit. For the plaintiff it was submitted, that, as the law, as appeared from the reasons given by Alderson, B., was in an uncertain state with reference to the case of *Wright* v. *Wakeford*, and as this suit was instituted before the decision of *Burdett* v. *Doe d. Spilsbury*, no costs ought to be given against the plaintiff. Knight Bruce, V. C., said:—"I am not aware of any reason or authority for saying that the author of this power meant that there should be a declaration to the witness by Mrs. Ireland of the publication of her will; nor do I understand what 'publication' means. 'Republication,' is a term well known and understood. A will is published when it is made. The word 'publish' is useless, or superfluous, or of no meaning. I confirm the certificate. Let the bill be dismissed, without costs up to and inclusive of the certificate of the court of Common Pleas, and with costs after that time, including the costs of the certificate of the court of Exchequer" (*a*).

[934] JOHNS *v.* DICKINSON. Dec. 10, 1849.

A power was reserved to a married woman to dispose of personal property by her last will and testament in writing, to be by her duly made and published in the presence of, and to be attested by, two or more credible witnesses. The donee, by her will, without any reference to the power, or to the subject-matter, bequeathed to her husband "all that she did and should or would thereafter be entitled to, or should possess;" concluding thus:—"Signed by me, E. J., February 24, 1831, in the presence of two witnesses," and then followed the signatures of the two witnesses:—Held, that this was not a due execution of the power.

The following case was sent by His Honor, Vice-Chancellor Wigram, for the opinion of this court:—

John Hill, late of East Smithfield, in the county of Middlesex, and of Woodford, in the county of Essex, duly made and published his last will and testament in writing, bearing date the 24th of February, 1812, and thereby gave and bequeathed unto his wife Mary Hill and Thomas Dickinson and John King all his ready money and securities for money, stocks or sums in the funds, and all the rest, residue, and remainder of his estate and effects, whatsoever, and of what nature, kind, or quality soever, and not thereinbefore given or disposed of, in or to which he might be interested or entitled at the time of his decease,—Upon trust to invest the same upon government securities in the public funds, and from the dividends and interest to pay the said Mary Hill an annuity of 650l. during her life, or until her second marriage (the same to be reduced to an annuity of 50l. for her life, if she married again); and, subject thereto, the said testator directed that his said trustees should be possessed of the whole of the residue of his personal estate and effects, in trust for all his children who should be living at the time of his decease, or born in due time afterwards, in equal proportions, share and share alike, and to become vested in and payable to them respectively, if males, at the age of twenty-one years, and, if females, at that age, or the [935] day of marriage. And the said testator directed, that, as soon as his daughters respectively should have attained their age of twenty-one years, or be married, a sufficient part of her share and interest of and in the said trust-moneys in the public funds, should be by the said trustees so settled as to secure to her the certain payment of an annuity or clear yearly sum of 50l., for her life, for her sole and separate use and benefit, and totally exempted from the debts, engagements, power,

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(*a*) See the next case.

intermeddling, or control of any person with whom she then had, or should thereafter intermarry, and that her receipts alone should be a full and sufficient release and discharge for the same, notwithstanding her coverture; and that the stock and principal sums whereon and whereby the said annuities to his said daughters respectively should be secured, should and might be at the disposal of each of them his said daughters at and from the time of her decease, and should thenceforth become and be payable to such person or persons, and at such time or times, and in such parts, shares, and proportions, and to and for such uses, intents, and purposes, and subject to such restrictions and contingencies, and in manner and form, as his daughters respectively, in and by their respective last wills and testaments in writing, by them to be respectively duly made and published in the presence of, and to be attested by, two or more credible witnesses, and which will they thereby severally had a power, or were intended to be authorised and impowered, to make, should or might give or bequeath, or order, direct, limit, or appoint the same; and, in default, or for want, of any such gift or bequest, or direction or appointment as aforesaid, then, as to the part or share of the said stocks or securities from the interest or dividends whereof the said annuity became and was payable to the daughter so dying intestate in that respect as aforesaid, the same was to **[936]** go and be divided between and among her own lawful issue, if any should survive her, in equal shares and proportions, share and share alike if more than one, and, if but one, then to such only child, with the like benefit of survivorship, and to be payable to them respectively at the age of twenty-one years, and the interest or dividends, or such part thereof as should be necessary, in the meantime to be applied for and towards the clothing, maintenances, and education of such child or children as aforesaid; and, if no such lawful issue her surviving, or, being any, all of them should depart this life under the age of twenty-one years, then the same to go and be divided between and among the lawful issue of his said other children, with the like benefit of survivorship, and to become payable to them respectively in like manner as aforesaid; and, in default of such issue, to go unto his, the said testator's next of kin, in manner and form as by the statutes of distributions directed.

The said John Hill died in the month of November, 1816; and his said will was duly proved in the prerogative court of the Archbishop of Canterbury, by the said Mary Hill, Thomas Dickinson, and John King, the executors therein named.

Eliza Hill, one of the eight children of the testator, in 1826 intermarried with Joseph Milbank, and the said Joseph Milbank shortly afterwards died, and there was not any issue of the said marriage. The said Eliza Milbank, formerly Eliza Hill, on the 2nd of June, 1830, intermarried with William Johns.

Thomas Dickinson and John King, as the surviving executors and trustees of the said testator's said will, in pursuance of the said directions in the said will, invested part of the share of the said Eliza, the wife of the said William Johns, in the residuary personal estate of the said testator, in the purchase of the sum of **[937]** 1428l. 11s. 6d. new three and a half per cent. annuities, in their joint names, the dividends upon which sum produced the yearly sum of 50l.

Shortly after the marriage of William Johns, an indenture, dated the 2nd of March, 1831, and purporting to be made between the said Thomas Dickinson and John King, of the one part, and the said William Johns and Eliza his wife, of the other part, was executed by the said Thomas Dickinson and John King,—whereby, after reciting the said will of the said testator, and the facts hereinbefore stated, it was witnessed that the said Thomas Dickinson and John King did, for themselves, their heirs, executors, and administrators, covenant and declare with and to the said William Johns and Eliza his wife, their executors, administrators, and assigns, that they the said Thomas Dickinson and John King, their executors, administrators, and assigns, should and would stand and be possessed of and interested in the said sum of 1428l. 11s. 6d. new 3½ per cent. annuities, invested by them as aforesaid, and which then stood in their joint names in the books of the governor and company of the Bank of England, and of and in the dividends, interest, and annual produce thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations in and by the thereinbefore-recited will of the said John Hill expressed and declared of and concerning the trust-moneys, stocks, funds, and securities directed to be set apart for securing of an annuity of 50l. for the life of the said Eliza Johns, as one of the daughters of the said testator.

The said Eliza Johns departed this life on the 23rd of October, 1841, having previously made and signed a document or instrument in writing, dated the 24th of February, 1831, in the words and figures following:—

"In the name of God, amen.—This is the last will **[938]** and testament of me, Eliza Johns, the wife of William Johns, woolstapler, of Chelmsford. I thank God, I am in health both of mind and body; but I think it my duty to make my will, in case I should die before my dear husband, in order to prevent any dispute. I give and bequeath to my dear husband, the said William Johns, woolstapler, of Chelmsford, all that I do and shall or will hereafter be entitled to, or shall possess, at his whole and sole disposal; and I do appoint and fix my dear husband, the said William Johns, woolstapler, of Chelmsford, my whole and sole executor: And may the Lord be with him, and bless him in all his undertakings, is the sincere prayer of his affectionate wife.

"Signed by me, "ELIZA JOHNS,
"Feb. 24th, 1831, in the year of our Lord.

"In the presence of two witnesses,
"Thomas Milbank, Ironmonger, Chelmsford,
"Mary Ann Barnard."

On the 30th of May, 1844, the said William Johns, proved the said will of his said wife, in the prerogative court of the Archbishop of Canterbury.

Mary Ann Newell, formerly Mary Ann Barnard, a witness sworn and examined in a suit in the high Court of Chancery, in which William Johns was the complainant, and Thomas Dickinson and others were the defendants, deposed that the said Eliza Johns signed the document produced and shewn to the deponent, and declared it to be her will, at the time it bears date, in the joint presence of the witness and of Thomas Milbank of Chelmsford, Ironmonger; that the witness did not remember that the said Eliza Johns did anything on that occasion, as regarded the said produced document, except that, when she had signed it, and declared it to be her will, she handed it over to Mr. Milbank and the witness to sign it; she at the same time observed that she gave all she might die **[939]** possessed of to her husband, and that the witness and the said Thomas Milbank might one day be called upon to prove the paper; that the witness and the said Thomas Milbank then signed their respective names or signatures to the said produced will, as witnesses thereto, in the presence of the said Eliza Johns and of each other; and that the name or signature "Mary Ann Barnard," which is signed to the said will, as one of the witnesses thereto, and which was her then name, was in the witness's own handwriting, and the name or signature "Thomas Milbank," signed to the said will, as the other witness thereto, was of the handwriting of the said Thomas Milbank.

Thomas Milbank, a witness also sworn and examined in the said suit in the court of Chancery, deposed that the document produced and shewn to him was signed by the said Eliza Johns, and declared to be her will, at the time it bears date, in the joint presence of the witness and Mary Ann Barnard, afterwards Mrs. Newell, the wife of John Newell; that the said Mrs. Johns then handed the said document to the witness and the said Mary Ann Barnard, in order that they might attest it; that the witness and the said Mary Ann Barnard then accordingly signed their respective names or signatures to the said produced will, as witnesses thereto, in the presence of the said Eliza Johns, and of each other; and that the name or signature "Thomas Milbank," signed to the said produced will, as one of the witnesses thereto, was of the witness's own handwriting, and the name or signature "Mary Ann Barnard," signed to the said produced will, as the other witness thereto, was of the handwriting of the said Mary Ann Barnard, afterwards Mrs. Newell.

The question for the opinion of the court, is, whether the document or instrument of the 24th of February, **[940]** 1831, was a due execution of the power given to Eliza Johns, as one of the daughters of John Hill, by the said will of John Hill, dated the 24th of February, 1812.

W. Bigg, for the plaintiff. The power here does not require the will to be signed by the testatrix: it is to be "duly made and published in the presence of, and to be attested by, two or more credible witnesses." In *Burdett* v. *Doe d. Spilsbury* (6 M. & G. 386, 7 Scott, N. R. 66, 10 Clark & Fin. 340),—where all the earlier authorities are discussed,—it was held that a power of appointment "by a will to be signed, sealed, and published by A. B., in the presence of, and attested by, three credible witnesses," was well executed by an instrument concluding thus,—"I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, set my hand and seal, this 12th of December, 1789;" such instrument being signed by A. B., and a seal appearing opposite to such signature, and the words "Witness, C. D., E. F., G. H.," appearing in the usual place of attestation, and it being shewn, by extrinsic evidence, that the instrument was, in fact, so signed, sealed, and published. Maule, J., in the opinion given by him in answer to the questions propounded to the judges, says (6 M. & G. 406, 7 Scott, N. R. 85, 10 Clark & Fin. 360): "All that is required to make a good execution by will is, that the will be in writing, signed, sealed, and published in the presence of, and attested by, three credible witnesses. The jury have found that the will was signed and sealed and published in the presence of three persons whom it names, and that it was attested by them in the manner which appears in the instrument, which is, by writing their names under **[941]** the word 'witness.' The will, on the face of it, professed to be signed, sealed, and published. Considering this case independently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of and attested by three witnesses; which are all the conditions imposed by the instrument conferring the power; for, I cannot doubt that the substantive to which the participle 'attested' is to be referred, is the will which is mentioned, not signature, execution, &c., which are not mentioned." [Cresswell, J. All the cases upon this subject were cited in *Vincent* v. *The Bishop of Sodor and Man* (ante, p. 905), where we held a power under similar circumstances to have been well executed. Younge. The Vice-Chancellor (Sir James Wigram), being disappointed at this court's sending a mere certificate in that case, and giving no reasons for the opinion to which they came, sent another case for the opinion of the court of Exchequer, which is now pending (*b*)[1].] This is, within all the cases, a good exercise of the power. [Maule, J. The objection here will be, that it does not appear upon the face of the will, that it was published.] It is submitted that that does sufficiently appear. In *Mackinley* v. *Sison* (8 Sim. 561), the testator gave to trustees a sum of 3 per cents. in trust for his daughter for life, and, after her decease, in trust for such persons and for such purposes as she should, either by deed, or by her will, signed and published by her in the presence of and attested by two witnesses, appoint, and, in default of appointment, in trust for children; but, if she should leave no child, then in trust for the testator's **[942]** other daughters and their children. The daughter, by her will, which was expressed to be signed and sealed only, but which was attested by three witnesses, gave several pecuniary legacies, and directed them to be paid out of the moneys invested in her name in the 4 per cent. government securities. The daughter died unmarried. She had no 4 per cents. standing in her name, nor was there anything to satisfy the legacies, except the 3 per cents. standing in the names of the trustees of her father's will. It was held that the power was not confined to the daughter's children, but was general; and that her will was a due execution of it. The Vice-Chancellor (Sir L. Shadwell) there says: "I find no legal definition or explanation of the meaning of the term 'publication'; and, therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence." So, in *Bartholomew* v. *Harris* (15 Sim. 78), a will, in order to be a good exercise of a power, was required to be signed and published by the donee, in the presence of, and attested by, two or more credible witnesses. The donee made a will, which was signed by her, and was attested thus—"We, the undersigned, attest to have seen the above testator sign the above will:" and it was held that that clause was, in effect, an attestation to the publication as well as to the signature of the will, and, consequently, that the power was well exercised. *Stanhope* v. *Kier* (*b*)[2], and *Moodie* v.

(*b*)[1] The case of *Vincent* v *The Bishop of Sodor and Man*, has since been argued in the court of Exchequer, and a certificate given in conformity with that given by this court, but accompanied by reasons.

(*b*)[2] 2 Sim. & Stu. 37. Where a power was to be exercised by a will signed and published in the presence of, and attested by, three witnesses:—Held, that a will concluding with this declaration—"This is my last will and testament," and expressed

Reid (c) **[943]** are, in effect, overruled by *Burdett* v. *Doe d. Spilsbury*: and, if they are still to be considered as law, they are not inconsistent with the present argument. In *Ward* v. *Swift* (1 C. & M. 171), by indenture of lease and release, certain premises were conveyed to A. and his wife, after other uses, to such uses as M. S., by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be her will, or by any codicil to be by her duly executed and published under her hand and seal, in the presence of, and attested by, three or more credible witnesses, notwithstanding her coverture, &c., should direct, limit, or appoint, &c. M. S. signed, sealed, and delivered as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof, I have set my hand and seal thereto, this 5th day of August, 1801, in the presence of the underwritten, Mary Swift (L.S.). Signed, sealed, and delivered this 5th day of August, 1801, as the last will and testament of the said testatrix M. S., who, in her presence, and in the presence of each other, have put our names as witnesses thereof. H. F., J. F., R. F.:" and it was held that the power was well executed; delivery being equivalent to publication. Upon these authorities, it is submitted that all has been done here that was required to make this will a good and valid exercise of the power.

The next question arises under these circumstances: Eliza Johns had power to dispose of a sum of 1428l. 11s. 6d. new 3½ per cent. annuities. By her will she makes a general bequest of the whole of her **[944]** property. She being at the time a married woman, her will could only operate upon this money. [Maule, J. I do not find that the case negatives her having other property. The general rule is, that, to be an execution of a power, the will or other instrument must refer to the power or to the subject.] If nothing else be shewn upon which the will could operate, it will be assumed that it intended to deal with that which was the subject of the power. In *Curteis* v. *Kenrick* (9 Sim. 443, 3 M. & W. 461), by a marriage-settlement, freehold lands were conveyed to trustees during the joint lives of the husband and wife, for her separate use, and the other moiety to the husband, and, after the decease of one of them, to the use of the survivor, with remainder to the use of the children of the marriage, with remainder, in default of such issue, if the wife should survive the husband, to the use of her in fee, but, if not, then to such uses, &c. as she, notwithstanding her coverture, by her will, by her signed and published in the presence of, and attested by, three or more credible witnesses, should appoint, and, in default of appointment, to the use of her in fee. The wife died in her husband's life-time, having made a will which purported to be signed, sealed, and delivered by her, and by which, without referring to any power, she gave all the property of which she was possessed, whether real or personal, and also her reversionary interest or interests in any property or properties whatsoever, to her husband. And it was held that the will was a due execution of the power given to the wife by the settlement. [Maule, J. Suppose the wife had several powers?] This would be a good execution of them all. [Maule, J. The affirmative is on the plaintiff: if the matter is left doubtful, the plaintiff must **[945]** fail.] *Churchill* v. *Dibben* (2 Ld. Ken., 2nd part, 68) is also an authority to shew that this is a due exercise of the power.

Younge, for the defendant. The power in this case is to be exercised by a will, to be "duly made and published, in the presence of, and to be attested by, two or more credible witnesses." Mrs. Johns's will, therefore, which was signed and attested, but not "published," is not a due exercise of the power. In *Moodie* v. *Reid*, the power was to be exercised by a will "signed and published;" and the appointment was made thus,—"These my last bequeaths, signed by me this 4th Feb. 1812. S. M. Witness, B. H. and J. H.:" the testatrix told each of the witnesses that that paper was her will; and this court held that the will was not a sufficient execution of the power. Gibbs, C. J., there says: "Here, the power is to be exercised by a will signed and published. Therefore, there must be some publication here: the will must be

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to be signed by the testatrix in the presence of three attesting witnesses, was not a good appointment, because the publication was not attested.

(c) 7 Taunt. 335 (and see 1 Madd. 516). An appointment by will was thus made: "These my last bequeaths, signed by me this 4th of February, 1812. S. M. Witness, B. H. and J. H." The testatrix told each of the witnesses that that paper was her will:—Held, that this was not a sufficient execution of the power.

signed, published, and attested; and there must therefore be some attestation here of signing and publication. Though the most respected late chief justice of this court (Sir James Mansfield) differed from the other judges in *Wright* v. *Wakeford* (4 Taunt. 213, 17 Ves. 454), it is established by that case, that the witnesses must attest everything that is necessary for the execution of the power. Here, the witnesses have clearly attested the signing: the question is, whether they have attested the other formality, of publication, in attesting the signing. If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it attests the publication also, because they attest that by which she publishes it. I called on the bar to say what publication **[946]** was: I do not wonder that I had no answer; for, though the parties use the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as, for instance, of a libel. I know what an uttering is; if a man puts forth base money, in certain cases it is an uttering: but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." It is suggested, on the other side, that that case, and also the case of *Stanhope* v. *Keir*, are overruled by *Burdett* v. *Doe d. Spilsbury*. There, however, the will in fact purported to be published by the testatrix. Here, there is no evidence of publication at all,—none is mentioned in the attestation: the fact of publication is sought to be supplied by extrinsic evidence. [Maule, J. Where signing is not in terms required, is not the signing in the presence of witnesses a sufficient publication?] After *Burdett* v. *Doe d. Spilsbury*, it would be difficult to contend that it is not; though it is to be observed that Mr. Baron Rolfe there takes a different position from that assumed by Mr. Justice Maule. [Maule, J. But one which is not inconsistent with it. What have you to say on the other point?]

A will of a married woman, to be a good exercise of a power, must either refer to the power which it professes to exercise, or to the subject-matter on which the power was intended to operate,—or it must distinctly appear that there is no other property upon which the will could operate. The authorities on this point are clear and consistent. Thus, in *Nannock* v. *Horton* (7 Ves. 391), it was held, that a power of appointment was not executed by a will having no reference to the power, or to the subject of it; and that the court will not inquire **[947]** into the circumstances of the property. In *Jones* v. *Tucker* (2 Meriv. 533), M. M. gave to the defendant all her freehold and copyhold estates, upon trust to permit E. S. to receive the rents, &c., during her life; and, after her death, to sell, and, out of the produce, to pay 100l. to such person as she should by will appoint. E. S., by will, without reference to the power, gave 100l., and the whole of her household furniture, to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property, at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into; and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the 100l. as an execution of her power. But the inquiry was refused, and the bill dismissed. Again, in *Jones* v. *Curry* (1 Swanst. 66), it was held, that the will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate,"—was not an execution of the power. And in *Webb* v. *Honnor* (1 Jac. & W. 352), a testator, having a general power over a sum in the funds, limited, in default of appointment, to his children, and having no other funded property, bequeathed all his personal estate, "consisting of money invested in any of the public funds, household furniture, &c.:" and it was held, that this was not an execution of the power; and that the circumstance of his having no other funded property, was not to be adverted to, on the question whether the testator was or was not executing the power. *Lovell* v. *Knight* (3 Sim. 275) is **[948]** precisely in point: there, a married woman, having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gave to her husband the whole of her property both real and personal, and whatsoever she might possess at her decease: and it was held not to be an execution of the power. The Vice-Chancellor (Sir L. Shadwell) said: "The question, as it appears to me, is, whether I can take this testamentary instrument to be anything else than a general will by the testatrix, meaning to dispose of all her property, in general terms. Here, there is no specific enumeration of the articles of property intended to be deposed of; but she affects to give 'the whole of my property, both real and personal, and whatsoever I may possess at the time of my decease.' Now, I do not think, that, if this person had intended to dispose of all her property, more comprehensive and general terms could have been selected than are here used: and I apprehend it to be perfectly clear, that, wherever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property." And, in *Lempriere* v. *Valpy* (5 Sim. 108, 121), the same learned judge says: "It cannot be assumed, on principle, that the will of a feme covert is, of necessity, altogether inoperative as a will. And no case has been quoted, nor, at the hearing, did I recollect any, nor have I since been able to find any, in which it has been held that the will of a feme covert, professing to give all her property, in general terms, must be taken to be an execution of mere powers which she may possess. If any such case had existed, the counsel for the plaintiff (Sir Edward Sugden), whose able Treatise on the Doctrine of Powers is so well known to the profession, would have named it." **[949]** It is possible here that the testatrix may have had other property upon which the will could operate: she might have savings. [Maule, J. Or, she may have intended to save,—which is the more probable conjecture, seeing the amount of her annuity!] If she had none, that fact ought to have appeared on the plaintiff's case.

W. Bigg, in reply. As to the first point, the case comes completely within the decision of the House of Lords, in *Burdett* v. *Doe d. Spilsbury*. Signing, or sealing, and delivering a will in the presence of a third person is a publication. This instrument purports to be Mrs. Johns's last will and testament: the mere fact, therefore, of her signing it in the presence of two witnesses, was a publication, and consequently the will was a valid exercise of the power.

As to the second point,—*Nannock* v. *Horton*, *Jones* v. *Tucker*, *Jones* v. *Curry*, and *Webb* v. *Honnor*, were all cases of the execution of powers by persons not being under any disability. The only cases upon the subject that have any application, are, *Churchill* v. *Dibben*, *Curteis* v. *Kenrick*, *Lovell* v. *Knight*, and *Lempriere* v. *Valpy*. Consistently with the two former, the court will, it is submitted, hold that this will is a sufficient compliance with the terms of the power.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel: we have considered it, and are of opinion that the document or instrument in question, was not a due execution of the power in question.

"W. H. Maule.
"C. Cresswell.
"E. V. Williams."

[950] In the House of Lords.

Benson v. Chapman. Dec. 4, 1849.

[S. C. 2 H. L. C. 696; 9 E. R. 1256 (with note, to which add), *Assicurazioni Generali* v. *S.S. Bessie Morris Company*, [1892] 1 Q. B. 581; [1892] 2 Q. B. 652.]

The ship "Lord Cochrane," with a cargo on board, left Pernambuco, on a voyage to Liverpool, on the 29th of June, 1839: in proceeding out of the harbour at Pernambuco, she struck on a rock, and was obliged to put back to be repaired: the master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the owner to procure a cargo, proceeded to repair the ship, the repairs continuing from the 29th of June, 1839, till the 4th of January following: the expenses of the repairs amounted to 713l. 3s. 8d., a sum much exceeding the value of the ship and freight, and which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and accordingly executed a bottomry-bond, charging the ship, freight, and cargo: the cargo, which had been necessarily taken out during the repairs, was reshipped, and the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool: the obligees of the bottomry-bond received the freight under a decree of the court of Admiralty. It did not appear when the owner was first informed of the accident to the ship: but it appeared that a letter from Pernambuco, dated the 14th of November, 1839, and received on the 30th of December, containing an intimation that "the 'Lord Cochrane's' expenses were likely to exceed 5000l., with commission, discharging and reloading cargo, &c.," was shewn to him, and that, on the same day, he gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards in respect of either ship or freight.—In an action against the underwriters on freight, claiming for a total loss, by a special verdict, setting out the above facts, the jury found that the plaintiff had acted bonâ fide, without laches and as a prudent owner of the ship and freight, if uninsured, would have acted:—Held,—affirming the judgment of the Exchequer Chamber,—that the plaintiff was not entitled to recover in respect either of a total or of a partial loss of freight,—the freight having actually been earned, and its receipt by the obligee of the bottomry-bond being, in law, a receipt by the plaintiff.—Held also, that it is the duty of the master, in case of damage to the ship, to do all that can be done towards bringing the adventure to a successful termination,—to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous,—and to bring home the cargo, and earn the freight, if possible; that, in the absence of any finding to the contrary, it must be assumed that this duty has been properly performed; that, where the master elects to repair, the mere fact of the expenses of repair ultimately proving to be greater than the value of the ship, would not be sufficient to shew that he acted beyond the scope of his authority, or to entitle the owner to treat him as ceasing to be his agent, as soon as he commenced the repairs; and that, as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the court could not infer that he would not have done so.—A partial loss of freight may be recovered upon a declaration alleging a total loss.

Covenant. Benson (the plaintiff below, as well as plaintiff in error,) declared on a policy of insurance, dated the 12th of July, 1839, made by the defendant **[951]** as chairman of the Neptune Marine Insurance Company, of London, in relation to the ship "Lord Cochrane," at and from Pernambuco to Liverpool, "on freight, valued at 2000l." The declaration further alleged, that, on the 12th of July, 1839, certain goods were loaded on board the "Lord Cochrane" at Pernambuco, and that the ship proceeded therewith on her voyage; and that the plaintiff and one William J. C. Benson were interested in the subject-matter of assurance; that the ship, with the said goods on board thereof, departed and set sail from Pernambuco aforesaid, and that during the continuance of the risks in the policy mentioned, and whilst the ship was proceeding on her said voyage, with the said goods so on board of her as aforesaid, and whilst she was leaving the harbour of Pernambuco aforesaid, to wit, on, &c., the ship struck and was driven, by the perils and dangers of the seas, and the violence of the winds and waves, against and upon a certain bank and reef off the said harbour there, and thereby then became and was bulged, strained, broken, damaged, spoiled, and destroyed, and was thereby wholly disabled from proceeding on her said voyage, and became and was wholly lost; that by means thereof the said freight became and was wholly lost to the plaintiff; that of all the premises as well the defendant as the said company, had due notice, to wit, on the day aforesaid; that the plaintiff thereupon then requested the defendant to pay to him the plaintiff the said sum of 2000l. so insured by him as aforesaid, and which he the defendant, by reason of the premises, **[952]** and according to the custom of merchants, then ought to have paid to the plaintiff, according to the tenor and effect of the said policy of insurance; and that, at the time of the making of the said policy of assurance, and also at the time of the accruing of the cause of action in that count mentioned, to wit, on, &c., the amount of the individual share of him the defendant in the capital stock of the said company exceeded 2000l.; yet that the defendant did not then pay, nor had he at any time thereafter paid, the said sum of 2000l., or any part thereof, to the plaintiff, but had wholly neglected and refused so to do, &c.

The defendant pleaded,—first, that the plaintiff and the said William J. C. Benson were not, nor was either of them, interested in the said premises in the said policy of insurance mentioned, modo et formâ,—secondly, that the said ship was not, during the continance of the risks in the said policy mentioned, wholly lost, modo et formâ, —thirdly, that the said freight in the declaration mentioned, did not become wholly lost, modo et formâ,—fourthly, that the said loss in the declaration mentioned did not, nor did any part thereof, take place, nor was the same occasioned, by the adventures and perils which the said company were contented to bear, and did take upon them, in that voyage, modo et formâ,—fifthly, traverse of the abandonment alleged in the declaration,—sixthly, a set-off of 4000l. for money had and received.

The plaintiff joined issue on the first five pleas, and to the last replied that he was not nor is indebted, modo et formâ. Issue thereon.

At the trial, before Erskine, J., at the sittings in London after Trinity term, 1842, a verdict was by consent, found for the plaintiff, subject to the opinion of the court of Common Pleas upon a special case, with liberty to either party to turn it into a special verdict,—**[953]** it being agreed, that, upon the argument of the special case, the court should be at liberty to draw all inferences which in their opinion ought to have been drawn by the jury; and that, if the case should afterwards be turned into a special verdict, those inferences should be stated therein as facts found by the jury.

The special case was argued in Michaelmas term, 1843: and the judgment of the court was delivered by Tindal, C. J., on the 6th of December, in that year,—the court holding that, under the circumstances disclosed, the plaintiff was entitled to recover, as for a total loss, against the underwriters on freight (*a*).

By the special verdict,—which was ultimately settled by Maule, J.,—it was found,

As to the first issue, that the plaintiff and W. J. C. Chapman were interested in the premises in the said policy of insurance mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged.

As to the second issue,—that the said ship was, during the continuance of the risks in the policy mentioned, wholly lost, in manner and form as the plaintiff had in his declaration alleged.

As to the fifth issue,—that the freight so insured against by the plaintiff was abandoned, in manner and form as the plaintiff had in his declaration alleged.

As to the sixth issue, that the plaintiff was not indebted to the defendant, in manner and form as the defendant had in his last plea alleged.

As to the third issue,—that, after the commencement, and during the continuance of the risk insured against by the policy in the declaration mentioned, the ship in question being at Pernambuco in the Brazils, **[954]** received goods on board, on freight for Liverpool, in June, 1839; the amount of the freight of which goods was 2200l., in which goods the plaintiff and the other owner of the ship were interested, as in the declaration mentioned: That the ship, being thus laden, sailed from Pernambuco for Liverpool, on the voyage insured against, on the 29th of June, 1839: That, while proceeding out of the harbour of Pernambuco, she, by perils of the sea, struck on a rock and a bank; the damage produced by which rendered it necessary for her to put back to Pernambuco for repair: That she was so put back to Pernambuco for repair; but there being no dry-dock there, nor any other means of examining the ship, to ascertain the nature and extent of the injury, with a view to the requisite repairs, except by heaving down, it became necessary to take out the cargo, and heave the ship down, in order to make that examination: That the said cargo was taken out, and the ship thereupon hove down accordingly; whereupon, several surveys were necessarily made; and, subsequently, the master of the said ship, in concurrence with the firm of M'Calmont & Co., of Pernambuco (to whom, on going out from England, he had been directed to apply for cargo), proceeded to cause such ship to be repaired: That she was under repair from the 29th of June, 1839, to the 4th of January, 1840: That Pernambuco is a place very inconvenient and expensive for the repair of ships: That the repairs so done, the cost of which amounted to 7132l. 3s. 8d.,—a sum exceeding the value of the ship and freight,—were necessary, by reason of the damage aforesaid, in order to make the ship navigable, and in a condition to proceed on her voyage: That, to discharge this sum, every reasonable effort was made, at Pernambuco, to obtain money from various persons on loan, by bottomry, and otherwise: That no money could be obtained, on any terms, until M'Calmont & Co. consented to ad-**[955]**-vance 7132l. 3s. 8d. on bottomry, at 20 per cent. premium; and, accordingly, the master of the ship, on the 6th of January, 1840, at Pernambuco, executed a certain instrument in writing, commonly called a bottomry-bond, to M'Calmont & Co., pledging to them the said ship, freight, and cargo, for that

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(*a*) See *Benson* v. *Chapman*, 6 M. & G. 792, 7 Scott. N. R. 625.

sum and bottomry premium at 20 per cent.: That, on the 30th of December, 1839, the plaintiff was shewn a letter from M'Calmont & Co. to their agents in London, which had been received, and was as follows:—

"Pernambuco, 14 November, 1839.

"The 'Lord Cochrane's' expenses are likely to exceed 5000l., with commissions, discharging and reloading cargo, &c., &c."

That thereupon the plaintiff, on the same day, gave the following notice to the defendant, and to the underwriters on the ship, which the plaintiff had insured with the several insurance offices described in the notice:—

"London, 30 December, 1839.

"My ship, the 'Lord Cochrane,' being insured as follows:—ship, 3000l. with the Indemnity Marine Insurance Company, 700l. with the Dundee Marine Insurance Company, 800l. with the Dundee Sea Insurance Company,—freight, 2000l. with the Neptune Insurance Company; and having sustained damage since she sailed with her cargo from Pernambuco; and I having received information that the expenses incurred in relation to the accident, will exceed the value of the ship and freight, and that the amount will be secured by bottomry, and that the repairs will still be incomplete; I do hereby abandon the said ship and freight to the said respective insurers, according to their respective rights under the circumstances. I have further to acquaint the underwriters, that I am informed that a bill will be drawn **[956]** upon me for the amount, which will exceed 5000l., by the payment of which the bottomry premium may be avoided; and that I shall not accept such bill on my own account, but shall be ready to pay same for their account, upon their putting me in funds for that purpose." (Signed) "Thomas Benson."

"W. Ellis, Esq., Indemnity Mutual Marine Insurance Company, Broad Street, underwriters on the ship, for 3000l.

"A. Crichton, Esq., Dundee Sea Insurance Company, Dundee, ditto, for 800l.

"The Manager of the Dundee Marine Insurance Company, Dundee, ditto for 700l.

"James Mackie, Esq., Neptune Marine Insurance Company, 39 Old Broad Street, underwriters on freight for 2000l.," being the company, as a member of which the defendant is sued on the policy in question:

That the plaintiff did not interfere in any way afterwards, in respect of either ship or freight; nor had he ever received any part thereof, or any satisfaction or benefit on account thereof: That the ship, having received the cargo again on board,—in respect of the reloading of which certain expenses included in the 713l. 3s. 8d. were necessarily incurred,—sailed again from Pernambuco on the 6th of January, 1840, and arrived, with the whole of the original cargo (which was of the value of 19,139l.) on board, at Liverpool, on the 19th of March, 1840: That, upon the arrival of the said ship, proceedings to enforce payment were taken by the obligees of the bottomry-bond, in the court of Admiralty; under the order of which court the ship was sold for 1675l., and the freight collected from the consignees of the goods; and the amount of both, under an order of that court, was paid to the obligees of the bottomry-**[957]**-bond: That, according to the practice and course of business between assured and underwriters in London, in a case of average loss, the amount of the proportion of the 713l. 3s. 8d., and of the bottomry premium, which ought to be borne on account of the freight, was 569l. 11s. 3d.: That, in respect of all the aforesaid premises, the plaintiff and the several other parties acted bonâ fide, and the plaintiff acted without laches, and as a prudent owner of ship and freight, if uninsured, would act:

But, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said freight in the declaration mentioned, did or did not become wholly lost in manner and form as the plaintiff hath in his said declaration alleged, the jurors aforesaid are altogether ignorant; and thereupon they pray the advice of the justices of the court of our Lady the Queen of the Bench at Westminster: And if, upon the whole matter aforesaid, it shall seem to the said court that the said freight in the declaration mentioned, became wholly lost, in manner and form as in the declaration is alleged, then the jurors, &c. say that the said freight in the declaration mentioned became wholly lost, in manner and form as in the declaration is alleged:

But, if, upon the whole matter aforesaid, it shall seem to the said court that the said freight did not become wholly lost, in manner and form as in the declaration in that behalf alleged, then the jurors, &c. say that the said freight did not become wholly lost as aforesaid: And, if the justices of the said court shall be of opinion, upon a consideration of the premises, that, by reason thereof the said freight became partially lost to the plaintiff, but not wholly lost, and that the plaintiff, by reason of the premises, is entitled to recover against the defendant for an average loss, the jurors, &c. find that the said freight became lost to the plaintiff, in manner and form [958] as the plaintiff has alleged in his declaration; and in that case they assess the damages of the plaintiff on occasion of the breach of covenant in the declaration mentioned, besides his costs and charges by him about his suit in that behalf expended, to 569l. 11s. 3d., and, for those costs and charges, to 40s. And because, &c.

As to the fourth issue within joined, the jurors, &c. find, upon and in relation thereto, the said several matters particularly mentioned, and hereinbefore set forth, as found by them upon and in relation to the third issue joined between them the said parties: But, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said loss of the said freight in the declaration mentioned was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff hath in his said declaration in that behalf alleged, the jurors aforesaid are wholly ignorant, &c.: And if, upon the whole matter aforesaid, it shall seem to the said court that such loss of the said freight was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff hath in his said declaration in that behalf alleged, then the jurors, &c. say that the said loss of the said freight was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff had above in his said declaration in that behalf alleged: But, if, upon the whole matter aforesaid, the contrary shall appear to the said court, then the jurors, &c. say that the said loss was not occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage:

And, if it shall appear to the said court of our said Lady the Queen of the Bench, that the verdict ought [959] to be entered for the plaintiff on the said several issues, for a total loss, then the jurors, &c assess the damages of the said Thomas Benson, on occasion of the breach of covenant in the declaration mentioned, besides his costs and charges by him about his suit in that behalf expended, to 2395l. 4s. 2d., and, for those costs and charges, to 40s.

The judgment was formally entered on the 28th of February, 1845,—as to the third issue, "that the said freight in the declaration mentioned became wholly lost, in manner and form as in the said declaration is alleged,"—and, as to the fourth issue, "that the said loss of the said freight in the said declaration mentioned, was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff had in his said declaration in that behalf alleged."

A writ of error was afterwards brought, upon which the common errors were assigned.

The case was argued in Michaelmas Vacation, 1845, before Pollock, C. B., Parke, B., Alderson, B., Patteson, J., Coleridge, J., Rolfe, B., Williams, J., and Wightman, J.

The court of Exchequer Chamber reversed the judgment of the court of Common Pleas on the third and fourth issues, holding that the adventure was not, in point of fact, abandoned, and that, as it was not found, it could not be inferred, that a prudent owner, if uninsured, would not have repaired, and therefore that the underwriters on freight were not liable as for a total loss; and, further, that the court was not at liberty to refer to the finding of the jury upon another issue,—viz. that the ship was wholly lost,—and to take that fact as found, in deciding whether the freight was wholly lost, and lost by a peril insured against.

The plaintiff below thereupon brought a writ of error returnable in parliament.

[960] The case was argued on the 3rd and 4th of July, 1848, the judges present being, Alderson, B., Patteson, J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., and V. Williams, J., and the arguments differing little from those already urged in the courts below.

Sir F. Thesiger and Peacock (with whom was Barstow), for the plaintiff in error, cited the following authorities:—*Poux* v. *Salvador* (1 N. C. 526, 3 N. C. 266, 1 Scott, 491, 4 Scott, 1), *M'Carthy* v. *Abel* (5 East, 388), *Sharp* v. *Gladstone* (7 East, 24), *Case* v. *Davidson* (5 M. & Selw. 79 (in error), 2 Brod. & Bingh. 379, 5 J. B. Moore, 116), *Cambridge* v. *Anderton* (2 B. & C. 691, 4 D. & R. 203; 1 Carr. & P. 213; Ryan & Moody, 60), *Allen* v. *Sugrue* (8 B. & C. 561, 3 M. & R. 9), *Young* v. *Turing* (2 M. & G. 593, 2 Scott, N. R. 752), *Mellish* v. *Andrews* (15 East, 13), *Idle* v. *The Royal Exchange Assurance Company* (8 Taunt. 755, 778, 3 J. B. Moore, 115, 151), *Gardner* v. *Salvador* (1 M. & Rob. 116), *Fleming* v. *Smith* (1 House of Lords Cas. 513), *Webster* v. *Seekamp* (4 B. & Ald. 352), *Cary* v. *White* (1 Bro. P. C. 284 (first edit. 1784); 5 Bro. P. C. 325 (second edit. 1803), the case of the *Alexander* (6 Jurist, 241), *Green* v. *The Royal Exchange Assurance Company* (6 Taunt. 68), *The General Interest Insurance Company* v. *Ruggles* (12 Wheaton's Rep. 408, 413), *Read* v. *Bonham* (3 Brod. & Bingh. 147, 6 J. B. Moore, 397), *Doyle* v. *Dallas* (1 M. & Rob. 48), *Hunter* v. *Parker* (7 M. & W. 322), *Holdsworth* v. *Wise* (7 B. & C. 794, 1 M. & R. 673), Abbott on Shipping (8th edit., by Shee, Serjt., 135), and Park on Insurance (*z*).

[961] Sir F. Kelly, and Martin (with whom was for the defendant in error), cited *Anderson* v. *The Royal Exchange Insurance Company* (7 East, 38), *Holdsworth* v. *Wise*, *M'Carthy* v. *Abel*, *Everth* v. *Smith* (2 M. & Selw. 278), *Falkner* v. *Ritchie* (2 M. & Selw. 290), *Idle* v. *The Royal Exchange Assurance Company*, and the case of the *Gratitudine* (3 Rob. Adm. Rep. 240).

Peacock, in reply, referred to *Idle* v. *The Royal Exchange Assurance Company*, *Buxton* v. *Snee* (1 Ves. jun. 155), *Milles* v. *Fletcher* (1 Dougl. 231), the case of the *Gratitudine*, *Fleming* v. *Smith*, the case of the *Constantia* (2 Rob. Adm. Cas., temp. Lushington, 404), *Johnson* v. *Shepper* (1 Salk. 35), *Young* v. *Turing*, and *Irving* v. *Manning* (1 House of Lords Cas. 287, ante, vol. i. p. 168).

Lord Brougham proposed that the following questions should be put to the judges,—First, "Whether, on the facts stated on the special verdict, the plaintiff is entitled to recover for a total loss of the freight?" Secondly, "Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff is entitled to recover for a partial loss of the freight?" And, thirdly, "Whether the findings of the jury do not entitle the plaintiff to a verdict for 569l., as for a partial loss?" His Lordship added that it might, in the result, be the opinion of the judges that either there had been a total loss, or none at all; but that it would be better that both the questions, as to total and as to partial loss, should be considered by the judges.

The judges who were present at the argument desired time to consider what answers they should give **[962]** to these questions; and, on the 9th of July, 1849, their unanimous opinion was delivered by

ALDERSON, B. The first question put by your lordships to the judges, is,—"Whether, upon the facts stated in the special verdict, the plaintiff was entitled to recover for a total loss of the freight."

We are all of opinion that he was not.

The special verdict states, that the ship, with her cargo, left Pernambuco, on her voyage to Liverpool, on the 29th of June, 1839; that, in proceeding out of the harbour, she struck on a rock, and was obliged to put back to repair; that the master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the plaintiff to procure a cargo, proceeded to repair her; that she was under repair from the 29th of June to the 4th of January following; that the expenses of those repairs amounted to the sum of 7132l. 3s. 8d., much exceeding the value of the ship and freight, which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and executed a bottomry-bond, charging the ship, freight, and cargo; that the cargo had been necessarily taken out during the repairs, but was re-shipped; that the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool; and that the obligees of the bond received the freight, under a decree of the court of Admiralty.

The freight, therefore, having been earned, it is plain that the plaintiff cannot recover for a total loss of that freight, unless he can repudiate all that was done by the master, and treat the ship and freight as wholly lost at Pernambuco on the 29th of June.

(*z*) Page 600,—citing *Gardiner* v. *Croasdale*, 2 Burr. 904, 1 W. Bl. 198, *White* v. *Bodinam*, 2 Salk. 629, 1 Wms. Saund. 312 e.

The special verdict does not state when the plaintiff was first informed of the accident to the ship. The only information to the plaintiff which it notices, is, that **[963]** conveyed by a letter from Pernambuco, dated the 14th of November, 1839, which was received on the 30th of December, in that year, and contains this passage, —"The 'Lord Cochrane's' expenses are likely to exceed 5000l., with commission, discharging and reloading cargo, &c." On the same day, the plaintiff gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards, in respect of either ship or freight.

It is, undoubtedly, a rule, that the facts are to be taken as stated in a special verdict, and that inferences of fact are not to be drawn by the court: but it is material to observe that this special verdict does not state that the plaintiff abandoned when he first heard of the accident, or even when he first knew that the ship was under repair, nor that, in common prudence, he would not, if he had himself been at Pernambuco, and uninsured, have done precisely what the master did.

The duty of the master, in case of damage to the ship, is, to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous; and to bring home the cargo, and earn the freight, if possible.

In the absence of any finding to the contrary, we must assume that this duty was properly performed: and it may well have been so; for, consistently with all the facts found in the special verdict, the expenses, in the course of repairing, may have been discovered to be much greater than was at first contemplated, without any fault in the master, or those under whose advice he acted. Subsequent events may shew that he acted erroneously; but we think it impossible to say that he acted beyond the scope of his authority, or that the plaintiff is entitled to treat him as being no longer his agent, so soon as he commenced the repairs, and to con-**[964]**-sider the ship as a new ship, or the adventure in the voyage home as a new adventure, as he might have done if the master had, as perhaps the facts might have justified him in doing, abandoned the adventure, and sold the ship. The election to repair was made, and the repairs commenced, in July, 1839: and the facts found by the special verdict are not sufficient to shew that the master, in making that election, acted beyond the scope of his authority; for, he certainly had authority to act as a prudent uninsured owner would have done; and it is not found that an owner so situated would have acted differently.

Under these circumstances, the plaintiff was, we think, bound by the election of the master, and could not, in the month of December following, when he heard of the great amount of the expenses, get rid of that election, and put himself in the same situation as if no repairs had been done. The abandonment can have no effect under such circumstances. If the loss, being a loss by damage to the ship, was total in the first instance, no abandonment was necessary: if it was not, abandonment could not, even at the first, make it so; much less, after the plaintiff, by his agent, had elected to repair, and after the repairs had been nearly completed.

In cases of capture or detention, where the loss is apparently total, abandonment to the underwriters on freight may be very important: but, even in such cases, if the ship be re-taken or released, and freight be earned before action brought, the owner cannot recover on the policy on freight; nor, indeed, is there any instance to be found, in which an action for a total loss of freight, has been held to be maintainable, where the freight has been actually earned.

We have no doubt that the receipt of the freight by the obligee of the bond, was, in law, a receipt by the **[965]** plaintiff,—having already expressed our opinion that he was bound by the election of the master to repair, and of course bound by the bottomry-bond which became necessary: and, even if it were not a receipt by the plaintiff, still he would not have been prevented from receiving the freight by the perils insured against, but by his own act in pledging the freight by the bottomry bond; and he might have obtained the freight, if he had chosen to pay off that bond. The freight was not actually lost by the perils insured against; for, it was, in point of fact, actually earned; nor can it be said to be lost to the plaintiff by those perils; but, if lost to him at all, it has been lost by his own acts and omissions.

We say nothing as to the finding of the jury on the issue as to the total loss of the ship; because your lordships' question is confined to the effect of the special verdict, which is found only on the third or fourth issues, and cannot be altered or construed by the finding on the other issues.

To the second question put by your lordships,—"Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff was entitled to recover for a partial loss,"—we answer in the negative. The pleadings, indeed, present no obstacle; for, if a partial loss of freight can be recovered at all, we know no reason why it may not be recovered on a declaration claiming a total loss, as is constantly the case in actions on policies on the ship. But, if any freight was earned, the whole freight was earned; and we have already expressed our opinion that freight was earned. The whole original cargo was re-shipped and brought home.

To the third question put by your lordships, we answer that the findings of the jury do not entitle the plaintiff to a verdict for 569l., as for a partial loss; and the findings on the other issues do not in any respect **[966]** touch this question. As to the sum of 569l., which is alleged to be the proportion of the expenses at Pernambuco which the freight ought to bear, a question might have arisen, if the underwriters on freight had accepted the abandonment, and paid the total loss claimed; for, then, the freight having afterwards been received, if the underwriters had claimed it as money had and received to their use, and could have supported that claim, an attempt might have been made to deduct the 569l. as salvage of the freight: but no such question arises in this action, in which the sum insured is claimed as lost freight, not as money paid by way of average or salvage, or in any other manner than as by loss of freight. The underwriters upon this policy engage only that freight shall be earned, and it has been earned. At all events, if, by the terms of the policy, any other contract can be considered to be entered into, the declaration in this case is not adapted to such contract, or to anything but loss of freight.

July 27, 1849.—On a subsequent day, LORD BROUGHAM said: In this case the learned judges have given an unanimous opinion; and I entertain no doubt whatever upon the question. I, therefore, move your lordships that judgment be given for the defendant in error.

LORD CAMPBELL. This case does not, I think, admit of any reasonable doubt. There is neither a partial nor a total loss of freight, because the goods, the freight of which was insured, were loaded at the port of outfit, and were delivered at the port of destination, and the freight was paid. It is true, the freight was not received by the owner of the ship; but it was received under his authority: and, unless you are altogether to discard what the master had done, or to suppose that he had acted fraudulently, or without authority, there can be no doubt that the judgment should be for the de-**[967]**-fendant in error. I therefore entirely concur in the motion of my noble and learned friend.

Judgment for the defendant in error, with costs.

NOTE—A.*

Mr. Justice Blackstone (1 Bla. Comm. 273) has said: "The affairs of commerce are regulated by a law of their own, called the law-merchant, or lex mercatoria, which all nations agree in, and take notice of; and, in particular, it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that, often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange." Here, the law appears to be correctly, as well as clearly, laid down, though the authorities referred to by the learned commentator may not have been well selected.

This lex mercatoria being adopted into, and made part of, the common law of England, its provisions are binding upon all the inhabitants of countries governed by that law. Thus, it being part of the law-merchant, that a bill of exchange payable to order, may be indorsed ad infinitum, if A., the drawer of a bill payable to the order of B., were to direct, upon the face of the bill or otherwise, that the bill should not be indorsed to more than three successive indorsees, the restriction would be void, —as much so as if an act of parliament had expressly declared that a bill drawn payable to order should be transferable indefinitely by indorsement notwithstanding the insertion of such a restriction. The presumption that parties in such commercial transactions mean to deal according to the lex mercatoria, is not a mere presumption of fact, but is a præsumptio juris et de jure, against which no averment and no proof can be received. Where, therefore, the judges have entertained doubts upon a point of mercantile law, they have consulted merchants upon the mercantile usage,—not as a matter of fact from which inferences are to be drawn, but as a matter of law, with which the merchants called were conversant, in which they were experts †. Thus, in *Pickering* v. *Barkley*, 2 Roll. Abr. 248, pl. 10 ‡, merchants "were heard in court," on a point of mercantile law raised on demurrer; and, though it afterwards became more usual to take the opinions of merchants at nisi prius, yet the opinions so delivered are to be regarded as responsa pru-[968]-dentum, given to assist the judge in laying down the law to the jury.

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* Accidentally omitted to be inserted in a former volume. See vol. iii., p. 530, n.

Where a commercial contract is entered into between persons carrying on business within a certain district, upon its being shewn, that, in the particular trade, as it is uniformly carried on in that district, a particular usage has obtained, the parties will be presumed to have contracted upon the footing of such usage until the contrary appears. It is an inference which a jury will unavoidably draw, but it is simply an inference of fact,—which must be drawn by the jury, and cannot be supplied by the court. Where the same usage has been frequently proved, the courts have said that they will take judicial notice of such usage, and will not require it to be proved in each case that arises. Still the effect of the special usage will be the same, whether it is proved in the particular case, or is imported into the particular case by a judicial recollection of the evidence given in similar cases before. In whatever way the fact of the usage may be established, it is for the jury to draw the inference that the contract before them was entered into with reference to that usage.

In the case of *Brandão* v. *Barnett*, ante, vol. iii. p. 519, 12 Cl. & Fin. 787, the special verdict is silent as to any usage giving to London bankers a general lien. But, inasmuch as such a usage has been often proved, judicial notice would be taken of its existence. This judicial notice would be tantamount to an express finding by the jury, that such a usage existed. But, the existence of the usage being assumed, the inference that the parties contracted with reference to the usage, is an inference of fact, open to be rebutted by proof that the parties, in contracting, expressly derogated from the usage. What power has the court to draw an inference of fact,—an inference which does not necessarily result from the premises,—an inference which may be more or less cogent, according to the surrounding circumstances?

A merchant at Cadiz drawing a bill upon Amsterdam, or a merchant at Archangel drawing a bill upon Lisbon, is bound by the law-merchant, and cannot annex to his bill any stipulation which that law disallows. But neither drawer nor drawee, nor the commercial tribunals of their respective countries, would, it is conceived, take notice of local usages in particular trades,—as, of a usage in a certain country market for butter-dealers to vend their commodity by the yard, or of a usage in London for bankers to hold the negotiable securities of their customers subject to a general lien, —although, the existence of such usages having been proved usque ad nauseam, judges may have been induced to relieve suitors, juries, and themselves, from the necessity of again going over the same ground, by taking judicial notice of the often-proved customs, and although every court in England should have declared that the effect of such judicial recognition had been, in each case, to engraft the local usage upon, and to cause it to form part and parcel of, the general law-merchant.

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† Ante, pp. 825, 826.

‡ M. 24 Car. I. B. R. Translated, 16 Vin. Abr. 203, pl. 10.

COMMON BENCH REPORTS. CASES ARGUED and DETERMINED in the COURT of COMMON PLEAS, in Hilary Term and Vacation, and Easter and Trinity Terms, 1850. By JAMES MANNING, Serjeant-at-Law; and JOHN SCOTT, of the Inner Temple, Esq., Barrister-at-Law. Vol. IX. London, 1857.

[1] Cases Argued and Determined in the Court of Common Pleas, in Hilary Term, in the Thirteenth Year of the Reign of Victoria.

Memoranda.

In the last Hilary Vacation, the Right Hon. Thomas Lord Denman resigned the office of Lord Chief Justice of the Court of Queen's Bench.

He was succeeded by the Right Hon. John Lord Campbell, who took his seat in Court on the first day of Easter Term, having first been called to the degree of Serjeant-at-Law, when he gave rings with the motto "Justitiæ tenax."

In Easter Term last, the following gentlemen were appointed Her Majesty's Counsel learned in the Law:—Michael Pendergast, of Lincoln's Inn, Esq.; Henry Bliss, of the Inner Temple, Esq.; Charles Sprengel Greaves, of Lincoln's Inn, Esq.; William Charles Townsend, of Lincoln's Inn, Esq.; Christopher Argyle Hoggins, of the Middle Temple, Esq.; William Carpenter Rowe, of the Inner Temple, Esq.; Thomas Colpitts Granger, of the Inner Temple, Esq.; Peter Frederic O'Malley, of the Middle Temple, Esq.; Barnes Peacock, of the Inner Temple, Esq.; Edwin James, of the Inner Temple, Esq.; Kenneth Macauley, of the Inner Temple, Esq.

The Judges who usually sat in Banco during this term, were—Wilde, C. J., Maule, J., Cresswell, J., Williams, J.

Jones *v.* How and Another. 1850.

[See S. C. in Chancery, 7 Hare, 267; 68 E. R. 109 (with note).]

A., upon the marriage of B., his daughter, covenanted with her husband, C., his executors, &c., by deed or will to give, leave, and bequeath unto B. one full equal eighth part or share (that being an equal share with his other children,) of all the real and personal estate of which he should die seised or possessed. B. died in the life-time of A. A. having, in his life-time, made some disposition of property in favour of a son, by will devised and bequeathed his real and personal estate for the benefit of his widow and some of his surviving daughters:—Held, that C. had not any cause of action against the executors of A.

The following case was sent by Vice-Chancellor Wigram for the opinion of this court:—

Previously to, and in contemplation of, a marriage be-[2]-tween Frederick Jones and Mary Way, spinster, the daughter of William Way, a deed of settlement, bearing date the 8th of April, 1826, was made and duly executed between and by the said Frederick Jones, of the first part, the said Mary Way, of the second part, and the said William Way and William Hearn, of the third part, by which deed of settlement the said Frederick Jones conveyed and assigned certain parts of his real and personal estate to the said William Way and William Hearn, upon certain trusts for the benefit of himself, the said Frederick Jones, and of the said Mary Way, and of the issue, if any, of the said intended marriage: and the same deed of settlement contained a certain covenant and agreement on the part of the said William Way, the father of the said Mary Way, in the words following, that is to say, "And this indenture lastly witnesseth, that, in consideration of the said intended marriage, and also in consideration of the settlement hereby made by the said Frederick Jones, he the said William Way, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree with and to the said Frederick Jones, his executors, administrators, and assigns, that he the said William Way shall and will, by deed or writing, or by his last will and testament, give, leave, and bequeath unto the said Mary Way one full equal eighth part or share, or such other part as shall be an equal share with all and each of his children and child, of all estates, moneys, real and personal estate, of which he the said William Way shall die seised or possessed."

The marriage between the said Frederick Jones and the said Mary Way was duly had and solemnized, shortly after the execution of the said deed.

At the date of the said deed, and of the said marriage, the said William Way had eight children only, and never had any more. Two of the said William Way's **[3]** said children died in their father's life-time, without issue, and leaving the said Mary Way, then Mary Jones, one of the six only children then surviving of the said William Way

The said Mary Jones died in the month of February, 1843, also without issue, and in the life-time of her father, the said William Way.

After the solemnization of the said marriage, and on the 23rd of October, 1831, a paper-writing, bearing that date, and purporting to be the last will and testament of the said Mary Jones, wife of the said Frederick Jones, was signed, sealed, and published by the said Mary Jones, and was attested in such manner as, at the date thereof, was required by law for rendering valid devises of freehold estates; and such paper-writing was in the words following, that is to say:—

"This is the last will and testament of me, Mary Jones, wife of Frederick Jones, of Arreton, in the Isle of Wight, surgeon, whereby I do give, devise, and bequeath unto my said dear husband, all my right, title, and interest to which I am or may become entitled to, in possession, reversion, or expectancy, under or by virtue of the last will and testament, or writing, deed, or instrument, signed and executed, or to be signed and executed, by my father, William Way, of Newport and Wootton, in the said island, grocer, in my favour, or for my benefit,—to hold to him, my said husband, his heirs, executors, administrators, and assigns, absolutely, and for ever; and I do appoint my said husband sole executor of this my will."

On the 5th of December, 1845, letters of administration, with the said paper-writing annexed, of the goods, chattels, and credits which were of the said Mary Jones, were granted, by and out of the prerogative court of Canterbury, to the said Frederick Jones, the sole executor named in the said paper-writing, and, as the lawful **[4]** husband of the said Mary Jones, the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she was dead intestate.

The said William Way, the father of the said Mary Jones, never in his life-time did any act by way of performance of the said covenant and agreement, and died in the month of July, 1846, leaving issue five children only him surviving; and, by his will, duly executed, and dated the 4th of April, 1843, the said William Way, after bequeathing certain specific parts of his personal estate to his widow, devised and bequeathed all his real estate, and the residue of his personal estate, to Thomas How, and Alfred Mew, upon trust, after payment of his debts, for the benefit of his widow and some of his said five surviving children. And the said testator appointed the said Thomas How and Alfred Mew executors of his said will: but the said testator, William Way, did not in his said will mention the said Mary Jones and Frederick Jones, or either of them, or the said covenant and agreement.

The said Thomas How and Alfred Mew duly proved the said will in the prerogative court of the Archbishop of Canterbury, on the 11th of August, 1846.

The said William Way died possessed of some personal estate, and also seised of a real estate of copyhold tenure, held of (*a*)[1] a manor in which, by the custom thereof, the father is the customary heir of his daughter who has died without issue.

The questions for the court, are,—

First, Whether Frederick Jones has, under the above-mentioned circumstances, any good cause of action against the executors of William Way; and, if so,—

Secondly, Whether, if William Way had died possessed of no personal estate, and seised only of the copy-[5]-hold estate above mentioned, Frederick Jones could have recovered any substantial damages in such action.

The case was argued in the last Michaelmas vacation.

J. Brown, for the plaintiff (*a*)[2]. Covenants such as this are not unfrequently entered into by trades-people, upon the marriage of daughters: and, in equity, questions sometimes arise whether a disposal of his property by the father in his life-time is a fraud upon the covenant. In Jarman on Conveyancing (vol. ix. p. 113), it is said that covenants of this nature "attach only on that portion of property which the covenantor happens to die possessed of, without interfering with his power of squandering or dissipating it in his life-time, if he chooses. [6] An unequal distribution of property among the children of the covenantor, by his will, to the disadvantage of the covenantee, is the act against which the covenant is immediately directed. The principal point arising on such covenants, has been, whether they admit of gifts to a child taking effect in the parent's life-time. In the case of *Jones* v. *Martin* (3 Anst. 882; more fully, 5 Ves. 266, n.), Lord Loughborough thought that a gift, out and out, might be allowed; but he decided (or, rather, induced the House of Lords to decide), that a transfer of stock to a child, with an agreement, though oral, that the father should take the dividends during his life, was void, as being designed to elude the covenant. And, even where the covenant was, in terms, confined to such real and personal estate as the covenantor should die seised and possessed of, it was held by Sir W. Grant, M. R. (following Lord Rosslyn's distinction in *Jones* v. *Martin*), that the covenantor could not defeat it by a gift posthumous in enjoyment, though not testamentary, as, by a transfer of stock to trustees, with a declaration of trust for the covenantor for life, and, on his decease, for one of his children: *Fortescue* v. *Hennah*" (19 Ves. 67). Lord Rosslyn, in *Jones* v. *Martin*, says (5 Ves. 268, n.): "This covenant was stated by the counsel for the respondent to be vague and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements. Many marriages

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(*a*)[1] Meaning "being within," &c.

(*a*)[2] The points marked for argument on the part of the plaintiff, were,—

"That the covenant of William Way, made on his daughter's marriage, to give her a share of his property, was absolute, and that the manner of the gift only was optional:

"That the covenantor might have effected the gift by deed, in his daughter's life-time, and was bound to do so, if he did not effect it by will:

"That, if the covenant could be performed in part, though not in all, the covenantor was bound to do it:

"That, if even performance of the covenant became impossible, the covenantor's executors must answer for it in damages:

"That the covenant might have been performed by a bequest to the administrator of the daughter.

"With regard to the damages in respect of the copyhold estate, the plaintiff contends that full damages may be recovered in respect of it; that, if a share in it had been given to the daughter in her life-time, she could have conveyed it to her husband, and would have done so, as appears by her will; that the father might have given the copyhold to one or more of his other children, and personal property, or money, of equal value, to the plaintiff's wife, which would then have come to the plaintiff; that a bequest of a share in the copyhold to the wife's administrator would have satisfied the covenant, and would have carried the whole interest to the plaintiff, and he was entitled to damages commensurate therewith; and that the will of the wife would, in equity, have made the father a trustee for the plaintiff, even if the share of the copyhold given to her had descended, at law, to the father."

are entered into on such covenants: and they are not inexpedient. They are entitled to favourable consideration. Such a covenant holds out a prospect that the party who marries into a family, will continue a member of that family; and it provides, as it were, a pledge that he shall be considered, and may consider himself, part of such family, till the death of the person who enters into the covenant. But, then, it [7] does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child more than another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not, however, exercise his power by an act which is to take effect, out against his own interest, but only at a time when his own interest will cease." [Maule, J. You treat this covenant as an insurance upon the wife's life?] The covenantor must answer in damages. [Maule, J. In the event that has happened, nothing that the father could do, would relieve him from an action for a breach of covenant. If he had left his whole estate to the husband, or to the daughter's children, even that would have been no performance of the covenant.] He is, in effect, an insurer. Marriage and the birth of children was contemplated; and the intention of the covenant was, to make provision for such issue, as well as for the covenantor's daughter. The covenant is in the alternative,—to make the provision by deed or will: the covenant itself being absolute; the mode of performance only conditional. *Laughter's case* (*a*),—where it was laid down, that, where the condition of a bond consists of two parts, in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible, by the act of God, the obligor is not bound to perform the other part,—has been distinctly overruled by the authorities cited in Mr. Fraser's note A.—"In *Stud*-[8]-*holmes* v. *Mandell* (1 Ld. Raym. 279, 1 Lutwyche 688), the court said that the rule and reason of *Laughter's case* ought not to be taken so largely as Coke has reported it, but according to the nature of the case: and Treby, C. J., puts this case,—A. in consideration of 500l., bound himself in a bond, with condition either to make a lease for the life of the obligee before such a day, or to pay him 100l. The obligee died before the day, yet, in the time when St. John was chief justice of C. B., it was adjudged that the obligor should pay the 100l.; and St. John there declared that he knew well some of the judges who gave the resolution in *Laughter's case*, and that they denied that they laid down such a rule as Coke has reported; yet the whole court held that the principal case of *Laughter* was good law. Vide S. C., somewhat differently reported, Lutw. fo. 693. The reporter observes that the case put by Treby seems to be indistinguishable in reason from *Laughter's case*. So, also, in *Drummond* v. *The Duke of Boulton* (Sayer, 243), the court said that the doctrine in *Laughter's case*, which does not appear to be laid down by the court, but to be the reason given by the reporter for the judgment of the court, is laid down too largely. And, in *Da Costa* v. *Davis* (1 B. & P. 242), it seems to have been taken for granted that the impossibility of performing one condition, is no excuse for not performing the other. And vide the dictum of Walmsley, *More* v. *Morecomb* (Cro. Eliz. 864, F. Moore, 654), which seems contrá to *Laughter's case*: and, note, in the case of an award, where one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed: *Simmonds* v. *Swaine*" (1 Taunt. 549). *Wood* v. *Bate* (Palmer, 513), and *Eaton* v. *Butter* (ibid. 552), so far as it is practicable to decipher [9] them, seem to be inconsistent with the ruling in *Laughter's case*. In *Prebble* v. *Boghurst* (7 Taunt. 538, 1 J. B. Moore, 258), a bond recited a marriage intended, and the wife's present and expectant property, and that, in consideration thereof, and of love, and to make a provision for the wife and the issue of the marriage, in case it should take effect, the husband had agreed to pay a sum to trustees, and also had agreed, that, if at any time during his natural life he should be seised of any hereditaments in possession, he would, by such conveyances as counsel should advise, settle the same on the wife and the issue of the marriage, in such parts and proportions, and

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(*a*) 5 Co. Rep. 21 b.; S. C. per nom. *Eaton and Monox* v. *Laughter*, Cro. Eliz. 398; S. C. per nom. *Eaton's case*, F. Moore, 357; S. C. per nom. *Eton and Monny* v. *Laughter*, Poph. 98.

to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive; and the condition was, for payment of the sum to trustees, and also that, if the obligor should, during life, become seised of hereditaments, he should settle the same upon the wife and the issue of the marriage, as counsel should advise, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for her, in case she should survive the obligor: the husband had issue, survived the wife, and afterwards acquired lands, but made no settlement thereof on the issue:—this court held that the bond was not forfeited; but that decision was afterwards overruled by Lord Eldon, assisted by Richards, C. B., and Abbott, J. (see *Prebble* v. *Boghurst*, 1 Swanst. 309). There are many authorities to shew that the circumstance of one alternative becoming impossible, whether by the act of God, or otherwise, will not relieve the covenantor from the performance of the other. [Maule, J. A man may, if he chooses, covenant that it shall or shall not rain to-morrow (c)[1].] In that **[10]** case he is an insurer, and shall answer in damages. In *Da Costa* v. *Davis*, it was held, that, where the condition of a bond is, to do one of two things, shewing that one could not be performed, is no good reason for not having performed the other. The like was held by Parke, B., in *Stevens* v. *Webb* (7 C. & P. 60). In that case, A. was in custody on a ca. sa., and, in consideration of the plaintiff's consenting to his discharge, B. agreed to pay 35l., or to surrender A. to the sheriff: A. on a subsequent day offered to surrender himself to the sheriff, who would not re-take him, as the plaintiff had consented to his discharge: and the learned baron ruled that the agreement was absolute for the payment of the 35l., and that the other alternative was not satisfied by the offer of the surrender. [Maule, J. There cannot be a stronger illustration of the principle, than the case of a covenant that a thing is in a given condition,—for instance, that a horse is sound.] Where a man covenants absolutely that he is seised in fee-simple, he is answerable in damages if his title turns out to be defective. [Maule, J. So, where one covenanted to enfeoff J. S., and J. S. refused to come and be enfeoffed, it was held that the covenantor was bound to make him.] In *Lee* v. *Garret* (2 Show. 143), in debt on a bond conditioned to pay 500l. to the administrator of the obligee within two months after his death,—a plea that he was ready to pay it, but that no administrator was appointed, without saying uncore prist, was held bad. [Maule, J. Covenants containing conditions are not so much objects of compassion now as they were formerly.] In Comyns's Digest, Condition (D. 1), it is said (c)[2], that, "if a man covenants or promises to do a certain thing at a certain time, and it becomes impossible, by the act of God, he **[11]** shall not be excused." Again, title Action upon the Case upon Assumpsit (G.), it is laid down, that, "if a man undertake to build a house before such a day, and afterwards a plague happens, and continues till the day, he shall be excused by this necessity for not doing it at the day, if he build it afterwards; for, he is not obliged to hazard his life (a): but, if the thing promised become afterwards impossible by the act of God, that does not excuse him; for, he took upon himself to do it" (b). And in a note to that passage is added the following,—"If performance of a contract becomes impracticable through the act of God, and there is no provision therein exonerating the contractor from performance, under such circumstances, he must answer for the breach of it in damages: *Shubrick* v. *Salmond* (3 Burr. 1637). Thus, a freighter who covenants generally to load a cargo, and is prevented so doing by the prevalence of the plague, is liable on his covenant; *Barker* v. *Hodgson* (3 M. & Selw. 267). There is no implied exception of loss or destruction by act of God, in a continuing contract; such as, to repair a bridge during a certain time, unless the contract cannot afterwards be fulfilled: *The Brecknock and Abergavenny Canal Navigation* v. *Pritchard*" (6 T. R. 750). Suppose a man covenants to pay money on a given day, and before the day arrives he becomes lunatic, he still remains liable on his covenant. So, a lessee of a house who covenants generally to repair it, is bound to rebuild it, if it be burnt by an accidental fire: *Bullock* v. *Dommitt* (*g*). That is substantially *Paradine* v. *Jane* (Aleyn, 26) over again. There, in debt for arrears of rent due upon a lease, the defendant pleaded, that a certain German **[12]** prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with a hostile army of men, and, with the same force, did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 July, 18 Car., till the feast of the Annunciation, 21 Car., whereby he could not take the profits: and it was resolved that the plea was insufficient; the court saying: "He hath not averred that the army were all aliens, which shall not be intended; and then he hath his remedy against them. That the matter of the plea was insufficient; for, though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that, where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; as, in the case of waste,—if a house be destroyed by tempest, or by enemies, the lessee is excused: Dyer, 33 a.; 1 Inst. 53 b., 283 a.; 11 H. 4, 6 (*a*). So, of an escape: Co. 4, 84 b. So, in 9 E. 3, 16 (*b*)[1], a supersedeas was awarded to the justices, that they should not proceed in a cessavit, upon a cessor during the war. But, when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer, 33 a.; 40 E. 3, 6" (H. 40 E. 3, fo. 6, pl. 11). In *Atkinson* v. *Ritchie* (10 East, 530), the owner of a vessel was held liable for sailing without a full cargo, pursuant to charter, **[13]** though the jury found that the master acted bonâ fide, under a reasonable and well-founded apprehension of a hostile embargo. Lord Ellenborough there said (ibid. 533): "No exception (of a private nature, at least,) which is not contained in the contract itself, can be engrafted upon it, by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine* v. *Jane* has been often recognised in courts of law as a sound one, i.e. that, 'when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.'" And this has been recognised in several cases, as, in *Bullock* v. *Dommitt*, and *The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation* v. *Pritchard* (*b*)[2].

(c)[1] See Com. Dig. Condition (D. 2), citing 1 Roll. Abr. 420 (D), pl. 1; 5 Vin. Abr. 111 (D. a.), pl. 1, which refers to 22 E. 4, 26. (*Sir James Harrington's case*, M. 22 E. 4, fo. 24, pl. 3), where this was said obiter by Brian, C. J. of C. P.

(c)[2] Citing 1 Roll. Abr. 450, l. 20. (5 Vin. Abr. 229, pl. 8.)

(a) Ibid. l. 30. (Ibid. pl. 10.)

(b) Ibid. l. 20, 25. (Ibid. 228, pl. 8.)

With respect to the copyhold, the argument on the other side will be, that the interest of the wife therein would have gone to her father, and therefore that no damages could have resulted from the breach of covenant. But the wife might have surrendered to the use of her husband, and such surrender would have been valid: *Seamon* v. *Maw* (3 Bingh. 378, 11 J. B. Moore, 243): the statute 3 & 4 W. 4, c. 74, s. 77, expressly reserves that power to the wife.

Crompton, for the defendants. The covenant in question was intended only to take effect in the event of the daughter surviving her father. [Maule, J. Even in the case of the daughter leaving issue?] Yes. [Maule, J. If the substantial meaning of the covenant is, that the contemplated provision shall be made by will, and it would be well performed by the father's bequeathing an equal share of his property to his **[14]** daughter, and she died before him, no mischief is done.] Exactly so. The substantial meaning of the covenant is, that the daughter shall, at the death of her father, provided she be then living, have an equal share of his property with the other children who shall then be living. This could only be carried into effect by a testamentary instrument. It would be impossible to convey by deed an equal share of goods or estate which the father should be possessed of at the time of his death,—which is the time at which the covenant was to operate. It was clearly not the intention of the parties that any present interest should pass: nor was it intended to

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(*g*) 6 T. R. 650. And see *Weigell* v. *Waters*, 6 T. R. 488, *Waters* v. *Weigell*, 2 Anstr. 575.

(*a*) M. 12 H. 4, fo. 6, pl. 11: and see *Earl of Arundel's case*, M. 11 H. 4, fo. 32, pl. 59.

(*b*)[1] P. 9 E. 3, fo. 16, pl. 30. That was not the case of a supersedeas, but of a prohibition to sue, which the judge disregarded.

(*b*)[2] And see Chitty on Contracts, 4th edit., by Russell, p. 930.

tie up the property. [Maule, J. Would the father's conveying to his daughter, in his life-time, a valuable freehold estate, be a performance of the covenant?] Clearly not: it would be a breach of the contract, as to the rest of the children. The covenantor could not, by any instrument made in his life-time, perform this covenant; the subject-matter not being ascertainable till his death: *Lunn* v. *Thornton* (ante, vol. i. p. 379). In *Needham* v. *Kirkman* (3 B. & Ald. 531), where A., being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees, that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate, to and amongst the children both of his first and second marriage, share and share alike, —was held that this covenant was applicable only to such real and personal estate of which A. might die seised or possessed, and that it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the settlement. In *Fortescue* v. *Hennah* (19 Ves. 67), a deed of this **[15]** sort was looked upon as a testamentary paper. It was there held, that a father under covenant for an equal division, at his death, of all the property he shall die seised or possessed of, between his two daughters, or their families, cannot defeat the covenant by a disposition in effect testamentary,—as by reserving to himself an interest for life. In the course of the argument in that case, it was said, that, according to the principles established by *Randall* v. *Willis* (*a*), *Jones* v. *Martin* (3 Anstr. 882, 5 Ves. 266, n.), and *Lewis* v. *Madocks* (8 Ves. 150), "a father under such a covenant, though he has the liberty of disposition during his life, cannot stipulate for his own benefit, and, reserving an interest for his own life, make an unequal distribution, in effect, though not in form, testamentary. If he will be partial, he must be partial against himself." But Sir W. Grant, M. R., said: "Robert Hickes having covenanted that his eldest daughter and her first husband, and her children by him, should, at the death of Robert Hickes, have a full moiety of all the real and personal estate of which he should die seised or possessed, it is clear that he could not defeat the effect of that covenant by any testamentary act. The question is, whether he could defeat it by acts which, though not strictly testamentary, were not to take effect until after his death. It is evident that such a covenant has little value, if its effect is to depend on the form of the instrument. Against a diminution of his property by absolute gift during his life-time, his own interest and convenience form a pretty good security: not so, where, without any diminution of his own enjoyment, he exercises a mere post-**[16]**-humous bounty, though by an irrevocable instrument. It seems to me that the spirit of such a covenant requires that every disposition should be excluded, which is in its effect testamentary, though not such in point of form." Here, the father never intended to put it in his daughter's power to give the property to her husband. [Williams, J. Leaving the share to her child, would not, according to Mr. Brown's argument, satisfy the covenant.] The language of the second branch of *Laughter's case* is precisely like that of this covenant: and that part of the case has never been found fault with. The same account of the reasons for the decision is given in Croke and in Moore, as that given by Sir Edward Coke: and it is undoubtedly good law. Where there is an absolute option, it cannot be taken away by the act of God. [Williams, J. *Laughter's case* is cited in Sheppard's Touchstone without any remark.] At p. 173 of that book, it is said, that, "if one covenant to leave a wood in the same plight as he finds it, and he cut down trees; in this case, the covenant is broken presently; for it is now become impossible to be performed, by his own act: but, if in this case, some of the trees be blown down with the wind, or the like, by this [act of God] the covenant is not broken: for, it is now become impossible to be done, by the act of God, and in this case the covenantor is not bound to supply it." Again, at p. 382, "When the condition of an obligation is, to do [one of] two things by a day, and, at the time of making the obligation, both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible, by the act of God, or by the sole act and laches of the obligee himself; in this case, the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation.

(*a*) 5 Ves. 262; and see the American cases, *Garner* v. *Garner's Executor*, 1 Desaus' Chanc. Rep. 437; *Tabb* v. *Archer*, 3 Hen. & Munf. 399; *Roane's Executor* v. *Hern*, 1 Wash, 47; *Fleming* v. *Willis*, 2 Call. 5.

But, if, at the time of the making of the obligation, one of the things is, and the **[17]** other of the things is not possible to be done, he must perform that which is possible. And if, in the first case, one of the things become impossible afterwards by the act of the obligor, or a stranger, the obligor must see that he do the other thing, at his peril. And, when the condition of an obligation is, to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be." *Studholmes* v. *Mandell* is also reported in Nelson's edition of Lutwyche, where the learned editor, speaking of *Laughter's case*, says (page 215): "'Tis true, Justice Croke tells us that Gawdy held the bond was not discharged, but that the husband ought to purchase lands for the heirs of the wife, because he was obliged to do so by the condition, and had time, during his life, to perform it; and that the word *heirs* in that place was not a word of limitation, but of purchase: but either he or my Lord Coke must be mistaken; for, Coke tells us judgment was given for the defendant, by Popham, C. J., and the whole court,—which could not be, if Gawdy, who was then a judge of that court, dissented. However, we having the concurrent testimony of my Lord Coke, Croke, and Moore, of whom two were afterwards judges, and one of them of counsel in the cause, I think we are rather to believe what they have written, than what the chief justice had by tradition. But I have this to object against that opinion of Gawdy, that I take it to be of no great weight, because he was of a contrary opinion in the very same term, in a like case between other parties; for, in *Greningham and Ewre's case* (Cro. Eliz. 396), he laid it down for a rule, that, where a condition is in the disjunctive, **[18]** and one part of it becomes impossible to be performed, by the act of the obligee himself, there the obligor is discharged from the other part; and his reason is, because in such case the obligor hath his choice to do either, and, being deprived of that choice by the obligee himself, therefore he shall do neither. Now, if this is law, what reason can be given why the act of God should not work a discharge, as well as the act of the party?" *Drummond* v. *The Duke of Bolton* has no application: and there is nothing in the cases of *Wood* v. *Bate* and *Eaton* v. *Butter*, to justify the suggestion that they are at variance with *Laughter's case*. In Com. Dig. Covenant (F.) (*a*)[1], it is said,—"If tenant for life, or in tail, leases for twenty years, and covenants by demisi, and dies within the term, covenant does not lie." That case is analogous to the present. There, as here, the subject-matter of the covenant was gone. So in Bac. Abr. Conditions (Q) (*b*), it is said,—"Regularly, if a condition which was possible at the making thereof, becomes impossible, by the act of God, the obligation is discharged." There being no words of limitation here, the provision for the wife would be limited to her life, and, if so, the husband has lost nothing.

The second question, it is submitted, should, like the first, be answered in the negative: for, the court will not assume that the covenantor's daughter would have disinherited her heir, viz. her father; and, consequently, they cannot say that the plaintiff has sustained any damage at all.

Brown was heard in reply.

[19] The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel; and we are of opinion,—first, that Frederick Jones has not any good cause of action,—secondly, that, in the event supposed, Frederick Jones could not have recovered any substantial damages in such action.

"W. H. Maule.
"C. Cresswell.
"E. V. Williams" (*a*)[2].

(*a*)[1] Citing *Cheiny and Langley's case*, 1 Leon. 179.

(*b*) Citing 1 Roll. Abr. 449 (Vin. Abr. Condition (G. c.), vol. 5, p. 227); Co. Litt. 206 a.; *Anon.* F. Moore, 124; *Pet and Cally's case*, 1 Leon. 304.

(*a*)[2] When the case afterwards came before Vice Chancellor Wigram, his Honour said (7 Hare, 267).—"In this case, I am not assisted by knowing the reasons of the judges of the court of Common Pleas: but I understand from counsel, that they considered the case by analogy to the reasoning of the court in *Laughter's case.* The covenantor in this case, has reserved to himself the privilege of not making the stipulated provision during his life; and the provision by will, it is said, has failed,

[20] HOARE *v.* SILVERLOCK. Jan. 11, 1850.

[S. C. 19 L. J. C. P. 215.]

It is a good defence to an action for a libel, that it consists of a fair and impartial (though not verbatim) report of a trial in a court of justice; and such defence is admissible under not guilty, which puts in issue as well the lawfulness of the occasion of the publication, as the tendency of the alleged libel.

This was an action upon the case for a libel. The alleged libel consisted of a report of the trial of a case of *Hoare* v. *Dickson*, also for a libel, which took place at the Croydon summer assises, 1847.

The defendant pleaded not guilty.

The cause was tried before Wilde, C. J., at the sittings at Westminster, after the last term. The plaintiff proved the publication of the alleged libel, and also that the defendant was the editor of the newspaper in which it appeared.

On the part of the defendant, it was proposed to give in evidence certain letters which had been produced at the trial of the cause of *Hoare* v. *Dickson* for the purpose of shewing that the then defendant, in communicating their contents to a benevolent society of which he was the secretary, had acted bonâ fide in the discharge of his duty; and it was further proposed to call witnesses to prove that the report in question, though not a verbatim report of what took place at the former trial, was a fair and substantially correct report.

On the part of the plaintiff, it was objected that the evidence so proposed to be given was not admissible,—at all events under the general issue; for that, however necessary the letters might have been for Dickson's justification, the present defendant was not justified in giving them publicity, or in publishing a garbled statement of what passed in court.

The objection was overruled, and the evidence ad-**[21]**-mitted: and his lordship, in submitting the case to the jury, told them that they must find for the defendant, if they were satisfied that the publication complained of was no more than a fair and bonâ fide report of the trial at Croydon.

The jury accordingly returned a verdict for the defendant.

S. Carter, for the plaintiff, now moved for a new trial, on the ground of misreception of evidence, misdirection, that the verdict was against evidence, and on the ground of the absence of a material witness. The letters produced on the trial of the case of *Hoare* v. *Dickson*, were clearly not admissible in this case. [Wilde, C. J. They were produced and read for the purpose of shewing that the statement of them in the alleged libel, was a fair and accurate statement of their purport. Maule, J. They formed a portion of the defendant's evidence that his report was a fair one.] At all events, the matter should have been pleaded specially, in order that the plaintiff might have an opportunity to meet it. *Curry* v. *Walter* (1 Bos. & Pull. 525) is apparently an authority against the plaintiff. It was there held, that an action cannot be maintained for publishing a true account of the proceedings of a court of justice, however

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not by his act or omission, but by the default of the legatee in his life-time. There cannot, I think, be any doubt that the intention of the parties is disappointed by this decision. Where a parent, on the marriage of a child, covenants to make for that child a provision by deed or will, it cannot be doubted that the provision is intended to be absolute, and that the mode of making it alone is intended to be left to the discretion of the covenantor. And a doubt crossed my mind, of this nature,—If the will of the covenantor had contained a provision in favour of the lady, and she had left issue living at her death, the new will-act would have prevented a lapse; and a doubt occurred to me whether the covenantor might not have made a will so as to have preserved to the lady the benefit of the covenant, notwithstanding her death in his life-time,—whether, in fact, he might not, by will, have done for her (dying without issue) that which the will-act would have done for her if she had left issue living at her death. I do not know whether this point was suggested in argument before the court of Common Pleas: but I do not feel such confidence in the point as to make it proper to send the case a second time to law. I shall confirm the certificate."

injurious such publication may be to the character of an individual: but, "some doubts being entertained upon the bench, whether the matter of justification ought not to have been pleaded, the case stood over; and no judgment was ever given." It is submitted that those doubts were well founded. And in all the subsequent cases it will be found that the matter was specially pleaded: **[22]** see *Lake* v. *King* (1 Wms. Saund. 131 b.); *Astley* v. *Younge* (2 Burr. 807); *Stiles* v. *Nokes* (7 East, 493. S. C. per nom. *Carr* v. *Jones*, 3 J. P. Smith, 491); *Lewis* v. *Walter* (4 B. & Ald. 605); *M'Gregor* v. *Thwaites* (3 B. & C. 24, 4 D. & R. 695); *Duncan* v. *Thwaites* (3 B. & C. 556, 5 D. & R. 447); *Flint* v. *Pike* (4 B. & C. 473, 6 D. & R. 528); *Stockdale* v. *Hansard* (9 Ad. & E. 1, 2 P. & D. 1). Many things are privileged when spoken, though defamatory of individuals, the publication of which in a written or printed form, might be made the subject of an indictment or of an action for damages: *The King* v. *Creevey* (1 M. & Selw. 273); *The King* v. *Lord Abingdon* (1 Esp. N. P. C. 226); *The King* v. *Mary Carlile* (3 B. & Ald. 167). It is no part of the duty of a newspaper editor to publish proceedings in a court of justice: he is a meer volunteer. The observations of Lord Ellenborough, in *Rex* v. *Fisher* (2 Campb. 563), evidently shew that there was no disposition in that learned judge to allow any great latitude in cases of this sort to defendants.

As to the alleged surprise,—the absence of the witness,—the affidavit was defective.

MAULE, J. Several points have been urged in this case. One is, that the plaintiff was surprised by the absence of a witness upon whose testimony he mainly relied. Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit: and here we have no affidavit of surprise, in the sense required by the practice of the court. That ground, therefore, fails.

The next question is, whether certain evidence which was offered on the part of the defendant, was admissible **[23]** under not guilty. That evidence was of this nature,—having a tendency to shew that the alleged libellous matter was published upon an occasion which justified the publication of that which might be injurious to the character of a third person. Now, evidence of that sort,—which is comprised within the class of privileged communications,—has always been held to be admissible under not guilty. It shews that the publication was not malicious: and not guilty denies the allegation of malice in the declaration. I do not mean to say that such matter may not also be pleaded specially: it does not follow, that, because it may be given in evidence under not guilty, it may not be specially pleaded.

The defence relied on, was, that the publication complained of, was a true and bonâ fide account of what took place at the trial at Croydon, in 1847. The evidence which was objected to, clearly had a tendency to shew that. The question now raised is, whether, assuming the report to be a fair and bonâ fide one, that affords any defence. I think it is impossible at this day to say that a fair account of proceedings in a court of justice, not being ex parte, but in the hearing of both sides, is not, generally speaking, a justifiable publication. I do not lay it down as an universal proposition. Matters may appear in a court of justice, that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated. But, as a general rule, it may be assumed that the publication of a fair account of what passes in a court of justice, not ex parte, is justifiable,—unless there be something to take it out of that rule. There is nothing to take this case out of that general rule. The cases cited all apply either to ex parte proceedings, or where there is some special reason against the application of the general principle. Upon the whole, I am of opinion that there ought to be no rule.

[24] CRESSWELL, J. concurred.

WILLIAMS, J. I also am of opinion that there should be no rule in this case. I understand the question upon the first count to be, whether the lord chief justice was right in leaving it to the jury to say whether the matter complained of was a fair account of what took place at the trial at Croydon, and in telling them, that, if they were of opinion that it was, their verdict must be for the defendant. The objection urged is,—first, that, assuming that to be so, it afforded no defence,—and, secondly, if it did afford a defence, that it was not admissible under not guilty. Before the new rules of pleading, it is clear, the defendant had the option of pleading matter of this sort specially, or of giving it in evidence under not guilty. And the new rules have made no difference in this respect. In *Cotton* v. *Browne* (3 Ad. & E. 312, 4 N. & M. 831), it was held, that, in an action for maliciously indicting the plaintiff, without probable cause, the defendant may give evidence of probable cause under not guilty; and that, if, in addition to the plea of not guilty, he pleads specially that he had probable cause, the court will order such plea to be struck out. Lord Denman there says: "The injury complained of in this action is, not merely in the indicting, nor in the indictment being wrongful, but in maliciously indicting, and in doing so without reasonable or probable cause. The plea of not guilty is sufficient." So, here, not guilty puts in issue, not merely the publication of the alleged libel, but also the maliciously doing it. Then, does the fact of the matter complained of being a fair and bonâ fide account of what took place in a court of justice, afford a defence? Subject to certain qualifications, there is no doubt that it does **[25]** afford a defence. The only difficulty I have felt has been in ascertaining the fact. It seems to me that this case is not affected by any of the qualifications adverted to. I assume that the publication complained of was of the whole of the proceedings,—not the substance merely; and I also take it for granted that there were no defamatory remarks of the writer's own added to it. I therefore think that the direction was correct, and that there is no foundation for the motion.

WILDE, C. J. The rule is moved principally on the ground of misdirection, in the reception and leaving to the jury, under not guilty, evidence which it is said was inadmissible unless the matter was specially pleaded: and it is further contended that the publication of a fair account of proceedings which take place in a court of justice, is not justifiable, if it reflects upon the character of an individual. It is not suggested that the alleged libel was not a fair account of what took place at the trial of the cause of *Hoare* v. *Dickson*, at Croydon: nor was there any evidence given to impugn its accuracy. I see no reason, therefore, for finding fault with the conclusion the jury came to. The giving publicity to the proceedings of courts of justice, subject to certain exceptions, is justifiable; and there is nothing in this case to bring it within any of the exceptions. My brother Shee opened his defence by stating that the alleged libel was only a fair and bonâ fide report of what had taken place on a former trial: and the objection then taken by the plaintiff's counsel was, not that the fact of the publication being a fair and impartial account of the proceedings, was not an answer to the action, but that the defendant's counsel was not entitled to read the whole of the letters which were in evidence on the former occasion, because the whole were not set out verbatim in the alleged libel. The objection was, in **[26]** terms, limited to the admissibility of the letters. It is now said that the whole matter of defence was inadmissible, because not specially pleaded. The question is, whether the publication complained of was what the law calls a protected or privileged communication. The inference of malice arising from the publication of libellous matter, is rebutted by shewing that it was published upon a lawful occasion. Not guilty puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published It does not follow that a defence may not be given under not guilty, because it might also form the subject of a special plea. I think the evidence was admissible on the record as it stood; and, my learned brothers being of opinion that there was no misdirection, I see no ground for disturbing the verdict.

Rule refused.

BLACKETER AND OTHERS *v.* GILLETT. Jan. 15, 1850.

[S. C. 1 L. M. & P. 88; 19 L. J. C. P. 307; 14 Jur. 814.]

In case for the disturbance of a ferry, a count alleging that the plaintiffs were entitled to a certain ferry across the Thames, that the defendant conveyed passengers and goods across the river near to the plaintiffs' ferry, and that, by reason thereof, the plaintiffs lost profits, and were prejudiced and disturbed in the possession and profit of their ferry, was held, after verdict for the plaintiffs, to disclose a sufficient cause of action.—Where, on a motion in arrest of judgment a clear objection is not shewn, the party will be left to his writ of error.

This was an action upon the case for the disturbance of a ferry.

The first count of the declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, were, and from thence hitherto had been, and still continued, possessed, to wit, as trustees for the society of

Free Watermen of the River Thames, residing at Greenwich, in the county of Kent, called "The Isle of Dogs Ferry Society," of an [27] antient ferry, called Potter's Ferry, for foot-passengers, and goods belonging to such foot-passengers, across the river Thames, from a certain place in the Isle of Dogs, in the parish of Stepney, in the county of Middlesex, to Greenwich, in the county of Kent; taking for the carriage and conveyance of such passengers, and their goods, as have occasion for the same, over and across such ferry, in any boat or boats kept by or by the authority of the plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, one penny for every person on foot: nevertheless, that the defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of the said ferry, theretofore, to wit, on, &c., injuriously and unlawfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of him, the defendant, divers foot-passengers, for hire, over and across the said river Thames, and upon the said part of the same river where the plaintiffs had such ferry as aforesaid, and upon the said ferry of them the plaintiffs, to wit, from the Isle of Dogs aforesaid to Greenwich aforesaid; and that, by reason thereof, the plaintiffs had lost and been deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their ferry, and had been and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto.

The second count stated that the plaintiffs, as trustees as aforesaid, were entitled to the fee-simple and inheritance of the said ferry, and that, whilst the plaintiffs were so entitled as trustees to the fee-simple and inheritance of the said ferry, the defendant conveyed divers passengers and goods over and across the river Thames, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry, [28] to wit, from the Isle of Dogs aforesaid to Greenwich aforesaid; and that, by reason thereof, the plaintiffs lost and were deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto, &c.

At the trial, before Wilde, C. J., at the sittings in Middlesex, after last Michaelmas term, a verdict was found for the defendant on the first count, and for the plaintiffs on the second.

Peacock, on behalf of the defendant, now moved to arrest the judgment. The second count discloses no cause of action. It merely alleges that the plaintiffs were entitled to a certain ferry, and that the defendant conveyed passengers and goods across the river near to the plaintiffs' ferry, and that by reason thereof the plaintiffs lost profits and were prejudiced and disturbed in the possession of the ferry: whereas, to give a cause of action, it should have charged the defendant, either with setting up a new ferry, as in *Churchman* v. *Tunstal* (Hardres, 162), and 2 Rolle's Abridgment, 140, l. 20 (*b*), cited in Com. Dig. Action upon the Case for a Nuisance (A.),—or with having so carried the passengers and goods fraudulently and with intent to evade the plaintiffs' antient ferry, as in *Tripp* v. *Frank* (4 T. R. 666), and *Huzzey* v. *Field* (*d*). [Williams, J. Surely this is a very old form of declaring.] The old form was, charging the setting up [29] a new ferry, to the nuisance and disturbance of the antient ferry. [Maule, J. The second count is substantially the same as that in the case of *Tripp* v. *Frank*. Does not the concluding allegation, that the plaintiffs "were greatly prejudiced and disturbed in the possession and profit of their antient ferry, and in their right and title thereto," make the count good? The plaintiffs, to entitle them to a verdict on this count, must have proved, not merely that the defendant carried over some person near to their ferry, but that the act complained of was a disturbance of their right.] It is not enough to say that the defendant disturbed the plaintiffs' ferry, without saying how. [Maule, J. Probably not, on special demurrer: but the question is, whether it is not sufficient after verdict.] The thing relied on as

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(*b*) Translated, 16 Vin. Abr. 26, pl. 4, and citing 22 H. 6, 14 b. (M. 22 H. 6, fo. 14, pl. 23, *Prior of St. Nede* v. *Weston*). That was an action for erecting a horse mill, to the injury of three mills of the prior, in which the ferry question was discussed obiter between Paston, J., and Newton, C. J.

(*d*) 2 C. M. & C. 432, 5 Tyrwh. 855. And see *Peter* v. *Kendal*, 6 B. & C. 703.

a disturbance of the plaintiffs' right, must be something that is equivalent to a setting up a new ferry.

Maule, J. Carrying passengers and goods across the river in the manner here alleged, may or may not be a disturbance of the plaintiffs' ferry. The count charges a disturbance; and the jury have found it.

It is only in a tolerably clear case that the court will grant a rule to arrest the judgment. We think this is a case in which the defendant ought to be left to his writ of error, if so advised.

Rule refused (*a*).

[30] NAVONE *v.* HADDON AND ANOTHER. Jan. 25, 1850.

[S. C. 19 L. J. C. P. 161.]

Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured, will amount to a total loss.—The plaintiff insured certain bales of waste silk, from Leghorn to Liverpool, with the usual memorandum declaring silk free from average, unless general, or the ship should be stranded. The vessel, being compelled by stress of weather to put into Gibraltar, was there repaired, her cargo being necessarily unloaded. Some of the bales of silk were found to be considerably damaged by sea-water, and were consequently sold at Gibraltar, by the master, in the exercise of what the jury found to be a reasonable discretion, and such as a prudent owner uninsured would have exercised. But the silk might at a reasonable or moderate expense have been put in a condition to be brought home by another vessel: and it was in fact brought to England, and sold as silk, though in a very deteriorated state:—Held, that this was not a total loss; and, consequently, that the assured was not entitled to recover.

Covenant, against two of the directors of the Neptune Marine Insurance Company.

The plaintiff declared upon a policy of insurance effected by him with the company upon eighty-one bales of waste-silk, valued at 2245l., warranted free of particular average, unless the ship should be stranded. The voyage was, in ship or ships at and from Genoa to Leghorn, and at and from thence per ship or ships to Liverpool. The declaration averred that forty-four out of the eighty-one bales of silk insured, were shipped at Genoa, and transhipped at Leghorn on board the "Wanderer" on the voyage mentioned in the policy; that one Pierre Borella was interested in the silk; and that there was a total loss, by perils of the seas, of twenty-three of those bales, and a general average as to the remainder of the forty-four bales.

The defendants traversed the total loss averred, and paid into court a sum sufficient to cover the general average loss.

The cause was tried before Williams, J., at the sittings in London after Trinity term, 1848, when a verdict was found for the plaintiff, with 620l. damages, **[31]** subject to the opinion of the court upon the following case:—

The ship "Wanderer," with forty-four of the eighty-one bales of silk mentioned in the policy, and a general cargo consisting of Indian corn, flour, and other articles, sailed from Leghorn, on the voyage insured against, on the 15th of April, 1846. From the 17th, she suffered bad weather,—the effect of which was detailed in the evidence: the water increased in the hold, and, notwithstanding incessant working at the pumps, she, on the 23rd, was making twelve inches of water per hour. After throwing overboard a part of the Indian corn, it became necessary, from the state of the ship, to put into Gibraltar, which was done on the 11th of May following. At Gibraltar, several surveys, by direction of the captain, were made of the ship; and it was found to be necessary to unload her cargo. This was done, and the forty-four bales of silk were taken out and examined. Some were found to have sustained no damage; others,—about eleven bales,—were damaged by the sea-water (by reason of the bad weather already mentioned), but were not considered by the surveyors to be incapable of being carried on. These undamaged and partially damaged bales were therefore re-shipped on board the "Wanderer" when she was repaired, and were conveyed to Liverpool: and, as to those, no question arises. As to the remaining (twenty-three) bales, both

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(*a*) See *Blissett* v. *Hart*, Willes, 508, Bull. N. P. 76.

parties gave evidence of witnesses at Gibraltar, who had, by direction of the master, surveyed them, and of witnesses in England chiefly engaged in the silk trade. It appeared, that, when examined, these twenty-three bales were found to be saturated with sea-water, greatly heated, partly in a state of putridity, and to emit an intolerable stench, which infected the atmosphere for some distance. As to the cause of this stench, the witnesses differed in opinion,—one ascribing it to the excrement of the **[32]** silk-worm, which, in his judgment, remained in the article called waste-silk, and which, when wetted by the sea-water, would cause putrefaction in the silk; others, who were of opinion that the excrement of the worm did not necessarily remain in the waste-silk, thought the action of sea-water on waste-silk was alone sufficient to account for the stench.

The witnesses for the plaintiff who had examined the silk at Gibraltar, were of opinion, that, if it had been reshipped, it would have arrived in England spoiled and perished, and wholly valueless, and have destroyed some other perishable part of the cargo of the "Wanderer"; that there was no part of any one of those twenty-three bales which could have been properly re-shipped; and that no endeavour to prepare the silk for re-shipment would have been successful.

The witnesses for the defendants examined at Gibraltar were persons who had there bought six of the twenty-three bales, at the sale hereafter mentioned. The purchaser of two of them described them as wholly damaged and spoiled, except about sixty-eight or seventy pounds in the centre of one of them, which were very slightly damaged,—the whole weight of that bale being about seven hundred and forty pounds, —which sixty or seventy pounds he thought would have been serviceable for the purposes to which waste-silk is usually applied. The purchaser of two of the others had them shipped to England, and sold, he losing about forty dollars by the transaction. The purchaser of one of the others had not been able to re-sell it: it was damaged, to the extent of one-third in bulk; the remainder was dry and sound. The purchaser of the rest had sent it to England at a fixed price; but it had not been sold. Of these witnesses, some described the other bales thus:—Some of the bales were completely and entirely damaged and spoiled; others had a portion dry and **[33]** sound, some to the extent of a third or fourth, others in a much less proportion.

The English witnesses for the defendants proved, that three of the above bales, and another bought by a purchaser who was not examined, were sold in England as silk; and that, in their opinion, silk in the state in which the above twenty-three bales were described to be, could have been sent to England by steamers, without being dried, and could there have been washed and so dealt with as to retain the character of silk.

The twenty-three bales were sold by the master, under the advice of the surveyors who had examined them, as before mentioned.

The examination of the ship was on the 16th of May,—the day after the ship's arrival. The surveyors recommended the Indian corn to be discharged.

The second examination was on the 19th, when they recommended that the whole of the perishable and light part of the cargo should be discharged, and the vessel further examined. The silk was accordingly conveyed on board a floating store in the bay, and examined on the 23rd of May, when the surveyors recommended an immediate sale of the twenty-three bales. Notice of sale by auction was given; and the sale took place, by direction of the master, on the 27th and 28th of May.

The "Wanderer" was under repair until the 30th of June. On the 2nd of July she sailed for Gibraltar; and she arrived at Liverpool on the 20th of July.

Mr. Borella, the person interested in the goods, resides at Manchester. He received no information as to the ship, until a few days before her arrival at Liverpool, when he received information that she had put into Gibraltar. On the 27th of July, he received information of the fact of the damage which had been sustained by the silk, and of the fact of the sale, and the account-sales, in the same letter.

[34] The plaintiff had no agent at Gibraltar.

The defendants' counsel contended at the trial,—first, that this was an insurance upon the whole eighty-one bales; and that, as all but the twenty-three in question had arrived at their place of destination, there could be no total loss within the meaning of the policy. The learned judge overruled this objection, and directed the jury that the insurance was to be taken as upon each bale.

Secondly, that, at all events, if the silk could have been put into a state in which it could have been conveyed to England in any other ship, it was the duty of the assured to incur the expense of putting it into such state, and of so conveying it.

The learned judge left to the jury the questions following, to which they returned the answers following:—

First—Was the damage to the goods such as to involve total destruction in specie, either actual or inevitable? Answer,—that some portion (but what portion they could not say) of each bale would have arrived home without losing its character of silk.

Secondly,—Would a prudent owner uninsured have adopted the course which, in fact, was adopted as to these bales? Answer,—Yes, he would.

Thirdly,—Did the damage to the goods render them such an intolerable nuisance to the rest of the cargo of the "Wanderer," that it was reasonably justifiable in the master to refuse to carry them any further in that ship? Answer,—that the damage to the goods rendered them such a nuisance to the ship's crew (but not injurious to the cargo) that it was reasonably justifiable to decline to carry them any further in the "Wanderer."

Fourthly,—Was it possible to examine the goods, and, by a reasonable expense, or moderate expense, at Gibraltar, to send them home, so that they would still **[35]** bear the character of silk, by some other vessel? Answer,—Yes, by some other vessel.

The question for the opinion of the court is, whether the plaintiff was entitled to recover as for a total loss in respect of any, and if any, of how many, of the bales. If he was, the verdict is to stand for such sum as the court shall direct. If he was not, a verdict is to be entered for the defendants.

Barstow, for the plaintiff (*a*). Upon the findings of the jury, as set out in the case, the plaintiff is clearly entitled to recover in respect of the whole twenty-three bales. It appears that these bales were in a state of putrefaction, and therefore the master was justified, by his duty in regard to the health of the crew, in declining to bring them home. It will probably be contended on the other side, that it was the duty of the assured to incur the expense of putting the silk in a state to be brought to England. But it is found as a fact, that he had no agent at Gibraltar, and that the master, in the course he adopted, acted bonâ fide for the benefit of all concerned. In *Cocking* v. *Fraser* (Park, Ins. 8th edit. 247), which was an action for a total loss of a cargo of fish, upon a voyage from St. John's, Newfoundland, to a port in Portugal,—the policy containing the usual memorandum declaring fish, &c., free from aver-**[36]**-age, unless general, or the ship were stranded,—the cargo remaining in specie, though by sea-damage rendered of no value, the underwriters were held not liable, there having been no stranding: and Lord Mansfield said: "This clause, relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured is, the absolute destruction of it, by the wreck of the ship. The fish may all come to port; though, from the nature of the commodity, it may be damaged, it may be stinking: still, as the commodity specifically remains, the underwriter is discharged." But Lord Kenyon, in *Burnett* v. *Kensington* (7 T. R. 210), said "that he could not subscribe to the dictum of Lord Mansfield, in *Cocking* v. *Fraser*, that, if the commodity specifically remain, the underwriter is discharged." *Cocking* v. *Fraser* was also considered in *Dyson* v. *Rowcroft* (3 Bos. & Pull. 474), where the court adopted the doubt thrown upon the case of *Cocking* v. *Fraser*, in *Burnett* v. *Kensington*. *Dyson* v. *Rowcroft* was the case of a policy on fruit from Cadiz to London, with the usual memorandum. In the course of the voyage, the fruit was so much damaged by sea-water, that it became rotten, and

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(*a*) The point marked for argument on the part of the plaintiff, was as follows:—"The plaintiff will contend, that, under the circumstances disclosed by the special case, he is entitled to recover as for a total loss of the twenty-three bales of silk in question."

For the defendants:—"The defendants will contend, that, as part of the subject-matter insured arrived at its place of destination uninjured, there was no total loss within the meaning of the policy; and that, if the uninjured part could have been put into a state in which it could have been conveyed to England, it was the duty of the insured to incur the expense of putting it into such a state, and of so conveying it."

stunk; and, on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on the voyage, was sold, and the cargo was necessarily thrown overboard. It was held that the assured were entitled to recover as for a total loss. *Cologan* v. *The London Assurance Company* (5 M. & Selw. 447) is also in point. There, a cargo **[37]** of wheat, fish, and staves, was insured at and from Quebec to Teneriffe, the policy containing the usual memorandum as to corn and fish being free from average, unless general. The ship was captured, and afterwards recaptured, and sent by the recaptors to Bermuda, where, a scarcity prevailing, an embargo was laid on the export of provisions; and, the cargo being landed, it was found that 585 bushels of wheat were so damaged by sea-water that they were, by order of the magistrates, for the sake of the public health, thrown overboard; and, other part of the wheat being damaged, the captain sold that part, and the fish (which sold at a profit), and put up the ship to sale, and purchased her for the benefit of the owners, at not more than one fourth of her value; and, having repaired her, and being refused permission to ship the remaining wheat to Teneriffe, he directed it to be sold, and purchased it for the benefit of those concerned; and, by leave of the governor, the embargo being then raised as to the West India Islands, shipped the same for Madeira, where he arrived, and delivered it, taking in there a cargo of wine for London, with which he arrived: and it was held that the assured, who had abandoned, upon receiving intelligence of the circumstances which happened previously to the time of the ship's being permitted to proceed to Madeira, were entitled to recover as for a total loss of the whole of the goods insured (*a*). [Cresswell, J. The form of the policy, excluding average loss, places you in this difficulty. Can it be said that this silk was totally lost when at Gibraltar? It is another thing to say it was not worth the expense of bringing home.] The case cer-**[38]**-tainly states that it existed in specie as silk. [Maule, J. Not only did it exist in specie, but it was of some value,—it was sold as silk. Can it, then, be said to have been totally lost?] If its condition was such as to justify the master in selling it, it was totally lost to the owner. In *Gernon* v. *The Royal Exchange Assurance Company* (6 Taunt. 383), it was expressly held, that, if a cargo be so much damaged that it is not fit to be sent forward to a market, the assured may abandon, as a total loss. [Maule, J. That was not the case of an assurance free from average.] If the cargo is so damaged by a peril insured against, that no prudent master would bring it home, the loss is total. [Wilde, C. J. Is the cargo unfit to proceed, when a little expense may restore it? Cresswell, J. What amount of injury to the silk would have justified the assured in treating it as a total loss? Would 80 or 90 per cent.?] Probably not. [Cresswell, J. Neither would 99 per cent.: to charge the underwriters upon such a policy as this, there must be an actual total loss. *Davy* v. *Milford* (15 East, 559) is very much like this case: there, the policy was effected on flax, valued at so much, and warranted free of particular average; and it was held, that, the vessel being wrecked, and the assured not having abandoned, but having laboured to save the cargo, and having in fact saved a part (one sixteenth), though much damaged,—they were entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest, which was saved to them in specie, though deteriorated.] *Parry* v. *Aberdein* (9 B. & C. 411, 4 M. & R. 343) shews that that is not the true test. There, a vessel, having goods on board upon which an insurance was effected, but which were warranted free from average unless general, was placed in so much **[39]** danger by perils of the sea, that the crew deserted her in order to save their lives; and the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards, the vessel was found by some fishermen, and towed into port, and repaired; but the goods (which were of a perishable nature) had been so much injured by the salt water, that they would not have been worth any thing if forwarded to the place of destination. It was held that the assured, under the circumstances, were entitled to recover for a total loss. All the authorities underwent discussion in *Roux* v. *Salvador* (3 N. C. 266, 4 Scott, 1), where the judgment of this court (see 1 N. C. 526, 1 Scott, 491) was affirmed on

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(*a*) Lord Ellenborough begins his judgment in that case thus,—"This seems to me to be a case of total loss, and on this ground, that, by the capture, a total loss occurred in the first instance, and, while the assured had no reason to believe that events had changed the nature of the loss, they abandoned."

error. In that case, certain hides had been shipped on board a vessel at Valparaiso, for Bordeaux. The ship sailed from Valparaiso on the 13th of May, and on the 7th of July put into Rio de Janeiro, in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them in specie to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction or thrown overboard, they were sold at Rio for one fourth of their sound value. On the 23rd of July, the ship set sail from Rio, on her voyage to Bordeaux, and was stranded, on the 29th of September, at the entrance of the Garonne. In an action on a policy containing a memorandum declaring hides free of particular average unless the ship was stranded, it appeared that the assured received the news of the damage, and of the sale of the hides, at the same time: and it was held that they were entitled to recover as for a total loss, without abandonment. Lord Abinger, in delivering the judgment of the court of error, says (3 N. C. 278, 4 Scott, 25): "The **[40]** object of the policy is, to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed of, or can have the control over, them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port, may be of no prejudice to them, beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel, and if it be certain, that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought **[41]** to their original destination: in any of these cases, the circumstance of their existing in specie at that forced determination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." In Stevens on Average (5th edit. p. 80), this very case is put:—"When a ship, on her voyage, puts into an intermediate port, in distress, to refit, &c., and, on unloading the cargo, it is discovered that some of the goods are damaged, which, to prevent further deterioration, are surveyed, and sold on the spot, in such a case, the claim must be adjusted as a salvage loss, and all the charge must be borne by the insurers; for, no particular average claim, according to the definition above stated, can be made up when the goods are sold at any other place than the port of destination. Here, the damaged goods are really (not as the term is often misapplied) sold on account of the underwriter, he paying all the charges, and even the freight, and the merchant is indemnified as for a total loss,—ex. gr. he receives the net proceeds from the person who effects the sales, and the balance from the underwriter." [Cresswell, J. The author is there merely giving the mode of stating an average loss.]

The other view of the case is this:—The assured, having no agent at Gibraltar, clearly was not bound to incur expense for the purpose of putting the silk in a condition to be re-shipped. The master, under the circumstances, was the agent of the underwriter. In Mr. Justice Story's edition of Abbott on Shipping (5th American edit. p. 447), it is said, that, if the cargo is of a perishable nature, "and there be no time or opportunity to consult the merchant, the master ought either to tranship or sell it, **[42]** according as the one or the other will be most beneficial to the merchant." And, in a note thereto, reference is made to a case of *Jordon* v. *Warren Insurance*

Company (Story, C. C. 342), where it was held, that, when a cargo is so much injured that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place where the necessity arises, even though it might have been carried to the port of destination, and there landed. That is exactly this case.

Martin (with whom was Greenwood), for the defendant, was not called upon.

WILDE, C. J. This is an action upon a policy of insurance on certain bales of waste-silk, valued at a certain sum, and warranted free of particular average, unless the ship should be stranded. The facts found are these:—That the vessel, with the silk on board, set sail on the voyage insured; that she encountered bad weather, and was compelled to put into Gibraltar; that, it being found necessary to unload the vessel, the silk was taken out; that, upon examination, certain of the bales were found to have sustained no damage, and others so little as not to render them incapable of being re-shipped and carried to their destination; and that certain other of the bales were found to be so much damaged by sea-water, that it was thought advisable to sell them at Gibraltar; but that no one of the bales was so damaged as to make the whole contents useless for any mercantile purpose. There was, therefore, no entire loss of any one bale; consequently, the facts stated, as it seems to me, decide the case. It is a case of average, and not of total, loss. It is found, that, by **[43]** incurring a reasonable expense, the silk might have been sent on by another vessel to its destination, though in a deteriorated state, still bearing the character of silk. What, then, is there to turn this into a total loss? From the nature of the article, and its being peculiarly susceptible of injury from various causes, the underwriter says he will not be liable to average loss on silk, except in a given event; and the premium is calculated with reference to his liability for a total loss only. Now, the facts found, are, that the silk in question was only partially damaged, that no one package was so injured as in the result to lead to its entire destruction, but that the whole might have been sent forward, as silk, in a reasonable time, and at a reasonable expense. There is, therefore, no pretence whatever for converting this into a case of total loss. The cases of *Anderson* v. *Wallis* (3 Campb. 440, 2 M. & S. 240), and *Hunt* v. *The Royal Exchange Assurance Company* (5 M. & Selw. 47) have settled that any delay within reasonable limits, would not suffice to make that a total loss which was not in its nature an entire destruction of the subject-matter of insurance. There was no unreasonable delay here; for, it appears that the "Wanderer" put into Gibraltar on the 11th of May, and was repaired and ready for sea on the 30th of June. To sustain the claim for a total loss, the case should have found circumstances which would have prevented the assured from having the benefit of the voyage. None such are found here: on the contrary, it is found, as before observed, that a reasonable expense would have enabled the master, within a reasonable time, to forward the silk to its destination. The facts bring the case within the authorities, which cannot be disputed, and which clearly entitle the defendants to our judgment. The only ground upon which **[44]** it was sought to distinguish the case from those which are adverse to the plaintiff's view was, that it is found here that the assured had no agent at Gibraltar. But, when it is found that the goods might have been forwarded at a reasonable cost, and within a reasonable time, to their destination, I think that argument fails.

MAULE, J. I also am of opinion that our judgment must be for the defendants. *Roux* v. *Salvador* was relied on for the plaintiff: but the decision there, proceeded upon the fact that the hides were damaged to such an extent that they could not have been forwarded to their destination in such a state as to retain the character of hides. The loss, therefore, clearly was total. Here, the silk was very much damaged, but not to such an extent as to prevent its being carried, as silk, to its destination. A partial loss cannot be turned into a total loss, because those who have the control over the goods, may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing and re-shipping them. It may be that a prudent owner uninsured would not have thought it worth his while to carry these goods further, but would have left them behind: still, that alone would not make the loss total.

CRESSWELL, J. I am entirely of the same opinion. Lord Mansfield, in the first case which I believe is to be found in the books upon this subject, expressed an opinion, that, upon a policy in this form, there could be no total loss, where the goods still physically existed. Some exceptions have, undoubtedly, been engrafted upon the rule so unequivocally laid down. Still, if the goods are in such a state that they are capable of being forwarded, however they may be deteriorated, the loss is not a total loss. The American courts seem to adhere **[45]** to the rule laid down in *Cocking* v. *Fraser*. Whether that is the better rule or not, it is not worth while now to consider; for, there clearly has been no total loss here, even according to the more liberal principle adopted by the recent English decisions.

Wilde, C. J. My brother Williams, who was present when the argument took place, concurs in the decision we have pronounced.

Judgment for the defendants (*a*).

[46] Lysaght *v.* Bryant. Jan. 14, 1850.

[S. C. 19 L. J. C. P. 160: at Nisi Prius, 2 Car. & Kir. 1016.]

A. and B. carried on business in partnership. The firm being indebted to C., A. (who acted as C.'s agent), with the concurrence of B., indorsed a bill of exchange in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C.:—Held, a good indorsement by A. & B., to C.—The holder of a bill of exchange may, in an action against the drawer, avail himself of a notice of dishonour given in due time by any party to the bill, who, at the time of giving such notice, was under liability to him.

Assumpsit. The first count of the declaration stated that the defendant, on the 7th of May, 1847, made his bill of exchange in writing, and directed the same to one Matthews, and thereby required the said Matthews to pay to his, the defendant's, order, the sum of 800l., six months after the date thereof; that the defendant then indorsed the said bill to one James Lysaght and one William Smithett, who then indorsed the same to the plaintiff; and that Matthews did not pay the same, although duly presented,—of which the defendant had notice, &c.

Pleas, amongst others,—first, that the defendant had no notice of the dishonour of the bill by the drawee; secondly, that Lysaght & Smithett did not indorse the bill, in manner and form as in the first count alleged.

The cause was tried before Wilde, C. J., at the sittings in London after the last term. It appeared that James Lysaght and William Smithett had carried on business in partnership together, as East India merchants; and that the firm being indebted to the plaintiff, Admiral Lysaght, the father of James Lysaght, in the sum of 6000l., James Lysaght, in July or August, 1847, with Smithett's concurrence, and in his

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(*a*) In Arnould on Insurance, vol. ii. p. 855, it is said that "It is quite certain that no amount of mere deterioration by sea-damage, however great, which does not annihilate the physical and distinctive character of the goods, will render the underwriter liable, especially where they arrive in bulk at their port of destination. (Citing *M'Andrews* v. *Vaughan*, Marshall on Ins. 219, Park, Ins. 252, 8th edit.; *Mason* v. *Skurray*, Marshall on Ins. 218, Park, 8th edit. 253; *Glennie* v. *The London Assurance Company*, 2 M. & Selw. 371; *Anderson* v. *The Royal Exchange Assurance Company*, 7 East, 38; *Thompson* v. *The Royal Exchange Assurance Company*, 16 East, 214; *Hedburg* v. *Pearson*, 7 Taunt. 154). In this country, where a cargo, or part of a cargo, of memorandum articles is made up of several distinct packages, each capable of a distinct valuation, and any one of these be entirely lost, the underwriters are liable to the full value of the package so lost, this being considered a total loss of such part. (Citing *Davy* v. *Milford*, 15 East, 559.) But, in order to this, each package must be literally and entirely lost or destroyed in bulk: if its contents be only deteriorated, or in great part washed out by sea-water, whatever the extent of the depreciation may be, the rule does not apply, and the underwriter is not liable. (Citing *Thompson* v. *The Royal Exchange Assurance Company*, and *Hedburg* v. *Pearson*.) In the United States, this whole doctrine of the total loss of part is exploded, and the construction of the memorandum settled to be, that, unless there be a total loss of the whole species (as, of all the corn, or all the sugars on board) the underwriter is not liable, whether the article be shipped in bulk or in several distinct packages:" *Wardsworth* v. *The Pacific Insurance Company*, 4 Wendell's Rep. 33.

presence, indorsed the bill in question to the plaintiff. To prove this, James Lysaght was called. He stated, that, after he had so indorsed the bill, he held it as his father's agent, keeping it either in a separate part of the cash-box, or at his chambers in Regent Street. It did not appear [47] that the fact of the indorsement had been communicated by the son to the father.

The bill was duly presented on the 10th of November, when it became due, but was not paid; whereupon Lysaght & Smithett, on the 11th of November, gave the defendant the following notice of dishonour:—

> "Sir,—We beg to inform you that your draft on Mr. Matthews, dated the 7th of May last, at six months' date, for 800l., was duly presented, at, &c., for payment, when the answer given to the notary was, 'no effects.' The bill is now in our possession, and we require you to take it up immediately. Meanwhile, we request you to take notice we do not release you from responsibility by holding it over.—Yours, &c.
>
> "LYSAGHT, SMITHETT, & Co."

On the part of the defendant, it was prove dthat it was the custom of notaries in London to keep copies of all bills that pass through their hands, with all indorsements thereon, and that this practice was observed at the office of Duff, the notary by whom the bill was presented. And the notary's book was produced, and the clerk who entered the bill therein, called: and from these it appeared, assuming the entry to have been correctly made, that there was no indorsement by Lysaght & Smithett upon the bill at the time of its presentment.

It was then submitted that the notice of dishonour was insufficient.

The lord chief justice reserving that point, left it to the jury to say whether the indorsement by Lysaght & Smithett was made before or after the bill arrived at maturity.

A verdict having been found for the plaintiff,

Byles, Serjeant, pursuant to the leave reserved to him at the trial, moved for a rule nisi to enter the [48] verdict for the defendant, or for a new trial on the ground that the verdict was against evidence. Assuming that the jury were justified in giving credit to the witness James Lysaght, rather than to the entry in the notary's book, there was no proof of the indorsement, to constitute which there must be something more than mere writing on the back of the instrument: there must be a delivery, actual or constructive, to the indorsee. [Wilde, C. J., there was evidence that James Lysaght acted as his father's agent; and he swore that he had appropriated and set apart this bill, after it had been indorsed, for his father.]

Assuming, then, that Admiral Lysaght, was the holder of the bill at the time it became due, the notice of dishonour given by Lysaght & Smithett, did not enure as a notice from him. The object of the notice of dishonour is twofold: not only must it shew that the bill has been presented and refused payment, but it must also contain a notification of the fact that the party who gives the notice, looks to the party who receives it, for payment of the amount. Three cases have occurred that are somewhat like the present. In *Woodthorpe* v. *Lawes* (2 M. & W. 109), a bill of exchange indorsed in blank was left by the indorsee at the office of R., an attorney, to be presented by him. The bill being dishonoured, R. sent the following notice to the drawer:—"A bill drawn by you upon, and accepted by, Mr. J. W., for 31l. 3s., due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up:" and this was held to be a sufficient notice, although the attorney did not state on whose behalf he applied, or where the bill was lying. The expression, however, "I am desired to give you [49] notice," was equivalent to saying that the person giving the notice did so as agent for the holder. In *Chapman* v. *Keane* (3 Ad. & E. 193, 4 N. & M. 607), it was held that the holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill; and, therefore, that an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonour, may give notice at such time to an earlier party, and, upon afterwards taking up the bill, and suing such party, may avail himself of such notice. In *Harrison* v. *Ruscoe* (15 M. & W. 231), a bill of exchange was drawn by A., indorsed by him to B., and by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority,) to apply for payment of the bill: and it was held that the notice of dishonour was sufficient, notwithstanding the misrepresentation, the only effect of which was, to give A. every defence against C. that he could have had if the notice had really been given by B. That case is the converse of this,—the notice being given by the party coming after the plaintiff on the bill. [Williams, J. Parke, B., in that case says: "Since the case of *Chapman* v. *Keane*, it must be considered as perfectly settled, that a notice of dishonour need not be given by the holder, but that he may avail himself of notice given, in due time, by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent (3 Kent's Comm. p. 100), and Mr. Justice Story on Bills of Exchange (sect. 304). The former states the rule to be, that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says that the notice will be sufficient, although not given by the holder or his **[50]** agent, if it comes from some person who holds the bill when it is dishonoured, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof."] The party who avails himself of a notice so given, must stand in the same position as the person whose notice he avails himself of. [Maule, J. Has this defendant any defence against Lysaght & Smithett? A notice by an intermediate party, is a good notice by the plaintiff, but it lets in a set-off or other defence which the defendant would have had against the person who actually gives the notice.] The defendant has not had such a notice as to entitle the present plaintiff to sue him upon the bill. [Cresswell, J. I find the rule thus laid down in Byles on Bills (5th edit. p. 214): "The object of notice is two-fold; first, to apprise the party to whom it is addressed, of the dishonour; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment (*b*)[1]. Hence, it follows that notice can only be given by some party to the instrument, though he need not be the actual holder of the bill at the time (*c*)[1], but that a stranger is incompetent to give it (*d*)[1]. And it has been held by Lord Eldon, that notice by the first indorsee, who had not himself received notice from the second indorsee, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer (*e*). And it seems clear, that even a party to the bill, who has been already discharged by laches, or who could **[51]** not in any event sue, is incompetent to give notice (*a*). But a prior indorsee, who has himself received due notice, may transmit it (*b*)[2]. And notice by the holder, or by a party who is liable to be sued, and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer, will operate as a notice from each indorsee to the drawer; and, if the payee, or first indorsee, has duly received notice, a notice by him to the drawer will be equivalent to a notice from each indorsee, and from the holder, to the drawer (*c*)[2]. And a notice from an intermediate party may, in pleading, be described as a notice from the plaintiff" (*d*)[2].] That is not quite accurate.

Maule, J. I am of opinion that the notice of dishonour that was given in this case, was sufficient. Lysaght the younger appears to have acted as the agent of his father, the plaintiff. In that character, he received the bill from Lysaght & Smithett, by whom it was sworn to have been indorsed before it became due; and Lysaght the younger proved that it had ever since been kept by him amongst the documents which were held by him for his father. It was undoubtedly his duty to see that his father

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(*b*)[1] Citing *Tindal* v. *Brown*, 1 T. R. 167.

(*c*)[1] Citing *Chapman* v. *Keane*, 3 Ad. & E. 193, 4 N. & M. 607, and *Harrison* v. *Ruscoe*, 15 M. & W. 231.

(*d*)[1] Citing *Stewart* v. *Kennett*, 2 Campb. 177. Vide tamen *Abel* v. *Potts*, 3 Esp. N. P. C. 242.

(*e*) Citing *Ex parte Barclay*, 7 Ves. 597; but quære, since the case of *Chapman* v. *Keane*.

(*a*) Citing *Harrison* v. *Ruscoe*, 15 M. & W. 231, and *Miers* v. *Brown*, 11 M. & W. 372.

(*b*)[2] Citing *Jameson* v. *Swinton*, 2 Campb. 373, 2 Taunt. 224, and *Wilson* v. *Swabey*, 1 Stark. N. P. C. 34.

(*c*)[2] Citing Bayley on Bills, 209.

(*d*)[2] Citing *Newen* v. *Gill*, 8 C. & P. 367.

should have all proper remedies upon the bill. The bill, it seems, was presented on the day it became due, and was dishonoured; and due notice of dishonour was given by Lysaght & Smithett to the defendant, as drawer. Ly-**[52]**-saght the younger having due notice of the dishonour, which operated as a notice to Lysaght & Smithett, it was clearly competent to the latter, according to the decided cases, to give notice to all prior parties to the bill; and a notice so given would enure as a notice by the party who had given notice to them. I therefore think the defendant has had a sufficient notice of dishonour. Then, as to the other point,—there was evidence on both sides. It was for the jury to say whether the plaintiff's witness was perjured or the defendant's mistaken. The former stated positively that the indorsement was made before the bill became due; the latter, not professing to have any special recollection on the subject, merely stated that it was the usual course of his office to copy all indorsements into the book which he produced, and that no such indorsement was entered therein. I think it is impossible for us to say that the jury, in giving credit to the positive statement, rather than to the inference arising from the statement on the other side, came to a wrong conclusion.

Cresswell, J. I am of the same opinion. Two questions arose in this case—first, whether the defendant had received a sufficient notice of dishonour,—secondly, whether Lysaght & Smithett indorsed the bill before it became due. The decision of the first question depends in some degree upon the second; because, whether the notice was sufficient or not, may depend upon whether there was a proper indorsement. Mere writing on the back of the bill is not enough to constitute an indorsement; there must be a delivery, or something equivalent to a delivery, of the bill to the indorsee. Here, the fact has been disposed of by the jury; and I think there was evidence enough to justify the conclusion they came to. James Lysaght swore positively that the bill was indorsed in the name, and with the concur-**[53]**-rence, of the firm, in July or August: and he further stated, that, ever since the indorsement, it had been kept by him, as his father's agent, apart from the securities of the firm. That being so, it seems, from the cases, that the holder of a bill may avail himself of a notice of dishonour given in due time by a prior indorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here, Lysaght the younger, holding the bill as his father's agent, duly presented it, and had it returned to him dishonoured. Notice of that fact to him, therefore, operating as notice to the firm, the present plaintiff was entitled to sue them, and consequently is in a condition to avail himself of the notice of dishonour given by them to the defendant.

Williams, J. I am of the same opinion. The evidence established the whole case, if the jury were right in the conclusion to which they came: and I am not prepared to say that they were wrong.

Wilde, C. J. I certainly was not dissatisfied with the verdict. Lysaght the younger swore positively that the security in question was appropriated by him, with Smithett's assent, in part discharge of the debt due to the plaintiff. He was very strictly cross-examined as to the period at which the indorsement took place: he distinctly swore that it was before the bill became due: he believed it was in July or August. If Lysaght & Smithett intended to act honestly, they were bound to make the indorsement; and there is no reason for supposing that they did not, or that James Lysaght stated that which was untrue. On the other hand, there can be as little doubt that the notary's clerk meant correctly to copy the indorsements into the book. It was for the jury to decide between the conflicting statements. As **[54]** to the notice of dishonour, the case seems to fall within the authorities. The facts shew that Lysaght & Smithett had due notice of the dishonour of the bill,—one of them having caused it to be presented, and having had it returned to him. A notice, therefore, by Lysaght & Smithett, then being under a liability to the present plaintiff, according to the authorities, enures as a notice to the defendant.

Rule refused.

Lawson and Another *v.* Dumlin. Jan. 15, 1850.

A Trinity-House pilot, who, in navigating a vessel, negligently runs against and damages another vessel, is not within the protection of the 84th section of the pilot act, 6 G. 4, c. 125, which enacts, amongst other things, that all actions brought for anything done in pursuance of the act, shall be brought in the county where the cause of action arises, and not elsewhere.

This was an action upon the case brought by the plaintiffs, the owners of a collier, against the defendant, a Trinity-House pilot, for running foul of and injuring their vessel.

The declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, were lawfully possessed of a certain ship or vessel called the "Sarah," of great value, to wit, 5000l., then lawfully being off the coast of Essex; that the defendant then had the care, control, &c., of a certain other ship or vessel; yet that the defendant, not regarding his duty in that behalf, to wit, on, &c., took so little and such bad care of the said ship or vessel of which he had the care, control, &c., as aforesaid, and governed and navigated the same in so unskilful and improper a manner, that the same, by and through the carelessness, mismanagement, and improper conduct of the defendant, then, with great force and violence, ran foul of, and struck against, the said **[55]** ship or vessel of the plaintiffs, and thereby then greatly broke, injured, and damaged the same; and also, that, by reason of the premises, the plaintiffs then necessarily incurred divers expenses, to wit, 50l., in and about the surveying and repairing the said damage so done to their said ship or vessel as aforesaid; and also, by means of the premises, the plaintiffs lost and were deprived of the use of their said ship or vessel, for a long space of time, &c.; to the plaintiffs' damage, &c.

The defendant pleaded not guilty "by statute," upon which issue was joined.

The cause was tried before Wilde, C. J., at the sittings in London after the last term. It appeared, that, on the 11th of July, 1848, the plaintiffs' vessel, the "Sarah," was weighing anchor on the Essex side of the river, about five miles below the Nore, when the defendant, who had charge of a barque called the "Poictiers," negligently ran foul of, and injured, the plaintiffs' vessel.

On the part of the defendant, it was objected that the venue was improperly laid in London, the 84th section of the pilot act, 6 G. 4, c. 125, requiring that all actions brought for anything done in pursuance of that act shall be brought in the county where the cause of action arises, and not elsewhere.

The lord chief justice directed the jury to find for the plaintiffs, reserving leave to the defendant to move to enter a nonsuit, or a verdict for him, if the court should be of opinion that the objection was well founded.

A verdict having been accordingly found for the plaintiffs, damages 35l.,

Byles, Serjeant, now moved, on the part of the defendant, to enter a nonsuit, or a verdict, pursuant to the leave reserved. The pilot act, 6 G. 4, c. 125, s. 84, enacts, "that, if any suit or action shall be brought or **[56]** prosecuted against any person or persons for any thing done or to be done in pursuance of this act, in every such case the action or suit shall be commenced within six calendar months next after the fact committed, and not otherwise, and shall be laid or brought in the county, city, or place where the cause of action arises, and not elsewhere; and the defendant or defendants in such action or suit may plead the general issue, not guilty, and give this act and the special matter in evidence at the trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and, if it shall appear so to be done, or if any such action or suit shall be brought after the time limited for bringing the same, then the jury shall find for the defendant or defendants," &c. [Cresswell, J. Was the thing here complained of an act done "in pursuance of the act?"] The defendant, in the exercise of his duty as a Trinity-House pilot, was navigating the vessel in pursuance of the act. If he was strictly pursuing the act, he would not need the protection of this clause. The main difficulty that was presented to the defendant at the trial was, that the place where the collision occurred, was not within the body of the county of Essex, but upon the high seas. But it is submitted that the river Thames, in law, commences at Orfordness, on the one side, and the North Foreland on the other; and that the jurisdiction of the Admiralty does not extend within those limits: *Leigh* v. *Burley* (Owen, 122). There, "Burley, master of a ship, gave money to Craddock, to buy sailors' clothes for him: Craddock bought such clothes for him of Leigh, in the parish of St. Katherine's, near the tower of London, whereby Leight delivered the clothes to Burley in his ship that was in the Thames adjoining to St. Katherine's; and, because the money was not paid, he

[57] sued Burley in the Admiralty court: and a prohibition was awarded, for two causes,—first, because the contract was made on land, and infra corpus comitatus, and therefore the Admiral can have no jurisdiction; for, the statutes of the 13 and 15 of Ric. 2 (13 Ric. 2, c. 5; 15 Ric. 2, c. 3), and 2 H. 4, c. 11, are, that the Admiral shall not have conusance but of things done super altum mare: vide 5 Co. Rep. 107. And so it was resolved by the justices: and they said that the 15 of Ric. 2 is misprinted, viz. that the Admiral shall have jurisdiction to the bridges; for, the translator mistook bridges for points, that is to say, the land's end (*b*)[1]. And Coke said that the Admiral should have no jurisdiction where a man may see from one side to the other; but the coroner of the county shall inquire of felonies committed there; which was held to be good, by all the other justices: and he gave this difference, that, where the place was covered over with salt water, and out of any county or town, there est altum mare, but the trial shall be per vicinetum of the town." The like law is laid down in the Fourth Institute (pages 135, 137, 140, 141). Lord Coke there says (page 137): "By the statute of 15 Ric. 2, c. 3, it is enacted and declared that the court of the Admiral hath no manner of conusance, power, nor jurisdiction of any manner of con-[58]-tract, plea, or querell, or of any other thing done or rising within the bodies of the counties, either by land or by water, and also of wreck of the sea; but all such manner of contracts, pleas, and querels, and all other things rising within the bodies of the counties, as well by land as by water, as is aforesaid, and also wreck of the sea, shall be tried, termined, discussed, and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant, in no manner. Nevertheless, of the death of a man, and of a mayhem, done in great ships being and hovering in the main stream of the great rivers only beneath the points (*a*) of the same rivers, and in no other place of the same rivers, the Admiral shall have conusance. This latter clause giveth the Admiral further jurisdiction in case of death and mayhem (with neither of which we ever meddle); but, in all other happening within the Thames, or in any other river, port, or water, which are within any county of the realm (as all rivers and havens be, as hereafter shall manifestly appear), by express words of this act of parliament, the Admiral, or his deputy, hath no jurisdiction at all. Wherein it is to be observed how curious the makers of this statute were, to exclude the Admiral of all manner of jurisdiction within any water which lieth within any county of the realm." Before the statute 3 & 4 Vict. c. 65, s. 4 (*b*)[2], the court of Admiralty had no jurisdiction in cases of salvage or collision in places within the jurisdiction of the common law courts: case of *The* [59] *Eleanor* (6 Rob. Adm. Rep. 39); case of *The Eliza Jane* (3 Hagg. Adm. Rep. 335). In *Davis* v. *Curling* (8 Q. B. 286), the declaration (in case) charged that the defendant was, under the highway-act, 5 & 6 W. 4, c. 50, surveyor of the parish of T.; that gravel had been placed on a highway in T., by means of which gravel the highway was obstructed, and the gravel was a nuisance to the public; that the defendant had notice, and was requested to remove the same; but that he, well knowing, &c., did not nor would, in a reasonable time, remove it, or cause it to be removed, but, on the contrary, conducted himself with gross negligence, and knowingly, wilfully, and wrongfully, and in violation of his duty as such surveyor, permitted, suffered, and caused the gravel to continue and be upon the highway, obstructing the same, remaining and being a nuisance to the public, for a long and unreasonable time, without taking any care or

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(*b*)[1] The 15 Ric. 2, c. 3, as it now appears in the English translation, does not say affirmatively, that the Admiral shall have jurisdiction to the bridges, but, restricts it to, "only beneath the bridges of the same rivers nigh to the sea." The word "bridges" in this translation is warranted by the French original, not only as printed by Runnington,—"tantsoulment paraval les pountz de mesmes les rivres pluis proscheins al meer,"—but also as it appears on the parliament-roll, where, in the Royal answer to the petition of the Commons against the encroachments of the Admiralty, the words are,—"tant-soulement par avale les Pontz de mesme le Rivers pluis proscheins al meer:" 3 Rot. Parl. 291 a.

(*a*) Sic: sed vide supra, 57 (*b*).

(*b*)[2] Which gives the court of Admiralty jurisdiction "to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry which shall be instituted in the said court after the passing of this act."

precaution to guard against danger or damage to persons passing, contrary to his duty in that behalf as such surveyor; and that, by means thereof, the plaintiff's carriage was overturned. It was proved that the defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident. It was held that the defendant was charged with a thing done in pursuance of the act, and was therefore entitled to notice under s. 109 (*d*). [Maule J. My brother Patteson explains the ground of that decision. He **[60]** says: "The charge is not one of mere omission, but of actually continuing the nuisance. That is a charge of doing something wrong, of keeping the gravel in an improper place, an act continued until the occurrence of the mischief. Is it, then, an act done in pursuance of the statute? It is not denied that the heap of gravel was put there in pursuance of the statute: it could not be spread at the same moment: the question then would arise, whether the length of time during which it was kept in a heap, was reasonable or not. The continuing, therefore, was a thing done in pursuance of the statute."] The defendant here was piloting the "Poictiers" in pursuance of a duty cast upon him by the statute. [Maule, J. Suppose a policeman, in conveying a cart to the greenyard, negligently comes in contact with and damages a carriage,—would he be entitled to notice?] It is submitted that he would. It is of great importance to these pilots that questions of this sort should be tried in the county adjoining to which the accident happens, and where the state of the river is well known. [Maule, J. I do not think the statute could have intended to take away the right of action for a collision **[61]** upon the high seas, and, by an oblique inference, to confer an exclusive jurisdiction, in such cases, upon the court of Admiralty. How is a man who is run down to know that the offender is a Trinity-House pilot?] They are public officers, who are compelled to perform a responsible duty. [Wilde, C. J. Suppose, in going out to a ship, the pilot negligently runs down a boat,—would he be within the protection of the act?] It is submitted that he would.

Maule, J. I do not think that this case falls within the 84th section of the 6 G. 4, c. 125. Where a man mistakes his course, in doing something under the authority of an act of parliament, he is within the protection of a clause of this sort. But, here, the action is not brought for a thing done by the defendant in his character of pilot: it is not like the case of justices of the peace, who are compelled to hear and determine matters that are brought before them, and who sometimes, intending to act bonâ fide in discharge of their duty, mistake the proper course, and so subject themselves to actions. The scope of this act is, to confer a monopoly in the navigation of vessels entering and leaving the Thames, upon a certain number of skilful persons. In consideration of that monopoly, those persons are bound to perform certain duties when properly called upon: but it is no authority conferred by the act upon the pilot. The business of a pilot clearly is one in the exercise of which a man may be guilty of negligence: and, if he is guilty of negligence, there can be no reason why he should not be liable for it, like any other individual. This clearly is not within the scope of the cases relied on. If the statute had meant to restrict actions against pilots to six months, or altogether to prohibit the bringing of actions against pilots, it would, no doubt, have said so **[62]** in express terms. I think there is no ground for this motion.

(*d*) Which enacts "that no action or suit shall be commenced against any person for any thing done in pursuance of, or under the authority of, this act, until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction, or tender of satisfaction, has been made to the party aggrieved, nor after three calendar months next after the fact committed for which such action or suit shall be so brought; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place; and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and, if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given, as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein," &c.

Cresswell, J. I am of the same opinion. The defendant could not for a moment suppose, that, in running down the vessel in question, he was acting in pursuance of the act.

The rest of the court concurring,

Rule refused.

Storie, Clerk, *v.* Charles Richard, Bishop of Winchester. Jan. 25, 1850.

[S. C. 19 L. J. C. P. 217. For the written judgment of Wilde, C. J., see 17 C. B. 653.]

In quare impedit, the ordinary cannot counterplead the patron's title, by setting up title in the Queen, by lapse.—Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 G. 3, c. 45, and 59 G. 3, c. 134,—the annual value of the two livings exceeding 1000l.,—the parish church becomes, under the provisions of the 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void.

Quare impedit. The declaration stated, that whereas John George Storie, the plaintiff, theretofore, and before and until and after the making of the representation and order in council, and the effecting of the division and assignment of the district parish of St. Mary Magdalen, Peckham, as thereinafter respectively mentioned, to wit, on the 16th of April, 1842, and from thence continually until and upon and after the 28th of October, 1843, was seised of the advowson of the vicarage of the church of St. Giles, in the parish of Camberwell, in gross, as of fee and right: And also, before the making of the said representation, and the order in council, and the effecting of the division and assignment thereinafter respectively mentioned, to wit, on the 1st of May, 1842, Her Majesty's commissioners for building new churches, duly caused the said church of [63] St. Mary Magdalen to be built, to wit, under and in pursuance of the provisions of the act of parliament made and passed in the fifty-eighth year of the reign of His late Majesty King George the Third for building and promoting the building of additional churches in populous parishes, and of the act of parliament made and passed in the fifty-ninth year of the reign of His said late Majesty, to amend and render more effectual the said first-mentioned act: And the said last-mentioned church was then, to wit, on the day and year last aforesaid, duly consecrated, to wit, by the said Charles Richard, as, and being, such bishop as aforesaid: And thereupon, and whilst the said John George Storie was so seised as aforesaid, to wit, on the 1st of June, 1842, aforesaid, the said commissioners, having taken into consideration all the circumstances attending the said parish of St. Giles, Camberwell, were of opinion that it was expedient (amongst other things) that an ecclesiastical district should, to wit, under the provisions of the said first-mentioned act, be divided from the parish of St. Giles, Camberwell, aforesaid, and assigned to the said church of St. Mary Magdalen, for the purposes in the said first-mentioned act in that behalf mentioned; and did then, to wit, on the day and year last aforesaid, according to the statute in such case made and provided, represent such opinion to Her Majesty, the Queen, in council; and did state, in such representation, the bounds by which such district was proposed to be described: And the said bishop did then, to wit, on the day and year last aforesaid, consent to the said division and assignment, and did signify such consent under his hand and seal, to wit, at Camberwell aforesaid, in the county aforesaid: And afterwards, to wit, on the 13th of June, 1842, aforesaid, at the court at Buckingham Palace, our sovereign lady the Queen, having taken the said representation into consideration, was pleased, by and [64] with the advice of her privy council, to approve thereof, and to order and direct that the said division and assignment should be made and effected agreeably to the provisions of the statute in such case made and provided: And thereby, then, to wit, on the day and year last aforesaid, the said division and assignment respectively became and were made and effected under and by virtue of the said statutes, to wit, at Camberwell aforesaid, in the county aforesaid: And afterwards, to wit, on the day and year last aforesaid, the said district was duly ascertained and marked out by described bounds, and the description of such bounds was duly inrolled and registered, and notice thereof was duly given, as by the said first-mentioned act required: And thereupon, by force of the said statutes, to wit, on the day and year last aforesaid, such district became and was called "The district parish of St. Mary

Magdalen, Peckham" (being the name given thereto in the instrument so inrolled as aforesaid), and became and was a separate and distinct district parish; and the said church of St. Mary Magdalen, so assigned to such district (being duly consecrated for that purpose,) became and was the district parish church of the said district parish of St. Mary Magdalen, Peckham, for all ecclesiastical purposes, in manner as in and by the said acts respectively provided; and the said last-mentioned church (the same having been built and appropriated as and in the manner aforesaid,) became and was a perpetual curacy, and became, and was considered in law as, a distinct benefice and church, that is to say, a benefice presentative, so far as by the said acts in that behalf provided and enacted, to wit, at Camberwell aforesaid, in the county aforesaid: And the said John George Storie, being, during all the time aforesaid, and remaining, so seised of the advowson of the vicarage of the said church of the parish of St. Giles, Camberwell, as aforesaid (out of which the said district of St. Mary **[65]** Magdalen, Peckham, had been and was so taken as aforesaid), thereby then became seised, as of fee and right, of the perpetual right of presentation or nomination and appointment of the spiritual person to be the incumbent of, or to serve, the said district church of St. Mary Magdalen, Peckham, in manner as in the said acts respectively in that behalf provided, that is to say, upon and after the death or other avoidance of the said Rev. John George Storie, clerk, the then incumbent of the said parish of St. Giles, Camberwell, or upon and after the voluntary resignation of the said district church by the said incumbent of the said last-mentioned parish, to wit, at Camberwell aforesaid, in the county aforesaid: And the said John George Storie being and remaining so seised of the said advowson of the vicarage of the church of St. Giles, Camberwell, and of the said right of presentation or nomination and appointment to the said district church of St. Mary Magdalen, Peckham, as respectively aforesaid, afterwards, to wit, on the 20th of May, 1843, the said church of St. Giles, Camberwell, duly became and was vacant, to wit, by the resignation of the said John George Storie, to wit, at Camberwell aforesaid, in the county aforesaid,—which said resignation was then and there duly accepted by the said Charles Richard as, and being, such bishop as aforesaid: And thereupon the said John George Storie, being and remaining so seised as respectively aforesaid, to wit, on the 28th of October, 1843, aforesaid, at the parish of St. Giles, Camberwell, aforesaid, in the county aforesaid, presented to the last-mentioned church, being so vacant as aforesaid, or prayed the said Charles Richard as, and being, such bishop as aforesaid, to admit himself, the said John George Storie, clerk, who, on his own presentation or prayer as aforesaid, was duly admitted, instituted, and inducted into the same, in the time of **[66]** peace, in the time of our sovereign lady Victoria, the now Queen of Great Britain, to wit, on the day and year last aforesaid: And, afterwards, and whilst the said John George Storie was and remained so seised of the said right of presentation or nomination and appointment to the said district church of St. Mary Magdalen, Peckham, the Rev. James Sydney Darvell, clerk,—which said James Sydney Darvell had been and was, at the time of the consecration of the said district church, and the division and assignment of the said district parish as respectively aforesaid, appointed by the then incumbent of the said church of St. Giles, Camberwell, to wit, the said John George Storie, clerk, and licensed, to wit, by the said Charles Richard as, and being, such bishop as aforesaid as, and to be, the stipendiary curate to serve the said district church,—resigned the stipendiary curacy of the said district church of St. Mary Magdalen, Peckham, to wit, at Camberwell aforesaid, in the county aforesaid; which said last-mentioned resignation was then and there accepted by the said Charles Richard as, and being, such bishop as aforesaid: And thereupon, to wit, on the day and year last aforesaid, and whilst the said John George Storie was and remained so seised of the said right of presentation or nomination and appointment to the said district church as aforesaid, to wit, on the day and year last aforesaid, the said district church of St. Mary Magdalen, Peckham, had become and was vacant, no spiritual person having ever theretofore been instituted or licensed as the perpetual curate of the said district church, or presented, nominated, or appointed to the perpetual curacy of the said district church: And that it then and there belonged, and now belongs to the said John George Storie to present or nominate and appoint a fit spiritual person to the said district church, so being vacant as aforesaid; but that the said bishop would not permit him so to do, and unjustly hindered him,—**[67]** wherefore he, the said John George Storie, said he was injured, &c.

Second plea,—that the said John George Storie ought not to have or maintain his said action against the said bishop, because he said, that, after the passing of an act of parliament passed in the session of parliament holden in the first and second years of the reign of Her Majesty Queen Victoria, intituled "An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and after the building and consecration of the said church of St. Mary Magdalen, and the making of the representation and order in council, and the effecting of the division and assignment of the said district parish of St. Mary Magdalen, as in the declaration respectively mentioned, to wit, on the 1st of November, 1843, the said church of St. Giles in the declaration mentioned, became vacant, to wit, by the resignation thereof then and there made by the said John George Storie to, and accepted by, the said bishop, as ordinary thereof: that the said John George Storie was thereupon then and there admitted, instituted, and inducted, upon his own prayer or presentation, into the said church of St. Giles, as in the declaration mentioned,—which last-mentioned church was then and there a benefice with cure of souls, within the meaning of the said act: that the net yearly value of the said churches of St. Giles and St. Mary Magdalen, jointly, then and there greatly, to wit, by 500l., exceeded the sum of 1000l.: that the church of St. Mary Magdalen,—which the said John George Storie had, up to the time of his resignation as aforesaid, held together with the said church of St. Giles, as one church, and which church of St. Mary Magdalen, upon a district being assigned thereto, as in the declaration mentioned, became and was, and thence hitherto had been, and continued to be, a benefice with cure of souls [68] in the diocese of the said bishop, to wit, at Camberwell aforesaid, in the said county,—thereupon, then and there, by reason of the premises, became and was vacant, and it then and there belonged to the said John George Storie to present, nominate, and appoint a clerk to the said church of St. Mary Magdalen; of which said avoidance, and of all which premises, the said John George Storie then and there had notice: that the said church of St. Mary Magdalen, so having become and being vacant as aforesaid, was, and continually remained, so vacant for and during the period of eighteen calendar months from and immediately after such avoidance and notice as aforesaid, and also for and during the full period of eighteen calendar months from and immediately after the day of such avoidance and notice as aforesaid, to wit, for four years, to wit, at Camberwell aforesaid, in the county aforesaid, neither the said John George Storie, nor the ordinary, nor the metropolitan, nor any other person whatsoever, having during all the time last aforesaid presented, nominated, or appointed a clerk thereto, and, by reason thereof, the said last-mentioned church devolved to our said sovereign lady the Queen, and it now belongs to our said sovereign lady the Queen, to present, nominate, and appoint a clerk to the said last-mentioned church so vacant as aforesaid, to wit, at, &c.; and our sovereign lady the Queen has not as yet presented, nominated, and appointed a clerk thereto: that, after the said period of eighteen calendar months had elapsed, and not before, to wit, on the 1st of May, 1848, the said John George Storie, who, at the time of the last-mentioned church becoming vacant as last aforesaid, was, and thence continually to the pleading of the plea had been, seised of the advowson of the last-mentioned church, presented, nominated, and appointed a clerk, to wit, the said John George Storie, to the said bishop, to be admitted, [69] licensed, instituted, and inducted to the said last-mentioned church, to wit, at Camberwell aforesaid, in the county aforesaid: and that thereupon the said bishop refused to admit, license, institute, or induct the said John George Storie, upon his presentation, nomination, and appointment so made as aforesaid, as he lawfully might for the cause aforesaid; which was the disturbance in the declaration mentioned: verification, and prayer of judgment.

Third plea,—that the said church of St. Mary Magdalen in the declaration mentioned, upon such assignment of a district being made, as in the declaration mentioned, became and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said bishop, to wit, &c.: that the resignation by the said John George Storie of the said church of St. Giles, Camberwell, in the declaration mentioned, was, so as in the declaration mentioned, made and accepted, and notice of such acceptance was given by the said bishop to the said John George Storie, to wit, at, &c., more than eighteen calendar months before any presentation, nomination, or appointment was made to the church of St. Mary Magdalen in the declaration mentioned, or any disturbance was made by the said bishop in respect of the said last-mentioned church, to wit, on the 28th of October, 1843: verification, and prayer of judgment.

Fourth plea,—that the said church of St. Mary Magdalen in the declaration mentioned, upon such assignment of a district being made as in the declaration mentioned, became, and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said bishop, to wit, at Camberwell aforesaid, in the county aforesaid: that the said admission, institution, and induction of the said John George Storie to the said church of St Giles, Camberwell, in the declaration [70] mentioned, was, so as in the declaration mentioned, made, to wit, at Camberwell aforesaid, in the county aforesaid, after the passing of an act of parliament passed in the session of parliament holden in the first and second years of the reign of Her Majesty Queen Victoria, intituled "An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and more than eighteen calendar months before any presentation, nomination, or appointment was made to the said church of St. Mary Magdalen in the declaration mentioned, or any disturbance was made by the said bishop in respect of the said last-mentioned church; the said church of St. Giles having, during all the time in the declaration and this plea mentioned, been a benefice with cure of souls within the meaning of the said act, to wit, at Camberwell aforesaid, in the county aforesaid: and that the net yearly value of the said churches of St. Giles and St. Mary Magdalen, jointly, then, to wit, on the day when the said John George Storie was admitted, instituted, and inducted to the said church of St. Giles, as in the declaration mentioned, greatly, to wit, by 500l., exceeded the sum of 1000l., to wit, at Camberwell aforesaid, in the county aforesaid: verification and prayer of judgment.

And, as to the plea of the said bishop by him secondly above pleaded, the said John George Storie, not acknowledging anything above alleged by the said bishop in his said second plea to be true, but protesting that the said church of St. Mary Magdalen did not become, nor was, vacant at the time nor in the manner in the said second plea mentioned,—and further protesting that it did not belong to the said John George Storie to present, nominate, or appoint a clerk to the said church of St. Mary Magdalen until long after the time in the said plea mentioned,—and further protesting that the said John George [71] Storie did not have notice of the said alleged avoidance, or of the premises in the said second plea in that behalf mentioned,—and further protesting that the said church of St. Mary Magdalen was not, nor remained, vacant for or during the period of eighteen calendar months in the said second plea mentioned, or during any period of eighteen months,—and further protesting that the said John George Storie did present, nominate, and appoint a clerk to the said last-mentioned church within the period of eighteen calendar months next after the same had first become, and was, vacant,—and further protesting that the said last-mentioned church did not devolve to our sovereign lady the Queen, nor did it then belong to our said lady the Queen to present, nominate, or appoint a clerk to the said last-mentioned church,—and, lastly, protesting that the said second plea is wholly untrue in substance and in fact;—nevertheless, the said John George Storie said that he, by reason of anything by the said bishop in his said second plea alleged, ought not to be barred or precluded from having and maintaining his said action against him the said bishop, because he said that the said second plea, and the matters therein contained, were not sufficient in law to preclude or bar the said John George Storie from having or maintaining his said action against him the said bishop, and that he the said John George Storie was not obliged or bound by the law of the land in any manner to answer to the said second plea, in manner and form as the same was above pleaded,—verification; wherefore, for the insufficiency of the said second plea in this behalf, the said John George Storie prayed judgment against the said bishop, and his damages by him sustained by reason of the said hindrance, together with a writ to the said metropolitan, to be adjudged to him, &c.: And the said John George Storie, according to the form of the statute in such case made and provided, [72] states and shews to the court here the following causes of demurrer, amongst others, to the said second plea, that is to say,—that the said bishop ought not to be received, nor can by law be received or allowed, to set up, shew, or defend the right or title of our said lady the Queen, or the right or title of any other person, to the patronage of the said church of St. Mary Magdalen, or any such right or title to present, nominate, or appoint a clerk thereto, inasmuch as the said church is still vacant (as is confessed by the said plea), and neither has the said bishop, nor has the said metropolitan, nor has our said lady the Queen, nor has any other person than the said John George Storie, collated or presented thereto, or given or conferred the same to or upon any clerk, or elected so to do, upon, or for, or by reason of the said alleged lapse, or in any other manner;—that the said plea does not shew any cause or matter sufficient to enable the said bishop to counterplead the right or title of the said John George Storie to present, nominate, or appoint a clerk to the said last-mentioned church, being so vacant as aforesaid; that the said second plea does not sufficiently shew that the said last-mentioned church had been vacant, in such manner or so that a clerk might or could have been inducted, instituted, or admitted therein, or presented, nominated, or appointed thereto, for the full period of eighteen calendar months before the said John George Storie nominated, presented, or appointed a clerk thereto;—that the said second plea does not sufficiently allege or shew the day or time when the said church devolved to our said lady the Queen, as alleged in the said plea;—that the said second plea does not sufficiently, and with certainty, shew when, and at what time, and how, and on what act or event, the said church of St. Mary Magdalen became vacant, that is to say, whether the same became vacant on the resignation of the said John [73] George Storie of the said church of St. Giles, or the acceptance of such resignation, or the notice thereof, in the said second plea respectively mentioned, under and by force of the statutes relating to church-building, in the said declaration mentioned, or whether the said John George Storie continued to hold the said church of St. Mary Magdalen after such resignation, and until his said re-induction, re-institution, or re-admission into the said church of St. Giles, and whether the said church of St. Mary Magdalen then became vacant under and by force of the statute relating to the holding of benefices in plurality, in the said second plea mentioned, or how otherwise; —that the said plea is double and multifarious, in this, to wit, that it suggests, and relies on, two or more distinct and unconnected acts and matters, done and occurring at different times, as each causing the said church of St. Mary Magdalen to become vacant, that is to say, first, the resignation of the said church of St. Giles, or the acceptance of such resignation, or the notice thereof, and, secondly, the re-admission, re-institution, or re-induction of the said John George Storie to the said last-mentioned church;—that the said second plea is repugnant and inconsistent, in this, to wit, that the same supposes that the said church of St. Mary Magdalen became and was vacant on the resignation by the said John George Storie in the said second plea mentioned, of the said church of St. Giles, or the acceptance of such resignation, or notice thereof, under and by force of the church-building acts, and yet that the said second plea also supposes that he continued to hold the said church of St. Mary Magdalen until his re-induction or re-admission to the said church of St. Giles, and that thereupon the said church of St. Mary Magdalen became void by force of the said statute relating to pluralities;—that the matter relating to the said last-mentioned statute is irrelevant, and the intro-[74]-duction thereof into the plea tends to embarrassment and prolixity of pleading;—that the said church of St. Mary Magdalen is not shewn to have been a benefice with cure of souls, within the meaning of the last-mentioned act, at the time when the same is alleged in the plea to have become vacant;—that the said second plea does not allege or shew that the said John George Storie was admitted, instituted, inducted, or licensed to the said church of St. Giles, contrary to the provisions of the act in the said second plea mentioned;—that the same does not shew that the said churches of St. Mary Magdalen and St. Giles were not within the exceptions in such act made and provided:—that it appears in and by the declaration, that James Sydney Darvell, clerk, at the time of the consecration of the said district church of St. Mary Magdalen, and of the division and assignment of the said district parish, had been and was duly appointed and licensed a stipendiary curate to serve the said last-mentioned church, and continued to fill the said last-mentioned church, as such stipendiary curate, until the year 1848, and that the said last-mentioned church could not, and did not, become, and was not, vacant, at least so as to be subject to lapse, until the said James Sydney Darvell ceased to be such stipendiary curate; —that the second plea does not allege or shew that the licence of the said stipendiary curate was revoked or determined;—that the said second plea ought to have shewn how, and in what manner, the said James Sydney Darvell ceased to be such stipendiary curate as aforesaid, and to have shewn that the said church of St. Mary Magdalen was and remained vacant for eighteen calendar months after the said James Sydney

Darvell ceased to be such stipendiary curate ;—that it does not sufficiently appear how or in what way the said period of eighteen calendar months in the said second plea mentioned, is computed, or at or from what date such [75] period commenced ;—that the said second plea is argumentative, and amounts to a traverse of the right of the said John George Storie, as alleged in the declaration, and ought to have concluded to the country ;—that the said second plea does not sufficiently deny, or confess and avoid, the declaration, &c.

The third and fourth pleas were also demurred to, on similar grounds.

Manning, Serjt. (with whom was W. H. Cooke), in support of the demurrers (a)[1]. It is clearly not compe-[76]-tent to the bishop to counterplead the title of the plaintiff, as patron, by setting up the Queen's title by lapse. The leading case upon this subject is that of *Elvis* v. *The Archbishop of York* (a)[2]. There, Sir William Elvis brought a quare impedit to present to the church of Badworth, and declared that Sir Gervas Elvis, Knt., was seised of the manor of Sanby, to which the said advowson was appendant in fee, and held the same of the King, and, so seised, did present one George Turpin, his clerk, who was admitted and instituted, &c. ; that the said Sir Gervas, so seised, was attainted of felony, and executed (b) ; that, by force thereof, the King was seised of the said manor ad quod, &c., in fee, in right of his crown, and, so seised, did grant the manor and advowson thereunto belonging, to the plaintiff and his heirs, adeo plene et integre, &c.; and that, by virtue thereof, he entered, and was seised thereof in fee, and, so being seised, the church became void, by the death of Turpin, whereby it belonged to the plaintiff to present, and the defendants did disturb him, &c. The archbishop,—confessing the seisin of Sir Gervas Elvis, and the presentation of Turpin, and the attainder and [77] execution, as the plaintiff had set forth in his declaration,—pleaded, that, by virtue of the said attainder, the King was seised of the manor ad quod, &c., in fee, in right of his crown, and, so seised, the church became void by the death of Turpin, whereby the King, to the church, being void, did present to the said archbishop, Thomas Bishop, whom he caused to be admitted, instituted, and inducted, as it was lawful for him to do, &c.: whereupon the plaintiff demurred. Lord Hobart, in delivering judgment, after having adverted to the form of pleading for the ordinary and incumbent at common law, proceeds,—"Now we will see how it stands this day, and what change is made by the statute 25 E. 3, c. 7, pro clero, stat. 3, and what is the true meaning and use of that law, which is thus:—When an archbishop, bishop, or other ordinary, hath given a benefice of right devolute unto him by lapse of time, and after the King presenteth, and taketh his suit against the patron, who percase will suffer that the King shall recover without action tried, in deceit of the ordinary, or the possessor of the said benefice, that, in such cases, and in all other cases like, where the King's right is not tried, the archbishop, or bishop, ordinary, or possessor, shall be received to counterplead the title taken for the King, and to have his answer, and to shew and defend his right upon the matter, although that he claim nothing in the patronage in the case aforesaid. The particular cause of this law is, for the relief only of the ordinary that hath collated by lapse, and of the clerk that is so collated, that they may both plead to the title against the King; which when you consider, it was a necessary law as against the King more than against common patrons; for, the King not being bound by lapse of time, if the common patron suffered a lapse, and the bishop collated lawfully, yet, if the King, pretending himself patron, brought a quare impedit against [78] the ordinary and incumbent, there was no means for them to save themselves, since they could not deny the King's title, and maintain the patron's, in whose default the lapse took place; but the statute gives remedies likewise in like cases by express words, so that cases of like nature are rather remedied by letter than equity. And therefore, first, in the case of lapse, a common person might by practice have turned out a lawful collatee in one only case, and that was this: A common person, no true patron, presents within six months, and the true patron himself presents not in time, whereupon the ordinary collates by lapse, against whom the pretender brings a quare impedit, because his clerk was refused, wherein he must needs prevail if his title be good: and it must be taken for good, because neither ordinary nor incumbent could deny it; for, de non apparentibus et de non existentibus, eadem est ratio. This is one of the like cases meant in the statute; for, in all other cases, the lapse is an equal title against all common persons. But the commonest like case, and that which extends furthest, is the purview; for, every incumbent that is called a possessor, as well by presentment as by collation, is allowed, by the words of the law, to counterplead the King's title, and to shew and defend his own right upon the matter, though he claim nothing in the patronage in the case aforesaid. Note all the words, for they have all their weight; for, first, the incumbent must be a possessor; so that, if he have his presentation, admission, and institution upon the lawful title, yet remains, as he was before, under the mischief of the common law, because he is not a possessor, according to the letter of the law, till induction. Again, I say, that, though he be a possessor, he must, by the letter and meaning of this law, as well shew and defend his own right, as counterplead his adversary's. And therefore clearly he cannot make himself parson impersonee [79] of the presentation of J. S., and defend himself by the title of J. D., under whom he claims not, though that were sufficient to destroy the plaintiff's title, by confessing and avoiding, or the like; neither can he counterplead the plaintiff's title, but must also make a title to himself, by the word and meaning of this law,—which I speak not to bind the incumbent by the patron's plea, whereof I will speak hereafter, when I come to the incumbent's plea. But, touching the ordinary's plea upon this statute, I hold plainly that he can no otherwise plead than he could at the common law, but only where he hath collated actually by lapse; for, though the incumbent of presentation be also admitted to plead, by the meaning of this law, under the word 'like case,'—because the case is like indeed,—yet the ordinary's case before actual collation, is no ways like in case; for, he hath gotten no interest for himself, nor his clerk, in the church. And, therefore, if the incumbent instituted only at the presentation of another, be not within the relief, much less shall the ordinary, that hath no interest, but an office only, that ought to be indifferent to all patrons, and maintain no side." That authority was recognised in the recent case of *Apperley* v. *The Bishop of Hereford* (9 Bingh. 681, 3 M. & Scott, 102), where it was held, that the ordinary cannot, before he has collated, counterplead the patron's title. This objection applies to all the pleas.

(a)[1] The points marked for argument on the part of the plaintiff, were as follows :—

"That the second plea is bad for the following, amongst other, reasons,—first, that the defendant cannot counterplead the plaintiff's title, the defendant not having collated by lapse,—secondly, that the plea does not sufficiently shew that the plaintiff has lost the right to present, or that the same has lapsed,—thirdly, that the right of presentation could not lapse, as supposed by the plea, inasmuch as the district church was filled and served by a licensed stipendiary curate (see the statutes, 1 & 2 Vict. c. 107, s. 13, 2 & 3 Vict. c. 49, s. 11, and 59 G. 3, c. 134, s. 12),—fourthly, that the plea does not sufficiently shew when or upon what event the alleged title of our lady the Queen to present, accrued,—fifthly, that the plea is double and repugnant, in relying on the resignation of the church of St. Giles, and also on the re-acceptance thereof, as vacating the district church,—sixthly, that the plea is ambiguous and uncertain,—seventhly, that the plea does not traverse or confess and avoid the declaration,—eighthly, that the plea does not shew title in the defendant, or any other person through or under whom he claims or acts,—ninthly, that the district church is not alleged to be full,—tenthly, that the plea does not shew that the acceptance of the church of St. Giles was contrary to the statute 1 & 2 Vict. c. 106, or that a vacancy was caused thereby :

"That the third and fourth pleas respectively are bad, for the following, amongst other, reasons,—first, that the defendant cannot counterplead the plaintiff's title,—secondly, that the pleas do not shew that the plaintiff has lost the right to present, or that it had lapsed, or devolved to, or is vested in, any other person,—thirdly, that the pleas do not shew when or how the district church became vacant, or that it was vacant for eighteen months before a presentation or disturbance,—fourthly, that the district church is not alleged to be full,—fifthly, that the presentation was not subject to lapse during the licence and incumbency of the stipendiary curate,—sixthly, that the pleas do not traverse or confess and avoid the declaration,—seventhly, that the pleas are vague, ambiguous, and uncertain,—eighthly, that the pleas are wholly irrelevant,—ninthly, that the pleas do not shew title in the defendant, or other person under whom he claims or acts,—tenthly, that the pleas do not shew that any person other than the plaintiff has ever presented to the said district church, or elected so to do :

"And that the fourth plea is bad,—eleventhly, because it does not shew that the acceptance of the church of St. Giles was contrary to the statute 1 & 2 Vict. c. 106,—twelfthly, that the re-admission, institution, and induction to the church of St. Giles, and the time thereof, respectively, were immaterial, and that the plaintiff could not take issue thereon."

(a)[2] Hobart, 315, Sir W. Jones, 4, per nom. *Hellwayes & Archevesque de Yorke & Al.*

(b) As to the share of Sir Gervas Helwis in the murder of Sir Thomas Overbury, see Bacon's Works, by Birch, vol. iv. p. 460, vol. vi. pp. 107, 8.

The next objection to the second plea is, that it does not sufficiently shew that the plaintiff has lost the right to present, or that there has been any lapse. It is difficult to see what answer can be given to that. [Wilde, C. J. You contend, that, until the licence is revoked, the church continues full. H. Hill. The real question is, whether the district church was filled **[80]** by the incumbent of the mother church. The defendants will mainly rely on the 58 G. 3, c. 45, ss. 13, 21 to 25, and 67, and 59 G. 3, c. 134, ss. 12, 13, 19.]

The 58 G. 3, c. 45, s. 13, enables the commissioners to grant money for the building of additional churches in parishes of certain population, and in want of accommodation. The 21st section enacts "that, in any case in which the said commissioners shall be of opinion that it is not expedient to divide any populous parish or extra-parochial place into such complete, separate, and distinct parishes as aforesaid, but that it is expedient to divide the same into such ecclesiastical districts as they, with the consent of the bishop, signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending divine service according to the rites of the united church of England and Ireland, to persons residing therein, in the churches and chapels already built, or in additional churches or chapels to be built therein, and as may appear to such commissioners to be convenient for the enabling the spiritual person or persons, who may serve such churches or chapels, to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits of the persons residing therein,—the said commissioners shall represent such opinion to His Majesty in council, and shall state in such representation the bounds by which such districts are proposed to be described; and if thereupon His Majesty in council shall think fit to direct such division to be made, such order of His Majesty in council shall be valid and good in law for the purpose of effecting such division; or, in any case in which the said commissioners shall be of opinion that it is not expedient to make any such di-**[81]**-vision into such ecclesiastical districts as aforesaid, the said commissioners may build, or aid the building of, any additional chapels in any such parishes or extra-parochial places, to be served by curates to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or extra-parochial places, and licensed by the bishop of the diocese; such curates to be paid such salaries as shall be assigned by the said commissioners, under the provisions of this act, in manner hereinafter directed." The 22nd section enacts "that the several new parishes created by any such complete division as aforesaid, and also the several districts of any parish, or extra-parochial place, where any such division thereof shall have been so made as aforesaid, shall be ascertained and marked out by described bounds, and the description of such bounds shall be inrolled in the high court of Chancery, and be registered in the office of registry of the diocese, and notice thereof given in such manner as the commissioners shall deem necessary and direct for that purpose." By s. 23 the King in council is authorised to alter such boundaries. The 24th section enacts "that such boundaries shall continue, and be, the boundaries of such parishes or districts respectively, unless so altered, and such districts shall thereupon become and be called district parishes, by such names as shall be given to them respectively in the instrument so inrolled as aforesaid, and shall become and be separate and distinct district parishes, and the churches and chapels respectively assigned to such districts, shall, when duly consecrated for that purpose, become, and be, the district parish churches of such district parishes, for all purposes of ecclesiastical worship, and performance of ecclesiastical duties, and as to all marriages, christenings, churchings, and burials, and the registry thereof, respectively, within the same, and in relation to all fees, **[82]** oblations, and offerings, and the demanding, suing, and prosecuting for, and recovering the same, and as to all other purposes whatsoever, save and except as is in this act particularly excepted." The 25th section enacts "that every church and chapel built, or acquired, under the provisions of this act, and appropriated to any such district parish so made under the provisions of this act, shall be deemed a perpetual curacy, and shall be considered in law as a benefice presentative, so far only as that the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings, in like manner as institution to any such benefice; and the spiritual person serving the same, shall be deemed the incumbent thereof; and such incumbents shall have perpetual succession, and shall be, and are hereby declared to be, bodies politic and corporate, and may receive and take such endowments in lands or tithes, or both, or any such augmentation, as shall be granted to them or their successors; and all such incumbents, and all persons presenting or appointing any such incumbents, shall respectively be subject to all jurisdictions and laws ecclesiastical or common, and to all provisions, regulations, penalties, and forfeitures contained in any acts of parliament in force relating thereto respectively; and, in case of any failure or neglect, in not presenting or nominating any such incumbent for the space of six months, such presentation or appointment shall thereupon lapse, as in cases of actual benefices." And the 67th section enacts "that the nomination or appointment of the spiritual person to serve all such district churches and chapels, shall belong to the patron of the church of the parish or extra-parochial place out of which such district shall be taken; and the spiritual person so presented and instituted or licensed (as the case may be) by the bishop of the diocese, shall be subject to the same jurisdiction and **[83]** visitation as the incumbent of the parish now is." The 12th section of the 59 G. 3, c. 134, enacts "that all churches which shall be built, or acquired, under the provisions of the said act (58 G. 3, c. 45) or this act, whether belonging to parishes completely divided, or to district parishes, shall, immediately after the consecration thereof, become and be deemed to be, and be, district benefices and churches for all ecclesiastical purposes: provided always, that, during the incumbency of the then existing incumbent of the parish, except as hereinafter excepted, such churches shall be served by licensed stipendiary curates, appointed by the existing incumbent, and subject to all the laws in force relating to stipendiary curates, except as to the assigning salaries to such curates by the bishop of the diocese; and every such existing incumbent shall, until his death or other avoidance, continue to hold all the churches of the several divisions of his parish as if they were one church, unless he shall voluntarily resign one or more of them; any statute or law against plurality of benefices, or anything contained in the said recited act or any other act or acts of parliament, to the contrary, notwithstanding." The 13th section provides and enacts "that the right of presentation and appointment of the spiritual persons to be the respective incumbents of, or to serve, the churches of the several parishes created by the complete division of any parish, under the provisions of the said recited act or this act, shall, in every case, belong to the patron of the church of the original parish; and the exercise of such right of presentation or appointment shall commence on the death, or other avoidance, of the existing incumbent, except in any case in which the division of any parish shall have been made, or in which the commissioners shall have declared their intention of dividing any parish, before or during any avoidance, in which cases **[84]** the exercise of such right of presentation or appointment shall commence upon the consecration of the church or churches respectively of any such division; and the several churches erected in and for such divisions respectively, shall, immediately upon consecration, become benefices, and subject to all the laws in force concerning presentations and appointments to benefices and churches, and lapse, and all other laws, provisions, and regulations relating to the holding of benefices and churches: provided always that the spiritual care and superintendence of every parish so divided, during avoidance, shall, until incumbents shall have been presented or appointed for the divisions thereof, continue in the spiritual person who shall be the incumbent of the original parish; and such spiritual person shall receive all emoluments accruing and arising within the parish during such superintendence." And the 19th section enacts "that no chapel built, or acquired, under the provisions of the said recited act, which shall be situate in any district parish made a parish for ecclesiastical purposes under the provisions of the said recited act, and which shall not be, or be made, the church of such district shall be, or be deemed to be, a perpetual curacy, or be considered in law as a benefice presentative, under the provisions of the said recited act." Reliance will also probably be placed, on the other side, upon the 4th section of the 1 & 2 Vict. c. 107, which enacts, "that, except as thereinafter provided, no spiritual person holding a benefice with a population of more than three thousand persons, shall accept and take, and hold therewith, any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons; nor shall any spiritual person holding a benefice with a population of more than five hundred persons, accept and take, to hold therewith, any other **[85]** benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than three thousand persons; nor shall any spiritual person hold together any two benefices, if, at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of 1000l." The plaintiff, however, relies upon the 13th section of the 1 & 2 Vict. c. 107, which enacts, "that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish, or district parish, in which such chapel is situate, unless the same shall be revoked by the bishop of the diocese under his hand and seal; but such licence shall continue in force, unless otherwise directed, as aforesaid, by such bishop, notwithstanding the avoidance of the church of the parish or district parish, any statute, law, canon, or usage to the contrary notwithstanding." That modifies the provisions of the former statutes: it dispenses with the necessity of a new appointment. The effect of the statute is, to make the stipendiary curate the incumbent. On the death or avoidance of the incumbent, the interest of the stipendiary curate would, but for the 1 & 2 Vict. c. 107, s. 13, be gone. The effect of that section is, to make him continue curate until a new one has been presented to the bishop to be licensed. The incumbent has appointed a stipendiary curate to the district church: the incumbent dies, or resigns: the consequence is, that the patron *must* present to the mother church, and *may* present a proper curate to the district church; but, until he does so, the stipendiary curate continues to be the curate of the district church. [Maule, J. Here, the church of St. Giles, Camberwell, is vacated,—does that vacate the district church of St. Mary Magdalen, **[86]** Peckham?] No: the statute 1 & 2 Vict. c. 107, s. 13, prevents that. [Maule, J. The patron has a right to present; and the bishop may revoke the licence of the stipendiary curate: is the curacy full?] Yes. [Maule, J. Full of a person who may at any moment be turned out!]

The next ground of objection to the pleas is, that it is not sufficiently shewn when, or upon what event, the title of the Queen to present accrued. It does not appear whether it is the avoidance or the notice that is relied upon as the starting point from which the eighteen months are to run. [Maule, J. That is immaterial, the latest of those events being remote enough. If the time runs from the resignation, the allegation must be taken to mean that; if from the notice, it means that: whatever is unnecessary, will be rejected as surplusage.]

Hugh Hill (with whom was Sumner), for the defendant (*a*). On the face of the

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(*a*) The points marked for argument on the part of the defendant, were as follows:—

"That the facts admitted on the pleadings being, that the district church of St. Mary Magdalen was carved out of the plaintiff's vicarage of the parish of St. Giles, under the 58 G. 3, c. 45, and 59 G. 3, c. 134, that Mr. Darvell was then appointed and licensed stipendiary curate of the district church, that the plaintiff resigned the mother church, and was, upon his own presentation, re-instituted and inducted thereto more than eighteen months before he presented to the district church, Mr. Darvell having resigned the stipendiary curacy of the district church in the interval, but no perpetual curate having been appointed thereto,—first, the district church became vacant, either by the plaintiff's resignation of or re-institution and induction to the mother church,—secondly, and this though Mr. Darvell was, at both those times, stipendiary curate of the district church,—thirdly, consequently, that, no perpetual curate having been appointed within eighteen months, the district church lapsed to the crown under the 58 G. 3, c. 45, s. 25,—fourthly, that the enactment (1 & 2 Vict. c. 107, s. 13), that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish or district parish in which such chapel is situate, unless the same shall be revoked by the bishop of the diocese, declaration, the plain-[87]-tiff shews that he is both patron and incumbent. He alleges that he resigned the living of St. Giles, Camberwell, but not the district church of St. Mary Magdalen. [Maule, J. Though he might resign the district church without resigning the mother church, he could not resign the latter, and retain the former.] It is submitted that he could. Being possessed of the incumbency of St. Giles, Dr. Storie was disqualified from being presented to the district church. His incumbency of the mother church having ceased on his resignation, he is expressly prevented from holding the district church, by the 1 & 2 Vict. c. 106, s. 11, which enacts, "that, if any spiritual person holding any cathedral-preferment or benefice, shall accept any other cathedral-preferment or benefice, and be admitted, instituted, or licensed to the same, contrary to the provisions of this act, every cathedral-preferment or benefice so previously held by him, shall be and become ipso facto void, as if he had died or had resigned the same, any law, statute, canon, usage, custom, or dispensation to the contrary notwithstanding." Dr. Storie resigns St. Giles's: he presents himself de novo to St. Giles. Mr. Darvell resigns the district church; Dr. Storie then presents himself to the district church. [Maule, J. He thereby vacates St. Giles.] Only if his holding the two livings is incompatible with the 21 H. 8, c. 13. [Maule, J. No doubt, these two livings [88] cannot be held together: it is the first that is void. There is nothing to prevent Dr. Storie from holding St. Mary Magdalen, giving up St. Giles.] It is submitted that, on Dr. Storie's resignation of St. Giles, St. Mary Magdalen was not full of Mr. Darvell, so as to prevent a lapse.

Although it is true that the ordinary cannot, as against the patron, counterplead by a lapse to himself, yet the case is different where the lapse is to the crown. In Watson's Clergyman's Law (edit. 1747, p. 116, 117), it is said: "After a church is lapsed to the bishop or archbishop, it concerns them to take advantage thereof with all speed, lest the benefit be lost; for, after a church is lapsed to the immediate ordinary, if the patron doth present before he hath filled the church, the ordinary ought to receive his clerk: for, lapse to the ordinary is only an opportunity of executing a trust, viz. of seeing the cure supplied, in case of the patron's neglect; which being performed by the patron himself, the ordinary can take no advantage by it: 11 H. 4, 80 (T. 11 H. 4, fo. 79, 80, pl. 22); 18 E. 3, 21 a. (*R.* v. *Bishop of Carlisle*, E. 18 E. 3, fo. 21, pl. 37); 13 E. 4, 3 (M. 13 E. 4, fo. 3, pl. 5); 43 E. 3, 11 a. (H. 43 E. 3, fo. 10 b., 11 a., pl. 33); Trin. 18 H. 7, Keilwey, 50. And by Hobart, in *Colt and Glover's case*, p. 154; 28 & 29 Eliz. *Beverley* v. *The Bishop of Canterbury and Cornwall* (1 Anderson, 148); Doctor and Student, l. 2, c. 36). If one hath the nomination, and another the presentation, and, the six months being incurred, he that hath the presentation only presenteth to the bishop, before the bishop hath taken benefit of the lapse, without any nomination made to him, in such case the bishop is bound to admit the clerk, as the clerk of the very patron. By Doderidge, in his Complete [89] Parson, Lect. 12, fo. 67. Or, though the patron did not present within his six months, but the ordinary did collate before the expiration thereof, the patron is not thereby barred from presenting, but may present after the six months be expired, and his clerk ought to be received: *Green's case* (6 Co. Rep. 22); *Boswell's case* (6 Co. Rep. 50). But, if the bishop, in such case, after the six months, and before any presentation exhibited, hath made a new collation, the patron is barred; 2 Roll. 368; Co. Litt. 344. So, though lapse be incurred to the inferior ordinary, and the archbishop doth collate within the inferior ordinary's six months, the patron's clerk, if he be presented, ought to be received; because the collation of the metropolitan is tortious, and doth not put the patron to his quare impedit, but is null, and as no collation to the patron: By Rolle, in his Abridgment, vol. ii. p. 368 (translated, 17 Vin. Abr. 389, pl. 4). But this is doubted of, and objected, that the wrong is here done to the ordinary only, and not to the very patron. 11 H. 4, 80 (supra, 88). The like law, if lapse be accrued to the metropolitan; for, then, if the patron present to the inferior ordinary, whilst the church remains void, he is bound to receive his clerk, and the metropolitan is

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under his hand and seal, does not prevent the district church becoming vacant, or lapse to the crown taking place, under the circumstances stated,—fifthly, that it is perfectly competent to the defendant to set up the title of the crown to present by way of lapse, in opposition to the title of the plaintiff,—sixthly, that the pleas are good in point of form."

barred: *Booton* v. *The Bishop of Rochester* (Hutton, 24); Doctor & Student, l. 2, c. 36. But, if either the ordinary of the diocese, or metropolitan, hath collated his clerk, whilst the turn was respectively theirs, although the clerk be not inducted, the patron's clerk, if after that presented, is not to be admitted. Trin. 10 Eliz. Dyer, 277. Or, if the inferior ordinary, after the time is gone by lapse to the metropolitan, hath collated his clerk to the benefice that is in lapse, although this collation be **[90]** tortious to the metropolitan, yet it seems that it takes away the presentation of the patron, so that he shall not present, and is only an usurpation upon the metropolitan: By Finch, J., at Somerset assises; *Sir Francis Popham* v. *The Bishop of Bath and Wells*, 2 Roll. 350, 368 (17 Vin. Abr. 319, pl. 6). And thereby the metropolitan is put out of possession, and driven to his quare impedit. *Green's case*, 6 Co. 29 b.; *Boswell's case*, 6 Co. 50; Co. Litt. 344. It hath been a question whether the bishop ought to admit the patron's clerk, after the title of lapse is passed from the metropolitan to the King. Trin. 10 Eliz. Dyer, 277; and by Hobart, the patron's presentation takes place, after the church is lapsed to the King, if it be exhibited to the ordinary before the King's: in *Colt and Glover* v. *The Bishop of Coventry*, Hobart, 157. Because the patron's right to present continueth until the title by lapse is executed, and the King's title is not vested in him in this case absolutely, as other titles are, but conditionally, viz. if he doth present before the patron: because the King hath it only as supreme ordinary: Hutton, 24. But, by others, the turn by lapse is so vested in the King, that, if the patron's, or other persons, clerk be admitted to a church after 'tis come to the King by lapse, the King by quare impedit may recover the presentment, and remove such clerk. *Beverley* v. *The Bishop of Canterbury* (1 And. 148); *Baskervile's case* (7 Co. Rep. 28); 27 E. 3, 85 (*d*); *The Bishop of Lincoln's case* (Owen, 89); *Cumber* v. *The Bishop of Chichester*, cited in the case of *The King* v. *The Archbishop of Canterbury and Prust* (Hetley, 124). And this latter opinion is taken to be the law." In 2 Bla. Comm. 277, it is said: "If the bishop doth not collate his **[91]** own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk: for, as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason, that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage, if he present before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after the lapse to the metropolitan, collate his own clerk, to the prejudice of the archbishop: for, he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But, if the presentation lapses to the King, prerogative here intervenes, and makes a difference; and the patron shall never recover his right till the King has satisfied his turn by presentation: for, nullum tempus occurrit Regi." In 17 Viner's Abridgment, 392, Presentation (B. c. 2), pl. 4, it is said, that, "when a lapse is in the King, he is not compellable to present, and, till he presents, the ordinary has the cure de animis (*a*), and he shall provide for it; so the difference is between the cura animarum and the patronage: Per Doderidge, J., 1 Roll. R. 464, in the case of *Colt* v. *Glover*." In Watson's Incumbent (page 288), is the following passage:—"Note, that neither plaintiff nor defendant may have judgment or execution, but a third person, that is no party to the suit; for, if, in the debate of a cause betwixt a plaintiff and defendant, it doth appear to the court, either by the declaration of **[92]** the plaintiff, or by pleading, or confession of the parties, that neither of them hath right, but the presentation belongs to the King, the court may, nay, they ought to, award a writ to the bishop for the King, and without prayer on the part of the King; for, the court and judges are the King's counsel." Here, the plea merely adds to the facts stated in the declaration, that Dr. Storie held both the mother church and the district church as one church, being together of a greater yearly value than 1000l., whereby the church of St. Mary Magdalen became vacant; and that, eighteen months having elapsed since the resignation by Dr. Storie of the church of St. Giles, and notice thereof, the right to present

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(*d*) M. 27 E. 3, fo. 8, pl. 25. The reference in the text is to the old edition of Y. B.

(*a*) Sic in the report in Rolle.

vested in the crown: so that, by reason of the prerogative of the crown, the plaintiff is not entitled to recover. It is, therefore, not like the case of a bishop setting up the title of a private individual. In *Apperley* v. *The Bishop of Hereford*, the bishop pleaded, not the title of the crown, but his own title to present by lapse. For these reasons, it is submitted that Mr. Darvell was not incumbent so as to prevent a lapse, that the title to present was in the crown, and that it was competent to the bishop to plead that.

Manning, Serjt., in reply. The distinction attempted to be set up between the present case and *Elvis* v. *The Archbishop of York*, on the ground that the crown is interested here, is not well founded: and, in truth, that was a case of title in the crown. The reason why the ordinary is not permitted to counterplead is, that he is a stranger to the advowson. He cannot set up the jus tertii: and the rule applies with equal force in the case of the crown, as in the case of a subject. Besides, a mere allegation of title in the crown, is not enough to entitle the court to interfere in the way suggested. In the passage last cited from Watson, the **[93]** learned author adds: "But this must be when the King's title appears so clear in allegatis et probatis to the court, as that it is infallible both against plaintiff and defendant."

Cur. adv. vult.

Wilde, C. J.,* now delivered the judgment of the court (*a*).

We have considered this case, and we are of opinion that the declaration discloses a perfectly good title in the plaintiff to present, and that the pleas afford no answer. We consider the law to be well settled by the case of *Elvis* v. *The Archbishop of York*, confirmed by *Apperley* v. *The Bishop of Hereford*, viz. that it is not competent to the bishop to counterplead the patron's title.

With regard to the other objection,—that the incumbent, being in possession of the church of St. Giles, Camberwell, could not be admitted to the church of St. Mary Magdalen, Peckham,—it appears to be quite clear, according to the doctrine laid down by this court in *Apperley* v. *The Bishop of Hereford*, that, by the admission of Dr. Storie to the church of St. Mary Magdalen (the two livings being together worth more than 100l. per annum), the incumbency of St. Giles became, ipso facto, void. We are, therefore, of opinion that there is no objection to the admission of the plaintiff's clerk on that ground, and that the pleas are unquestionably bad, and therefore the plaintiff is entitled to judgment.

Judgment for the plaintiff.

[94] Moss and Others *v.* Smith and Another. Jan. 17, 1850.

[S. C. 19 L. J. C. P. 225; 14 Jur. 1003. Approved, *Farnworth* v. *Hyde*, 1866, L. R. 2 C. P. 225; *Rankin* v. *Potter*, 1873, L. R. 6 H. L. 115. Adopted, *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 762; *Dahl* v. *Nelson*, 1881, 6 App. Cas. 52; *Shepherd* v. *Henderson*, 1881, 7 App. Cas. 69; *Assicurazioni Generali* v. *S.S. Bessie Morris Company*, [1892] 1 Q. B. 578; [1892] 2 Q. B. 657. Discussed, *Angel* v. *Merchants' Marine Insurance Company*, [1903] 1 K. B. 817.]

A ship, valued at 12,000l. was insured from Valparaiso to England; the freight, valued at 4000l., was also insured by a separate policy: the ship, having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled, by stress of weather, to put back to Valparaiso, where the master, finding, upon survey, that, to repair her so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her: Held, not a total loss of either ship or freight.

Assumpsit on two policies of assurance.

The first count was upon a policy, dated the 4th of May, 1844, for 1000l. upon the ship "Alfred," valued at 12,000l., at and from her port or ports of loading in the Pacific, not North of Lima, to her port or ports of discharge in the United Kingdom: Averment of a total loss, by perils of the sea.

The second count was upon a policy of the same date for 1000l. on chartered freight in the said ship "Alfred," valued at 4000l., at and from Sidney, New South Wales, to all or any port or ports in the Pacific, not north of Lima, to her port or ports of discharge in the United Kingdom: Averment, that the ship, by the perils and dangers of the sea, &c. became leaky and greatly damaged, and by the said perils and dangers the said ship became wholly lost to the plaintiffs, and never did arrive at her port of discharge; that the plaintiffs thereby lost the freight of the goods on board the said ship; and that thereupon the plaintiffs gave notice of the premises to the defendants, and then, according to the custom of merchants, abandoned and renounced all their interest in the premises to the defendants.—Notice of the premises, and demand of payment.

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* [For the written judgment of Wilde, C. J., see 17 C. B. 653.—Ed. E. R.]

(*a*) Wilde, C. J., Maule, J., Cresswell, J., and Williams, J.

The declaration also contained the common counts.

The defendants pleaded, amongst other pleas, thirdly, as to so much of the first count as related to the defendants, not having paid or made good the partial loss **[95]** and damage, payment into court of 100l., and no damage ultra,—verification.

Fourthly, as to the residue of the causes of action in the first count, that the ship was not wholly lost; concluding to the country.

Seventhly, as to so much of the second count as related to the defendants' not having paid the partial loss by reason of the said ship, with the said goods on board, being lost, as attached to the said policy, payment into court of 150l., and no damages ultrà,—verification.

Eighthly, as to the residue of the causes of action in the second count mentioned, that the said ship and the said freight were not wholly lost, &c.; concluding to the country.

The plaintiffs joined issue on the fourth and eighth pleas, and replied to the third and seventh, that the plaintiffs had sustained damages to a greater amount, on each policy, than the respective sums paid into court; whereupon issues were joined.

The cause was tried before Wilde, C. J., at the sittings in London after Trinity term, 1848.

The plaintiffs were mortgagees of the ship "Alfred," of 716 tons. The defendants were three of the directors of the Marine Insurance Company. The policies were effected on the 4th of May, 1844,—the one upon the ship, valued at 12,000l., the other upon freight, valued at 4000l. The "Alfred," sailed from London, on the 8th of September, 1843, on a voyage to Australia, and thence to South America, whence she was chartered to bring home a cargo of guano or saltpetre, at a freight of 3l. 10s. per ton. She arrived, in the beginning of 1844, at a place called Cobaya, on the South American coast, and there, between the 22nd of June and the 4th of July, shipped on board a cargo consisting of 850 tons of guano. On the 2nd of September, she arrived at **[96]** Valparaiso, where she took on board a quantity of dollars, on freight, and whalebone: and, on the 12th of December, she set sail for England. Between the 2nd and the 29th of September, she encountered a great deal of bad weather, and sustained considerable damage. On the 29th she put back, and she arrived at Valparaiso on the 19th of October.

On the 4th of November, the vessel, having been partially unloaded, was surveyed by certain officers of Her Majesty's ship "Daphne," then at Valparaiso. They recommended certain repairs, which they thought would suffice to put the ship in a condition to bring home about 500 tons of her cargo.

Other surveys were had, on the 14th and 20th of November, by the port surveyor and other competent persons, who reported that it was necessary to take out all the cargo, and who estimated the repairs that would be necessary to enable the vessel to proceed to England with her entire cargo, at 11,711 dollars, and the expenses of unloading and reloading at 7608 dollars, making together 19,319 dollars, or 3710l. 5s.,—which would exceed the value of the freight, but would be less than the value of the ship when repaired. They further reported, that, seeing the difficulty of raising money at Valparaiso, and of obtaining the necessary workmen and materials to effect the repairs which they judged necessary, it would be for the interest of all concerned to sell the ship and to forward the cargo by other vessels. The ship was accordingly sold, by public auction, on the 10th of April, 1845, for 1734l., and the cargo was ultimately delivered at Liverpool, by three other vessels, at a freight of 4l. 15s., and 5l. per ton.

The purchaser of the "Alfred" repaired her at an expense of about 240l. and sent her, with a cargo of about 600 tons, to Hamburgh, where she arrived on the 16th of October, 1845.

[97] On the part of the plaintiffs, it was insisted,—first, that there was a constructive total loss of the ship,—secondly, that, supposing there was not a total loss of the ship, there was, at all events, a total loss of freight, to the extent, at least, of that portion of the cargo which the vessel was incompetent to carry home.

For the defendants, it was contended that there was no total loss of either ship or freight, and that enough had been paid into court to cover the average loss,—viz. 10 per cent. on the ship, and 15 per cent. on the freight (*a*).

The lord chief justice told the jury, that, if, upon the evidence laid before them, they were satisfied that the vessel was damaged, by perils of the sea, to such an extent that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired, regard being had to the facilities for repair, and for raising money for that purpose, at Valparaiso, and the time which would be consumed therein, they must find for the plaintiffs, as for a total loss of the ship; and that, on the other hand, if they thought that the vessel, when properly repaired, would be worth more than the sum expended in such repairs, the plaintiffs would be entitled to recover for an average loss only. And, as to the second count, he told them, that, if they thought the vessel might have been repaired within a reasonable time, so as to be enabled to bring home the whole of the cargo, there had been no loss of any part of the freight: and that, if she might have been repaired so as to be able to bring home a part of the cargo only, the [98] plaintiffs would be entitled to recover for a partial loss on freight.

The jury returned a verdict for the defendants.

S. Martin, in the following term—admitting that the summing up and the finding upon the first count could not be impeached,—obtained, as to the second count, a rule nisi for a new trial on the ground of misdirection, and that the verdict was against evidence. He contended that the proper question to be submitted to the jury upon the second count, was whether, under the circumstances in which the vessel was placed at Valparaiso, a prudent owner, uninsured, would have incurred the expense necessary to enable her to bring home her entire cargo. He cited *Doyle* v. *Dallas* (1 M. & Rob. 48), and *Green* v. *The Royal Exchange Assurance Company* (6 Taunt. 68, 1 Marsh. 447).

Sir John Jervis, A. G. (with whom were Channell, Serjt., and James Wilde), on a former day in this term, shewed cause. He submitted, that, it being conceded that the direction of the lord chief justice, so far as it related to the first count, and the finding of the jury thereon, that there was no total loss of the ship, could not be impeached, there could be no pretence for saying, as to the second count, that there was a total loss of any part of the freight.

The court called upon

S. Martin, Byles, Serjt., and Barstow, to support the rule. The ship having sustained sea-damage, and having, in consequence, put back to Valparaiso, and being there found to be incompetent, save at an expense equal to, or exceeding, her value, to be repaired, so as to bring home the cargo she originally had on board, the [99] jury ought to have been told that that amounted to a constructive total loss, at all events, of that part of the freight which the ship could not be rendered capable of earning. That part of the summing up which related to the first count, was undoubtedly correct, according to *Doyle* v. *Dallas* (1 M. & Rob. 48), and other cases. But the lord chief justice incorrectly applied to the freight, the same test as to repairs, which he had applied to the ship. The question is, whether a ship-owner, having no policy on the ship, but having effected an insurance on freight, and the ship sustaining sea-damage to an extent that would require an outlay to repair her, short of her value when repaired, may not say, that his ship has sustained damage to such an extent that no reasonable or prudent man would repair her at the place where she happens to be, for the purpose of earning the particular freight, and so treat the freight as totally lost. Assuming the ship to be worth 8000l., and that the expense of repairing her so as to enable her to bring home her cargo would be 7000l., there being a policy on freight for 2000l.—would the owner be bound to expend 7000l. in order to earn the

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(*a*) It was agreed that the sufficiency of the payment into court to cover an average loss, should be referred to an arbitrator. And, before the rule came on for argument, the arbitrator decided that enough had been paid in.

2000l.? Or, is he not at liberty to say that the freight is totally lost, because, by a peril insured against, he is called upon to incur an expense which no prudent owner uninsured would be justified in incurring? [Cresswell, J. Does the underwriter on freight undertake to pay, if the assured acts prudently in declining to earn freight?] Yes, provided he is prevented from earning it, by a peril insured against. [Maule, J. It must be assumed that a prudent owner would have repaired this ship.] The true test is, what a prudent owner would have done, if there had been no insurance on freight. In *Green* v. *The Royal Exchange Assurance Company*, it **[100]** was held, that, if, pending an insurance on freight, and a cargo shipped, the vessel becomes incapable of bringing the cargo home, the master is bound, or not bound, to repair her, and earn what he can on the homeward voyage, as a salvage for the underwriters on freight, according as a prudent owner, having regard to the state of his ship, but without reference to any insurance on the freight, would or would not pursue that course for his own advantage. [Wilde, C. J. You make the duty to repair depend upon the amount of the freight. What has the underwriter to do with that?] Is the owner bound to do more than an uninsured prudent owner, if he insures freight as well as ship? [Maule, J. The jury have found here that an uninsured prudent owner would have repaired the ship.] With reference to the ship only. [Cresswell, J. Is it competent to the ship-owner to say that he will not expend 600l. in the repair of the ship, for the purpose of earning 500l. freight, though the ship may be worth 10,000l.?] Is the owner of goods entitled to call upon the owner of the ship to carry them, if, to enable him so to do, he will have to expend a sum exceeding the amount of the freight? [Wilde, C. J. Yes. The test is, what a prudent owner would do; and that has always been, to repair when the repairs can be effected at an expense less than the value of the ship when repaired.] If the ship could not be repaired so as to bring home the cargo, except at an amount of expense exceeding the value of the freight, the assured may treat the freight as totally lost, although there may not have been a total loss of the ship.

MAULE, J. This is an action upon two policies of assurance, the one upon ship, the other upon freight, from Valparaiso to London. A rule has been obtained for a new trial, on the grounds of misdirection and that **[101]** the verdict was against evidence. The verdict of the jury negatived a total loss of ship and freight, and also a total loss of part of the freight,—no distinction having been made between a total loss of part of the freight, and a partial loss of freight. The jury also, as I understand the verdict, negatived a total loss of part of the freight, other than a loss in respect of the charges incurred with reference to the freight; as to which there was a payment into court, the sufficiency of which was agreed to be referred to an arbitrator. The questions which were put to the jury, were, whether there was a total loss of the ship, and whether there was a total or a partial loss of the freight. The direction given by the lord chief justice to the jury, to enable them to arrive at a satisfactory conclusion, was given with reference to the evidence in the cause. The evidence was, that, in the course of the voyage, the ship had sustained damage, that she had been compelled to put back, that she underwent several surveys, and was ultimately sold, and repaired by the purchasers, and afterwards performed several voyages. The evidence does not seem to have raised any question whether the ship might not have been repaired, at an expense not extravagant. The highest estimate of the probable expense of repairing her so as to have made her capable of bringing home the whole cargo, was, 19,319 dollars: and she was in fact repaired at an expense of 1248 dollars, so as to be able to carry six hundred tons of cargo to Hamburgh, within three months of the time of sale. It seems difficult to understand how it could, under these circumstances, have been insisted before the jury, that there was a total loss of the ship: and it is not so contended now. It is said, however, that there was a misdirection with regard to the freight, inasmuch as the lord chief justice omitted to tell the jury, that, in determining whether or not there was a **[102]** total loss of freight, they were to throw out of consideration the value of the ship, and to consider only whether or not a prudent owner, acting with a view to the earning of freight, would have executed the necessary repairs either wholly or in part. It is said, that, if, in a case like the present, a prudent owner, looking at the amount of freight, would not have executed the repairs so as to enable the ship to bring home the whole cargo, there would, at any rate, be a partial loss of freight, or a total loss of part, which would be the same thing; and that, if a prudent owner would not have executed any repairs, so as to enable the ship to bring home any part of the cargo, still, with reference only to the amount of freight, and without reference to the value of the ship, there would be a total loss of freight. The lord chief justice certainly did not put that proposition to the jury: and, if it was one which he ought to have put to them, the omission on his part so to do, undoubtedly amounts to a misdirection. But I do not agree that that is a correct view of the law upon the subject. The course which would be adopted by a prudent owner, with reference to the value of the ship, or the value of the freight, or with reference to many other considerations, is only introduced in this way:—Underwriters are responsible for losses arising from perils of the sea,—for such perils as are mentioned in the policy. If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found, so that to **[103]** repair her there is altogether impracticable: and in such a case the loss would also be a total loss. But, short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her,—seeing that the expense of repairs would be such that no man of common sense would incur the outlay,—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do, arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted, is this,—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. Now, in order to constitute a total loss of freight,—or, as far as that is in dispute in this case, a partial loss of freight,—the loss of freight must have arisen by reason of the total or partial incapacity of the ship to earn freight. I do not mean to say that there may not be a loss of ship or of freight, in the way which has been put in argument, but they do not arise here; nor is this a loss by charges,—which is a common partial loss on freight,—the underwriters having actually paid that. But the only loss in question here is, a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged, —considering the **[104]** damage to be irreparable in the view I have mentioned, and which I take to be well established,—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning. Both these views were submitted by the lord chief justice to the jury: he, in substance, told them, that, if they thought the ship could have been prudently and properly repaired, within a reasonable time, and at a reasonable cost, so as to be able to bring home the whole cargo, there had been no loss of any part of the freight; but that, if the ship could have been prudently repaired, so as to bring home a part of the cargo only, but not the whole, then the plaintiffs were entitled to recover as for a partial loss of freight. That seems to me to be perfectly correct. And I can find no authority, nor am I aware of any principle, to support the proposition which it has been insisted by the counsel for the plaintiffs the lord chief justice should have submitted to the jury. The shape which that proposition, as I understood it, ultimately took, was this,—that a ship sea damaged might be in such a condition that a prudent owner, uninsured, would repair her, and yet there might be a total loss of freight. Thus, supposing a ship, considered with reference to her own value only, to be worth 10,000l., and to be capable of being repaired, so as to be enabled to bring home the whole cargo, at a cost of 1000l., that is still to be regarded as a total loss with reference to a policy on freight. That appears to me to involve a pure contradiction. The question is, whether the damage to the ship was reparable or irreparable; if the former, it was not a total loss; if the latter, it was. **[105]** The total or partial loss of freight must be incident to the loss of the ship. The difficulties which have been suggested in the course of the argument, seem to me to shew that the proposition thus contended for cannot be sustained. No authority has been cited which bears upon the question: and nothing has been urged to induce me to conclude that the direction given to the jury, was other than correct.

With respect to the verdict being against evidence,—the lord chief justice does not report that he is dissatisfied with the conclusion to which the jury came; and I am unable to say that it was wrong. It seems that the ship might have been repaired for a sum not exceeding 10 per cent. on her value. If so, unless some special reason be shewn to the contrary, the proper conclusion is obviously that at which the jury have arrived.

CRESSWELL, J. I am entirely of the same opinion. The motion is founded on the count upon the policy on freight; and I shall deal only with that: the other count is disposed of by the finding of the jury, which is not sought to be disturbed. The argument which has been addressed to us upon the subject of the loss of freight, has, as far as I am aware, the merit of being perfectly novel. I never heard of such a thing as a total loss of freight by perils of the sea, because the ship has sustained sea-damage to an amount exceeding the value of the freight. What is the nature of the contract between the ship-owner and the merchant whose goods he contracts to carry on freight? The ship-owner engages to carry the goods from the port of loading to the port of discharge: his contract would be absolute, but for the exception introduced into the bill of lading,—unless prevented by perils of the sea. Now, when is the ship-owner said to be prevented by **[106]** perils of the sea from fulfilling the contract he has entered into? When the ship is, by peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary: if that were so, any the most considerable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract, —that, if the damage which results from a peril of the sea, is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract. Now, what is the contract of the underwriter? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured, would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight. The owner, then, has not been prevented from earning the freight by a peril of the sea, when, at an expense which it was reasonable for him to incur, he might have earned the freight. I therefore see no reason for disturbing the verdict, on the ground of any supposed misdirection; nor am I able to discover that the jury have come to an erroneous conclusion on the facts.

[107] WILLIAMS, J. I entirely concur in the observations that have fallen from my brothers Maule and Cresswell, though, as I was necessarily absent during a portion of the argument, I abstain from expressing at any length the very strong opinion I entertain upon the main point which has been urged on the part of the plaintiffs. I have heard enough of the case, however, to make me feel satisfied that ample justice will be done between these parties, by discharging this rule, and that a contrary course would be fraught with injustice, and would be alike inconsistent with principle and authority.

WILDE, C. J. I agree with the rest of the court in thinking that there is no ground for disturbing this verdict. The points argued at nisi prius were, whether the vessel in question had sustained damage by perils of the sea, and whether the damage so sustained, was so extensive that she could only have been repaired at a cost exceeding her value when repaired. This latter was, as I conceive, very properly negatived by the jury. The question we are now considering, arises upon the count on the policy on freight: and, in discussing this, I apprehend it is perfectly immaterial whether the ship was insured or not. I only advert to the first count, because the summing up was necessarily applicable to both. The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight. The question is, did the jury properly so find, as regards the count on freight? The interest in the freight is by law considered incident to the ownership of the vessel. The cases of *Camden* v. *Anderson* (5 T. R. 709, 6 T. R. 723, 1 B. & P. 272) and *Morrison* v. *Parsons* (2 Taunt. 407) are distinct authorities for that: and, in this case, the only evidence of interest to maintain the action, was, the evidence of ownership. **[108]** The question left to the jury being, whether the ship was damaged to such an extent as to prevent her from earning freight—the jury were told, that, if the cost of repairing the vessel, so as to enable her to earn the freight, would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight. The jury found that she was not. The plaintiffs now complain that this is a misdirection; insisting, that the proper question to be left to the jury was, not the extent of the damage, as compared with the value of the ship; but the cost of the repairs, as compared with the value of the freight. Did anybody ever before hear a suggestion that the question of loss or no loss was to be determined with reference, not to the extent of the damage sustained by the ship in relation to her value when repaired, but in relation to the amount of the freight? Can it be said, that, if a valuable ship has a small freight on board, and sustains sea-damage which is capable of being repaired at an expense not exceeding 10 per cent. on her value, the freight is to be said to be totally lost because the cost of repairing the ship exceeds the value of the freight? We are asked,—Would any man in his senses spend 1000l. upon the repairs of a ship for the mere purpose of earning 500l. freight? To this I answer, certainly not. But this is not the true question. If, by expending 1000l. upon the repairs, he gets, not only 500l. freight, but also a ship worth 3000l., who will for a moment question the prudence of the outlay? Besides, the underwriter has nothing whatever to do with the amount of freight, when considering whether or not there has been a total loss by perils of the sea. The two questions are wholly distinct. The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea-damage in such **[109]** distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it, viz. when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her. The ship is prevented from earning freight, when she is by a peril of the sea damaged to that extent. The amount of freight, therefore, forms no fair ingredient in the inquiry. The question was left to the jury in terms sufficiently explicit to avoid the possibility of doubt or mistake. They were told—You have before you the evidence on the part of the plaintiffs, of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage; and you have the evidence, unopposed, of the defendants, as to what was the value of the ship; and, looking at the ship in the condition shewn by the plaintiffs' evidence, do you believe that she could have been repaired so as to earn this freight, at an expenditure less than her value,—in other words, at an expense which a prudent owner uninsured would incur? The jury say that she might. What possible ground is there to object to the way in which the case was put to the jury, unless it is to be said hereafter, that the underwriter's liability is to be subjected to a new test, viz. whether the ship has sustained damage, by a peril of the sea, to an extent equal to or exceeding the value, not of the ship, but of the freight? That is a test which has never yet been applied: it is one which is entirely unknown to the law, and is equally devoid of principle as it is of authority. The underwriter engages that **[110]** the ship shall not by perils of the sea be disabled from performing the voyage: he does not consider whether she may meet with some accident which may entail upon her owner an expenditure exceeding the amount of freight,—which may be great or small, but of which he knows nothing.

It seems to me that the conclusion the jury came to was correct. It is clear there was no total loss of the ship. The rule must, therefore, be discharged.

Rule discharged.

FRANCES STERRY, Executrix of Wasey Sterry, Deceased, v. CLIFTON. Jan. 16, 1850.

[S. C. 19 L. J. C. P. 237; 14 Jur. 312.]

A., an attorney, holding the offices of clerk of the peace, clerk to the magistrates, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the deputy-lieutenants, steward of certain manors, coroner for a liberty, secretary to a conservative association, and secretary to a polling district association,—entered into articles of partnership with B., by which,—after reciting that A. carried on the business of an attorney at, &c., and held many offices, clerkships, and stewardships of manors, and that it had been agreed that B. should enter into partnership with A. "in the said business, and in the emoluments of the said offices, clerkships, and stewardships," upon the terms thereinafter expressed,—it was agreed that they should enter into partnership for twenty years, and that "all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by A., as also all such offices, clerkships, and stewardships as should be held by either of them the said A. and B. during the partnership, should be considered as partnership property, and be distributable accordingly:" and the articles contained this further provision—"that, if A. should die during the term, then, if and during such period or periods as, it should happen that no son of A. should be a partner in the said business, B. should be interested in one moiety of the said partnership business, and the executors or administrators of A. should be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate:"—Held, that the contract was not void, as being a contract for the sale of an office, either within the 5 & 6 Ed. 6, c. 16, or within the 49 G. 3, c. 126. —And that the latter clause was no violation of the 22 G. 2, c. 46, s. 11.

The following case was, by order of Vice-Chancellor Knight Bruce, sent for the opinion of this court:—

The plaintiff, Frances Sterry, is the widow and sole **[111]** executrix of Wasey Sterry, gentleman, deceased, who had, for many years previous to and at the time of the making and entering into the articles of partnership hereinafter set out, carried on the business of an attorney and solicitor, at Romford, in the county of Essex, and who, during that time, held many lucrative offices and appointments, that is to say, —clerk of the peace for the liberty of Havering-atte-Bower, in the county of Essex,—clerk to the commissioners of land and assessed-taxes for the same liberty,—clerk to the commissioners of sewers for the levels of Havering,—clerk to the magistrates for the half-hundred of Beacontree (Ilford division), in the same county,—clerk to the commissioners of land and assessed-taxes for the same half-hundred,—clerk to the deputy-lieutenants of the subdivision of Ilford, in the same county,—steward of the manors of Barking, Cockermouth, &c., in the same county,—coroner for the said liberty of Havering-atte-Bower,—secretary to the Essex conservative association,—and secretary to the Romford polling-district association.

In 1841, the said Wasey Sterry being willing to admit the defendant into partnership with him in his said business, a partnership was formed between them, upon the terms contained in the following articles of partnership, under seal, duly executed by both parties:—

"Articles of agreement, made, on, &c., between Wasey Sterry, of, &c., and William Henry Clifton, of, &c.: Whereas the said Wasey Sterry hath for many years carried on the business of an attorney and solicitor, and still carries on the same, at his offices at Romford, in the said county, &c.: and he holds many offices, clerkships, and stewardships of manors: And whereas it has been agreed between the said Wasey Sterry and the said William Henry Clifton, that he the **[112]** said William Henry Clifton shall enter into partnership with the said Wasey Sterry, in the said business, and in the emoluments of the said offices, clerkships, and stewardships, upon the terms hereinafter expressed: Now, these presents witness, and it is hereby agreed and declared by and between the said Wasey Sterry and the said William Henry Clifton, that they shall enter into such partnership on the day of the date of these presents, under the firm or style of Sterry & Clifton, and that such partnership shall continue for twenty years from that time, subject to the provisions hereinafter contained; and, further, that all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by the said Wasey Sterry as aforesaid, and also all such offices, clerkships, and stewardships as shall be held by either of them, the said Wasey Sterry and William Henry Clifton, during the said partnership, shall be considered as partnership property, and be distributed accordingly; and, further, that the said partnership shall be carried on at the present offices at Romford; and that, during the said partnership, the said William Henry Clifton shall reside at Romford, or within four miles thereof, and the said Wasey Sterry shall reside at Upminster, or within four miles of Romford; with liberty, nevertheless, for the said Wasey Sterry to be absent altogether from the said business and such residence, for any period or periods he may think necessary, in each year, but, in addition thereto, to take occasional holidays. [It was then provided that Sterry should have three fifths, and Clifton two fifths, of the partnership and profits; and that Sterry's sons should be introduced as partners, upon certain terms. The articles then proceeded as follows:] —That, in the event of the retirement of Wasey Sterry from the partnership, and also in the event of the said Wasey Sterry's death, and of all or **[113]** any of his sons being taken into partnership by the said William Henry Clifton, without having been appointed a partner or partners by the said Wasey Sterry, then, and in either of such cases, if and whilst two or more of the said sons shall be partners in the said business, the said William Henry Clifton shall continue to be interested in two fifth parts thereof; but, if and whilst one of the said sons only shall be a partner, the said William Henry Clifton and such one shall be interested in the said partnership business, in equal shares: and that, "if the said Wasey Sterry shall die during the said partnership term of twenty years, then, if, and during such period or periods as, it shall happen that no son of the said Wasey Sterry shall be a partner in the said business, the said William Henry Clifton shall be interested in one moiety of the said partnership business, and the executors or administrators of the said Wasey Sterry shall be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate. In witness," &c.

From the day of the date of the above articles of partnership, up to and at the time of the death of the said Wasey Sterry, the said Wasey Sterry and the defendant continued in partnership together, on the above terms.

The said Wasey Sterry died on the 15th of July, 1842, having previously duly made and published his last will and testament in writing, and thereby appointed the plaintiff, Frances Sterry, sole executrix thereof, who afterwards duly proved the same.

The questions for the opinion of the court are,—first, whether the said articles of partnership are or are not void in law,—secondly, if not, whether the particular clause or provision in such articles, beginning with the words "If the said Wasey Sterry shall die during the partnership term of twenty years," and end-**[114]**-ing with the words "as part of his personal estate," is or is not void in law.

Peacock (with whom was Channell, Serjt.), for the plaintiff. There is no pretence for saying that the deed, or any portion of it, is void. When the parties were before Vice-Chancellor Knight Bruce, it was insisted, on the part of the defendant, that the clause referred to in the second question was rendered illegal by the 11th section of the 22 G. 2, c. 46 (*a*), its effect being that Clifton should allow his name to be used

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(*a*) That section recited that "whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practise in, the office and business of attorneys and solicitors, to the great prejudice and loss of many of His Majesty's subjects, and the scandal of the profession of the law," and enacted, "that, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit, of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, for the benefit of unqualified persons, viz. the executors or administrators of Wasey Sterry. The Vice-Chancellor intimated an opinion that the deed did not fall within **[115]** the act of parliament, but gave the parties an opportunity to raise the question before a court of law. Two cases have been decided upon this statute,—*Tench* v. *Roberts* (6 Madd. 145 (*a*)), and *Candler* v. *Candler* (*b*)[1]. In the former, the agreement was, to allow an unqualified person, viz. the defendant's clerk, a share of the profits of the business, in lieu of a salary; and this was held to constitute a partnership, and therefore to be within the statute. But, in *Candler* v. *Candler*, where an attorney had died, and bequeathed all his property to his widow, and his eldest son, for the mixed consideration of the goodwill of the business, the advancement of money for carrying it on, and family affection, entered into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters,—this arrangement was held to be not contrary to the policy of the statute. The Vice-Chancellor (Sir John Leach) there says: "It appears by the preamble to this clause (22 G. 2, c. 46, s. 11), that the mischief which the legislature had in view was, that unqualified persons, by the assistance or connivance of regular attorneys, were enabled to act and practise as attorneys, to the prejudice of His Majesty's subjects, and the scandal of the profession. When, therefore, it is provided that an attorney shall not permit or suffer his name to be in any way made use of upon the account or for the profit of any unqualified person, the plain purpose is, that he shall not by any shift or contrivance enable an unqualified person to act or practise in his name. The deed in question does not enable any unqualified person in any manner to act or practise as an attorney. It is simply a grant of a moiety of the profits made by the sole acting of the **[116]** attorney himself during a certain period, for the mixed consideration of the goodwill of the business, the advance of money, and family affection, and is neither within the mischief nor the words of the statute. In the case of *Tench* v. *Roberts*, which was before me, on demurrer, on the 18th of May, 1819, the plaintiff, who was not an attorney, but described himself as a writer, entered into an agreement with the defendant, who was an attorney, to become an assistant to him in his business, on condition that he received one third of the profits, in lieu of salary, but not to be considered as a partner: I held, that, in point of law, this was a partnership, and that, by the necessary effect of this agreement, Tench, an unqualified person, was enabled to act or practise as an attorney, and to use the name of Roberts upon his account, and for his profit." In *Bunn* v. *Guy* (4 East, 190), a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attorneys, for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c., was held to be valid in law. The notaries' act, 41 G. 3, c. 79, s. 10 (*b*)[2], **[117]** makes express provision for allowances to widows and children

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and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid; then and in such case every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and, in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year."

(*b*)[1] 6 Madd. 141, S. C. upon motion to dissolve the injunction, Jacob, 225.

(*b*)[2] Which enacts "that, if any public notary shall act as such, or permit or suffer his name to be in any manner used, for or on account, or for the profit and benefit, of any person or persons not entitled to act as a public notary, and complaint shall be made in a summary way to the court of faculties wherein he hath been admitted and inrolled, upon oath, to the satisfaction of the said court, that such notary hath offended therein as aforesaid, then, and in such case, every such notary so offending shall be struck off the roll of faculties, and be for ever after disabled from practising as a public notary, or doing any notarial act,—save and except as to any allowance or allowances, sum or sums of money, that are or shall be agreed to be made or paid to the widows or children of any deceased public notary or notaries, by any surviving partner or partners of such deceased notary or notaries."

of deceased partners (*a*); this was necessary, the language of the two acts being essentially different. *Jackson and Wood, In re* (1 B. & C. 270. And see 2 Stark. N. P. C. 443), and *Williams* v. *Jones* (5 B. & C. 108, 7 D. & R. 548), which was cited in equity, are distinguishable upon the same ground as *Tench* v. *Roberts*, viz. that, in both, the agreement was that the attorney's name should be used for the profit of an unqualified person.

Willes (with whom were Cowling and Joliffe), for the defendant. The articles of partnership in this case are illegal and void, upon two grounds,—first, that they relate to an illegal sale of an office within the 5 & 6 Ed. 6, c. 16, ss. 2, 3, and the 49 G. 3, c. 126, ss. 1, 3,—secondly, that the last clause is in express contravention of the statute 22 G. 2, c. 46, s. 11.

1. By the first of these statutes, it is,—"for the avoiding of corruption which may hereafter happen to be in the officers and ministers in those courts, places, or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, should hereafter be preferred to the same, and no other,"—enacted, "that, if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputa-**[118]**-tion of any office or offices, or any part of them, or to the intent that any person should have, exercise, or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the King's Highness's treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the King's Majesty's honors, castles, manors, lands, tenements, woods, or hereditaments, or any of the King's Majesty's customs, or any other administration or necessary attendance to be had, done, or executed, in any of the King's Majesty's custom-house or houses, or the keeping of any of the King's Majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence, or which shall concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered, —that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate which such person or persons shall then have, of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any of the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or **[119]** offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, or assurance to have or receive any fee, reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall, immediately by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward to be paid as is aforesaid, be adjudged a disabled person in law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee, or reward." The 1st section of the 49 G. 3, c. 126, extends the

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(*a*) See Lord Eldon's remarks upon this provision, Jacob, 232.

provisions of the former act to "all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval, or military, and to all places and employments, and to all deputations to any such offices, or commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master-general and principal officers of His Majesty's ordnance, the commander in chief, the secretary at war, the paymaster-general of His Majesty's forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, **[120]** the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary-general, the storekeeper-general, and also the principal officers of any other public department or office of His Majesty's government in any part of the United Kingdom, or in any of His Majesty's dominions, colonies, or plantations which now belong or may hereafter belong to His Majesty; and also to all offices, commissions, places, and employments belonging to, or under the appointment or control of the united company of merchants of England trading to the East Indies." And the 3rd section enacts, "that, if any person or persons shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall, by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly, or indirectly, and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit, or shall, by any way, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place, or employment specified or described in the said recited act or this act, or within the true intent and meaning of the said act, or this act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination, **[121]** or resignation,—then and in every such case, every such person, and also every person who shall wilfully and knowingly, aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor." The articles of partnership in this case recite that Sterry carried on the business of an attorney, and held many offices, clerkships, and stewardships of manors, and that it had been agreed between him and Clifton that the latter should enter into partnership with him in the said business, and in the emoluments of the said offices, clerkships, and stewardships; and the case enumerates the offices and stewardships to which the agreement has reference. If any one of the offices so enumerated be within the statutes, the agreement is one which cannot be carried into effect. Now, the office of clerk of the peace, of clerk to the commissioners of land and asesssed taxes, of clerk to the commissioners of sewers, and of clerk to the magistrates, are all offices which "touch or concern the administration or execution of justice." In *Hopkins* v. *Prescott* (ante, vol. iv. p. 578), an agreement whereby,—after reciting that A. had carried on the business of a law-stationer at G., and also had been sub-distributor of stamps, collector of assessed taxes, &c., there, and that he had agreed with B. for the sale of the said business, and of all his goodwill and interest therein, to him, for the sum of 300l.,—A., in consideration of the said sum of 300l., agreed to sell, and B. agreed to purchase, the said business of a law-stationer at G., and whereby it was further agreed that A. should not at any time after the 1st of March then next, carry on the business of a law-stationer at G., or within ten miles thereof, or collect any of the assessed taxes, &c., but would use his utmost endeavours to introduce B. to the said business and offices;—was **[122]** held to be illegal and void, as being a contract for the sale of an office, within the 5 & 6 Ed. 6, c. 16, and also within the 49 G. 3, c. 126. Wilde, C. J. there says: "The subject-matter of the agreement, in addition to the sale of the business of a law-stationer, is that the plaintiff will, for certain reward, resign the offices of collector of assessed taxes and sub-distributor of stamps, and use his best endeavours to procure the defendant to be appointed to those offices. The question is, whether these are offices within the statute 5 & 6 Ed. 6, c. 16. It is said that the court cannot take notice of the office of 'collector of assessed taxes.' He is, however, an officer appointed, under certain acts of parliament, of which we must take notice, to an office connected with the receipt of the revenue. The office of sub-distributor of stamps, likewise, is an office of the same description. Both are within the 5 & 6 Ed. 6, c. 16, the 3rd section of which avoids all contracts for the sale or purchase of the several offices mentioned in the 2nd section. We need not, therefore, look beyond the provisions of that statute, to see that the contract declared on in this case cannot be made the foundation of an action. The 49 G. 3, c. 126, s. 3, however, carries the matter still further, by making the transactions prohibited by the statute of Edward, misdemeanors. The effect of both statutes is, that this agreement is utterly void." [Williams, J. The statute 5 & 6 Ed. 6, c. 16, contemplates that the person who pays the money is to enjoy the office, or part of it.] *Dr. Trevor's case* (12 Co. Rep. 78 (*a*)), shews that a large and liberal construction is to be given to the statute, to suppress the mischief which it was designed to remedy. In *Palmer* v. *Bate* (2 B. & B. 673, 6 J. B. Moore, 28), the office of clerk of the peace was held to **[123]** be within the statute 5 & 6 Ed. 6, c. 16. The office of clerk to the commissioners of sewers,—who are a court of record (*a*),—is equally within the statute. So also is that of clerk to the magistrates: it is clearly an office connected with the administration of justice; its nature is discussed in *Ex parte Sandys* (4 B. & Ad. 863); and it is an office that is recognised in the statutes 26 G. 3, c. 14, 6 G. 4, c. 50, s. 10, and 9 G. 4, c. 61, s. 15. The office of coroner is within the provisions of the statute 5 & 6 Ed. 6, c. 16 (see Hawk. P. C. ch. 9, § 1). So also is that of clerk to the land and assessed tax commissioners, the duties of whose office are regulated by the 43 G. 3, c. 99, s. 9, and 3 G. 4, c. 88, s. 6. And *Hopkins* v. *Prescott* shews that it is immaterial that the office was unknown at the time of the passing of the statute of 5 & 6 Ed. 6, c. 16. The office of clerk to the deputy-lieutenants of the sub-division of Ilford, is probably a military, rather than a judicial office, and may not be within the statute of Edward; though it might still be within the 49 G. 3, c. 126. [Maule, J. It is not necessary to give effect to all the words in the deed: some of the offices that are mentioned clearly are not within the statute; stewardships of manors, for instance.] The agreement evidently contemplates the assignment of the profits of all the offices mentioned in the case; and, if any one of them cannot legally be assigned, the contract is altogether void. It is difficult to say that the stewardship of a manor,—which is an office partly ministerial and partly judicial (*d*),—is not within the statute. [Maule, J. Have you any express authority for that?] In *Williamson* v. *Barnsley* (1 Brownl. & G. 70), the **[124]** office of steward of a court-leet or court-baron was held to be within the statute. In *Godolphin* v. *Tudor* (6 Mod. 234, 2 Salk. 468, Willes, 375 (*f*); affirmed in the House of Lords, 1 Bro. P. C. 101 (135)), it was held, that, if a person hold an auditor's office for life, and depute another to exercise the said office during his good behaviour, a bond given by such deputy to pay his principal yearly, during the said deputation, 200l., and that, in consideration thereof, the deputy shall have all the rents and profits of the said office to his own use, is void by the statute 5 & 6 Ed. 6, c. 16, for, it is a bond to pay a certain sum at all events. This is not a mere case of giving a portion of the profits of an office to a deputy. [Cresswell, J. Do you contend that this would have been a void bargain within the statute of Edward, independently of the 49 G. 3, c. 126?] It is submitted that it does come within the statute of Edward: but, at all events, it is within the 3rd section of the 49 G. 3, c. 126. The cases of *Flarty* v. *Odlum* (3 T. R. 681) and *Wells* v. *Porter* (*e*), shew the extreme jealousy of the common law upon the subject of assignments of offices or profits of offices: and the statute 5 & 6 Ed. 6, c. 16, must be taken to enact what was the common law before, with an additional penalty. It may be said that there is nothing in these articles of partnership to entitle Clifton to a portion of the profits of any offices held by Sterry, the sale of which would be illegal. But general words are used, which, if found in a

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(*a*) See Fitz. Nat. Brev. 113; Com. Dig. Justices (G. 3); Callis on Sewers, 163-167; 4 Wentw. Pl. 191; *Ramsey* v. *Nornabel*, 11 Ad. & E. 383.

(*d*) See 1 Scriven on Copyholds, 4th edit. p. 116; *The Queen* v. *The Lord of the Manor of Old Hall*, 10 Ad. & E. 248.

(*e*) 8 M. & W. 149. And see *Barwick* v. *Reade*, 1 H. Bla. 627, *Gibson* v. *The East India Company*, 5 N. C. 262, 7 Scott, 74.

will, would suffice to pass all the party had. Would one or two offices satisfy the words "many offices?"

2. Upon the other question,—whether the agreement in this case comes within the 22 G. 2, c. 46, s. 11,—the court will have to elect between the opinions of **[125]** Lord Eldon and Sir John Leach in *Candler* v. *Candler* (Jacob, 225, 6 Madd. 141), and that of Lord Tenterden, in *Jackson, In re* (1 B. & C. 270). In the former case, however, it is to be observed, there was no ultimate judgment; the matter appears to have been compromised. In *Jackson, In re*, an attorney had engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profits, instead of a salary: and Abbott, C. J., said: "I am clearly of opinion that this is a case both within the spirit and the words of the statute. The enacting part must be construed with reference to the mischief recited in the preamble. That mischief was, that persons not admitted as attorneys, did, by the connivance of attorneys, intrude themselves into, and act and practise in, the office and business of attorneys. Now, here, Wood, who is not an admitted attorney, was enabled, by the connivance of Jackson, to intrude himself into, and act and practise in, the office and business of an attorney. This is a case clearly, therefore, within the mischief which it was the object of the statute to remedy. The statute then proceeds to enact, 'that, if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or permit his name to be in any wise made use of, for the account or profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise in any respect as an attorney, the attorney so offending shall be struck off the roll, and for ever after disabled from practice.' Now, here, Jackson permitted his name to be made use of upon the account and for the profit of Wood. It is, therefore, a case within the words of the enacting part of the clause. It has been urged, that, to bring the case within the act, **[126]** it must have been done for the purpose of enabling an unqualified person to act as an attorney. I am of opinion the word *thereby* applies merely to the sending of process to the unqualified person, and not to the whole of the preceding sentence." [Williams, J. The decision there proceeded upon the ground that the case fell within the mischief recited in the preamble to the 11th section.] Where the enacting part of a statute is clear, it is not to be controlled by the words of the preamble. This is clearly laid down by Pollock, C. B., in delivering the judgment of the court of Exchequer, in *Salkeld* v. *Johnson* (2 Exch. 282, 283): "Although," he says "the title has occasionally been referred to as aiding in the construction of an act (particularly by Sir John Nicholl, in *Brett* v. *Brett* (3 Addams, 210)), it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all: Lord Coke, *Powlter's case* (11 Co. Rep. 33); Lord Holt, *Wells and Wilkins* (6 Mod. 92); Lord Mansfield, *Rex* v. *Williams* (1 W. Bla. 95); and Lord Hardwicke, *The Attorney-General* v. *Lord Weymouth* (Ambler, 22). But the preamble is undoubtedly a part of the act, and may be used to explain it, and is, as Lord Coke says (4 Inst. 330), 'a key to open the meaning of the makers of the act, and the mischiefs it was intended to remedy;' but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble." [Williams, J. The clear words of the enacting part certainly are not to be controlled by the language of the preamble.]

Peacock, in reply. This is not a contract for the sale of an office, or of part of an office, within the meaning of the statutes. [Maule, J. I doubt whether **[127]** the case ought not to have stated, as a fact, that the parties contracted with reference to all the offices referred to, or some of them. Upon the case as it stands, the question is, whether there is evidence from which we can infer that they did intend to include these offices.] The obvious meaning of the contract is, that Sterry conveys to Clifton, so far as it may be legal so to do, an interest in the offices or appointments which he held. In *Harrington* v. *Kloprogge* (4 Dougl. 5, 2 Chitt. R. 475, 2 Brod. & B. 678 (*a*), 6 J. B. Moore, 38 (*a*)), it was held that an assignment of the profits of all offices which the defendant might acquire, is legal; as it will be taken to mean, of all offices which may be legally assigned. Assuming that the agreement in this case affects to deal with the office of clerk of the peace, and that that is an office within the statute, still, it is submitted, the contract is not illegal. There is no portion of the fees of that or of any of the other offices, that Sterry has agreed to assign to Clifton. In *Aston* v. *Gwinnell* (3 Y. & J. 136),—where it was held that the office of clerk to the deputy registrar in the prerogative court of Canterbury, is not an office connected with the administration of justice, within the meaning of the statute 5 & 6 Ed. 6, c. 16, so as to prevent its being aliened or charged; nor is an alienation of or charge on the profits of the office, contrary to the policy of the law restricting the alienation of the income of a public officer,—Lord Chief Baron Alexander makes a distinction between the sale of an office, and an assignment of the profits. "It is then objected," he says (ib. 148), "to the part of the prayer respecting the profits of the office, that the contract is void by the statute of 5 & 6 Ed. 6, c. 16. I am not able to perceive the bearing of this act upon the present question. The object of that law was, to prohibit corrupt contracts, by which a right to an office, or a right **[128]** to exercise any of its duties, might be obtained, with a view that persons worthy of such trusts might be advanced to them. This contract seems to me to have no relation to that subject. Forgetting, for the moment, that this is a mere clerkship held during the pleasure of the chief officer, I cannot avoid recollecting that the appointment, or any influence used or to be used for the purpose of obtaining it, is quite remote from this transaction. I cannot, therefore, apply any argument drawn from that statute, to the point now under my consideration. Another class of cases has been, with more plausibility, applied to this controversy. I allude to that class which is founded on principles of state policy, and which protects the servants of the public from their own improvidence, and secures to them, in defiance of their own acts, the possession of those resources derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers, and their incapacity to assign it either at law or in equity, after some hesitation, at last established, affords the most distinct and intelligible instance of the application of this rule. The office, or rather the profits of the office, of clerk of the peace, seems another instance of the same character. But I am not able to apply that principle to the situation of the defendant Askew. His situation is called an office; but its nature is not very distinctly explained. This, however, is represented, that he is a mere clerk, assisting the deputy-registrars, receiving emolument for business done, at the pleasure of his superiors. It does not appear to me that he can be considered as an officer of the court. And, as to his connection with the actual execution of any function in the prerogative court, there is none. It is confined to receiving, during the pleasure of his superiors, certain sums earned by the labours of another person permitted actually to perform **[129]** there these functions." *Layng* v. *Paine* (Willes, 571; ante, vol. iv. p. 587) was the case of an actual sale of an office. In *Gulliford* v. *De Cardonell* (2 Salk. 466), and in *Godolphin* v. *Tudor*, a bond given by a deputy to the principal, to pay him half the profits, or a certain sum out of the salary or profits, of the office, was held good. *Hopkins* v. *Prescott* was the case of an agreement that was clearly illegal, within the rule laid down in Co. Litt. 234 a., and 3 Inst. 154. The deed now in question, was not intended to operate, nor did it operate, as an assignment of the offices, or any part of them. Even, therefore, supposing the court should incline to hold the deed to be illegal if intended to convey part of the profits of any offices which the parties could not legally deal with, will they, without any evidence upon the subject, assume that the parties did so intend? In Co. Litt. 42 a., it is said: "A tenant in fee-simple makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee; for, it shall be taken most strongly against the lessor; and, as hath been said, an estate for a man's own life is higher than for the life of another. But, if tenant in tail make such a lease, without expressing for whose life, this shall be taken but for the life of the lessee, for two reasons,—first, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and, in this case, if, by construction, it should be for the life of the lessee, then should the estate-tail be discontinued, and a new reversion gained by wrong; but, if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that, whensoever the words of a deed, or of the parties with-**[130]**-out deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law, shall be taken," &c. In Bacon's Maxims (*a*), it is said: "It is a rule that Kings' grants shall not be taken or construed to a special intent: it is not so with the grants of a common person, for, they shall be extended

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(*a*) Reg. 10. Verba generalia restringuntur ad habilitatem rei vel personæ.

as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or repugnant intent: for, all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person." Here, notwithstanding the general words of the recital, the operation of the deed must be limited to those offices the profits of which could be legally dealt with. There is no authority for saying that the office of clerk to the magistrates, clerk to assessed tax commissioners, or clerk to commissioners of sewers, is an office touching or concerning the administration of justice, any more than that of clerk to a judge of one of the superior courts. The stewardship of a court-leet was held, in *Williamson* v. *Barnsley*, to be an office within the 5 & 6 Ed. 6, c. 16; but there are many manors that have no courts-leet. The duties of the steward of a manor are in no respect judicial: Com. Dig. Copyhold (R. 5), (R. 6). [Wilde, C. J. A court-baron is incident to every manor: Co. Litt. 58. And the steward presiding in a court-baron has been held to be a judicial officer: *Holroyd* v. *Breare* (2 B. & Ald. 473); *Bradley* v. *Carr* (c); *Brown* v. *Gill* (ante, vol. ii. p. 861).]

As to the last clause, the construction put by Sir John Leach and by Lord Eldon upon the statute 22 G. 2, c. 46, s. 11, in *Candler* v. *Candler*, is clearly the correct one, viz. that the meaning of the clause is, that **[131]** qualified persons should not permit their names to be used by others, so as to enable them to appear as attorneys. The true rule for the construction of acts of parliament, is that given by Tindal, C. J., in *The Sussex Peerage case* (11 Clark & Fin. 143), "The only rule for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. But, if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (b), is a 'key to open the minds of the makers of the act, and the mischiefs which they intended to redress.'" The intention of the framers of this act, it is submitted, will be best carried into effect in this case, by holding that the clause in question was not illegal.

Cur. adv. vult.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel; we have considered it, and are of opinion that the articles of partnership set forth, are not void in law.

"Secondly, we are of opinion that the particular clause therein mentioned, is not void in law.

"THOS. WILDE. C. CRESSWELL.
"W. H. MAULE. E. V. WILLIAMS."

[132] DOOGOOD v. ROSE. Jan. 16, 1850.

[S. C. 19 L. J. C. P. 246. See *Cobbold* v. *Peto*, 1872, 27 L. T. 133.]

The declaration stated that it was agreed between A. (the plaintiff) and B. (the defendant), that A., B., and C. should, at the expiration of a reasonable time, execute an indenture binding C. as an apprentice to A., and that B. should pay to A. a premium of 60l.,—5l. on the execution of the indenture, and the residue by certain bills, to be drawn by the plaintiff and accepted by the defendant: averment, that, although a reasonable time for B. and C. to execute the indenture, and for B. to pay the 5l., and to accept the bills, had elapsed, and although A. had always been ready and willing to execute such indenture, and to receive C. as such apprentice, and although A., at the expiration of such reasonable time, requested B. to execute such indenture, and to pay the 5l. and accept and deliver to him the said bills, yet B. did not nor would execute the indenture, or pay the 5l., or accept, and deliver to A., the said bills, but wholly refused so to do, and then wholly exonerated and discharged A. from tendering such indenture for execution, and such bills for acceptance, &c.—Plea,—that B. did not exonerate and discharge A. from tendering the indenture to him for execution, or the bills for acceptance. The issue having been found for the defendant: Held, upon motion for judgment non obstante veredicto, that the declaration would have been clearly bad without the averment of dispensation; and therefore that the issue taken thereon was not an immaterial one,—though, by reason of the want of an averment that B. had notice of A.'s readiness and willingness to execute the indenture, the declaration would be insufficient to support a judgment for the plaintiff.—A repleader can only be awarded where the court cannot, upon the matter alleged upon, and established by, the record, see which way the judgment ought to be given: and it is never awarded in favour of the party who makes the first default.

(c) 3 M. & G. 221, 3 Scott, N. R. 521. A fortiori, when holding a customary court.

(b) *Stowel* v. *Lord Zouch*, Plowden, 369.

This was an action of assumpsit. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the agreement and promise of the defendant thereinafter next mentioned, was, and ever since had been, and still was, a short-hand writer and reporter, and, for and during all the time aforesaid, had used, exercised, and carried on, and still did use, exercise, and carry on the profession or business of a short-hand writer and reporter; that, the plaintiff being such short-hand writer and reporter as aforesaid, theretofore, to wit, on the 1st of May, 1848, it was agreed by and between the plaintiff and the defendant, that the plaintiff and the defendant, and one [133] John Rose, the son of the defendant, should, at the expiration of a reasonable time then next following, make and execute, and as their act and deed deliver, a usual and reasonable indenture of apprenticeship, for the purpose of apprenticing, and binding as an apprentice, the said John Rose to the plaintiff in the way of his the plaintiff's said profession or business, and that the defendant should pay to the plaintiff, as and by way of premium or apprentice-fee for taking and receiving the said John Rose as such apprentice as aforesaid, the sum of 60l., to be paid in the manner following, that is to say, 5l., part thereof, to be paid to the plaintiff at the time of the execution of the said indenture of apprenticeship, and the residue of the said sum of 60l. to be then secured to the plaintiff by certain bills of exchange in writing, for the amount of the said residue, to be then drawn by the plaintiff upon, and accepted by, the defendant, and delivered to the plaintiff, that is to say, three several bills for the respective amounts of 20l., 20l., and 15l., and payable at the respective times of three months, six months, and nine months from the date thereof: Mutual promises: Averment, that, although a reasonable time from the making of the said agreement and promise of the defendant, for him, the defendant, and the said John Rose, to make and execute, and, as their respective acts and deeds, deliver such indenture of apprenticeship as aforesaid, for the purpose aforesaid, and for him the defendant to pay to the plaintiff the said sum of 5l., and to accept and deliver to the plaintiff such bills of exchange as aforesaid, had elapsed before the commencement of this suit; and although the plaintiff had always from the time of the making of the said agreement and promise, and during such reasonable time as last aforesaid, and at the expiration thereof, and at all other times, been ready and willing to make and execute, and as his act and deed [134] deliver, such usual and reasonable indenture of apprenticeship as aforesaid, and to receive and take the said John Rose as such apprentice as aforesaid, and to perform and fulfil the said agreement in all things on his part to be performed and fulfilled; and although the plaintiff, afterwards, and at the expiration of such reasonable time as aforesaid, and before the commencement of this suit, to wit, on the 20th of November, in the year aforesaid, requested the defendant to make and execute, and as his act and deed deliver, such indenture as aforesaid, and to pay to him the said sum of 5l., and to accept and deliver to him the plaintiff such bills of exchange as aforesaid, according to his said promise and agreement in that behalf;—yet that the defendant, not regarding his said promise, did not nor would, when he was so requested as aforesaid, or at any other time, make or execute, or as his act and deed deliver, such usual and reasonable indenture of apprenticeship as aforesaid, or pay the said sum of 5l., or accept and deliver to the plaintiff such bills of exchange as aforesaid, or at any other time, but wholly refused so to do, but wholly exonerated, and then, to wit, on the day and year last aforesaid, discharged the plaintiff from tendering such usual and reasonable indenture of apprenticeship as aforesaid to the defendant for execution, and such bills of exchange as aforesaid, for his acceptance thereof, and dispensed with the same; and that, at the time of the commencement of this suit, no such indenture as aforesaid was delivered by the defendant, and the said sum of 5l. then remained and was, and still continued, unpaid to the plaintiff, and the said bills remained, and still were, wholly unaccepted by the defendant: and that, by means of the said several premises, the plaintiff had not only lost and been deprived of the said sum of 5l., and the use of such bills of exchange as aforesaid, but also thereby the plaintiff was put to great expenses of **[135]** his moneys, to wit, to the amount of 20l., in and about the preparing such indenture as aforesaid, and otherwise arranging to perform his said contract.

To this count, the defendant pleaded, that he, the defendant, did not exonerate or discharge the plaintiff from tendering such usual or reasonable indenture of apprenticeship, as in the said first count aforesaid, to him, the defendant, for execution, or such bills of exchange as in the said first count aforesaid, or any or either of them, for his acceptance, or dispense with the same, or any or either of them, in manner and form as the plaintiff had in his said first count alleged,—concluding to the country.

The cause was tried before Wilde, C. J., at the sittings at Westminster after the last term, when a verdict was found for the defendant.

Byles, Serjt., now moved for a new trial, on the ground that the verdict was against evidence, or for judgment non obstante veredicto, on the ground that the plea, the issue upon which was found for the defendant, was a traverse of an immaterial allegation. The declaration would have been perfectly good without the allegation that the defendant exonerated and discharged the plaintiff from tendering the indenture for execution. It is not necessary for a party, in a case of this sort, to make such a tender: it is enough if he be willing to execute the indenture, and request the defendant to do so, and he refuses. In *Poole* v. *Hill* (6 M. & W. 835), it was held that a declaration in covenant by the vendor against the intended purchaser of lands, for non-payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant: but it is sufficient to allege that the **[136]** plaintiff has always been ready and willing to execute a conveyance; inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution. Lord Abinger, in delivering the judgment of the court, there says: "The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tended a conveyance. He was to perform the initiative, before the plaintiff could be called upon to offer a conveyance; and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution." So, in *Wilmot* v. *Wilkinson* (6 B. & C. 506), it was held, that, upon the refusal of the vendee to accept the title, the vendor is not bound to tender a conveyance. And *Stephens* v. *De Medina* (3 Gale & D. 110) shews that the like rule applies in the case of a sale of chattels: it was there held, that, where railway shares are, by the act constituting the company, made transferable by writing only, the purchaser of such shares cannot maintain an action for not transferring, unless he has previously tendered a conveyance to the seller for execution; and his declaration must aver such tender. [Maule, J. All that *Wilmot* v. *Wilkinson* decides is, that, where the vendee says to the vendor, "I will not accept your title," the latter is not bound to tender a conveyance, even though he has stipulated that the conveyance shall be prepared by him. There is but a very loose analogy between the case of a sale and a contract of apprenticeship.] A stamp would be requisite: who is to pay for that in the first instance? [Wilde, C. J. There is no rule of law upon the subject.] Assuming that the plaintiff was bound to prepare and to tender the indenture for execution by the defendant, **[137]**—it was enough for the plaintiff to allege that he was ready and willing to execute, and that the defendant was requested to execute, and refused. [Maule, J. The allegation of dispensation expounds what goes before, and shews that that which might have been understood to amount to an allegation of tender, must not be so expounded here; for, though an allegation may be idle and superfluous, you cannot treat it as if it did not exist. There is no averment that the defendant had notice of the plaintiff's readiness and willingness to execute the indenture: I doubt, therefore, whether the declaration can be good. Readiness and willingness is a matter that is within the party's own mind only.] Taking the whole declaration together, it is submitted that it discloses a good cause of action.

WILDE, C. J. The question here is, whether the verdict, which has been found, —and, upon the evidence, we think, properly found, —for the defendant, has been found upon an issue that is immaterial. What is the nature of the contract? Is all to be done on the one side? or, is there something to be done to perfect the contract on both sides? Undoubtedly, in a case of this sort, the signature of the master is indispensable. If so, and the master complains of a breach of the contract, what is it necessary for him to allege? Suppose the old form of indenture had been still in use, where the instrument was cut in two, and each party took a part of it,—how would the case have stood then? It seems to me that the acts to be done by the plaintiff on the one side, and by the defendant on the other, were to be contemporaneous: and that, before the plaintiff complains of the non-performance of the contract by the defendant, he should have put himself in a condition to ask for performance, by being prepared to deliver what the defendant was entitled to receive. This per-**[138]**-formance on the part of the plaintiff may be dispensed with or discharged, by a notice from the defendant that he does not mean to execute the contract on his part. Now, what must the plaintiff in such a case aver? He must, I apprehend, at least aver that he was ready and willing to execute the deed, and that the defendant had notice of his readiness and willingness. Here, the plaintiff does not aver that the defendant had such notice. He merely alleges that the defendant refused to pay the 5l. or to accept the bills, and exonerated and discharged the plaintiff from tendering the indenture to him for execution. The declaration would, I apprehend, clearly have been bad without that allegation. Supposing you could intend the allegation of readiness and willingness alone as amounting to a tender, the subsequent allegation here, prevents that meaning from being given to it. Taking this declaration simply to allege readiness and willingness, and no notice thereof to the defendant, it clearly discloses no good ground of action. Supposing the declaration to be good, it is only made so by reason of the allegation which is traversed by the plea: the issue, therefore, is not a material one. There is consequently no ground for arresting the judgment.

MAULE, J. I am of the same opinion. The lord chief justice is satisfied with the verdict: and in that I concur with him. The defendant has entered into a contract that he will make and execute an indenture. The contract being executory, and each to have a part, each party should have been ready to perform his part of it, and was bound to give notice to the other of such readiness, before he could complain of non-performance. In the declaration, there is no allegation of notice of the plaintiff's readiness and willingness; but it is averred that the defendant exonerated and discharged the plaintiff from tendering the indenture for execution,—not **[139]** that he exonerated and discharged him from giving notice of his readiness and willingness to perform the contract on his part. That is consistent with the parties having made an agreement to do concurrent acts, and that the plaintiff should tender an indenture before he could call upon the defendant to execute one, and that the defendant afterwards had dispensed with the formality of a tender. That would still leave the agreement untouched to this extent, that the parties should concurrently do those acts. Now, it is quite clear that one party cannot maintain an action against another for not doing a concurrent act, without averring that he was ready and willing to perform his part, and that the defendant had notice of such his readiness and willingness. This declaration does not contain any such allegation. I therefore think it bad; and I also think that the allegation which is traversed, and the issue upon which is found for the defendant, does not interfere with his right to judgment. Supposing the declaration to be a good one, it is only by that allegation that it is made so; and therefore the issue upon it cannot be an immaterial one. A repleader takes place where, on the matters alleged and found on the record, the court cannot see which way the judgment should be pronounced; and that is the case where an immaterial averment in the declaration is traversed and found for the defendant. The case for a repleader, therefore, does not arise here; for, the court can see that the matters which are contained in the declaration, and not negatived by the finding of the jury, shew no right of action in the plaintiff, and therefore can see, that, in giving judgment in conformity with the verdict, they run no risk of giving a judgment that is contrary to the justice of the case, for, assuming all the allegations not found by the jury to be true, the defendant will still be entitled to judgment.

[140] CRESSWELL, J. I am of the same opinion. We cannot, upon this record, give judgment for the plaintiff. By the declaration, an agreement is shewn, by which the parties were to do concurrent acts. To entitle the plaintiff to sue for the non-performance of the contract by the defendant, he was bound to shew, either that he had performed his part, or that he was ready and willing to perform it, and that the defendant had notice thereof. The declaration does not shew notice, and therefore it is bad. If it is to be said that the declaration is rendered good by the subsequent allegation, that the defendant exonerated and discharged the plaintiff from tendering an indenture, that is a material allegation, and, being traversed, and found for the defendant, the defendant is entitled to judgment. As to the repleader,—I entirely agree with the rule laid down by my brother Maule. Assuming that the averment traversed by the plea is material, we can see here that the plaintiff is not entitled to judgment. Another rule upon this subject, is that a repleader is not granted to the party who has made the first default in pleading. Here, the first fault is in the plaintiff, unless the last allegation makes the declaration good.

WILLIAMS, J. I am of the same opinion. It appears to me that the allegation which is traversed by the plea, is a material and necessary allegation; and that the issue thereon having been found for the defendant, he is entitled to our judgment.

Rule refused.

[141] WEST *v.* BAXENDALE. Jan. 19, 1850.

[S. C. 19 L. J. C. P. 149.]

In trespass for false imprisonment, a plea justifying the apprehension of the plaintiff on suspicion of felony, set out various circumstances of suspicion, and, amongst others, stated a conversation alleged to have been had by the plaintiff with one A. At the trial, the whole of the plea was proved, except that the conversation alleged to have been had by the plaintiff with A., was had with B.—The defendant applied to the judge to amend the plea, by inserting therein the name of the right person; which was refused.—In leaving the case to the jury, the judge told them they must exclude from their consideration the statement as to the conversation with A., and say whether the facts which were proved, and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to cause a reasonable and cautious man, acting bonâ fide, and without prejudice, to suspect the plaintiff of the offence charged:—Held, a misdirection,—inasmuch as it was leaving to the jury what it was the province of the judge to determine: and, held, that the amendment was one which might have been made, upon terms, under the latter branch of the 3 & 4 W. 4, c. 42, s. 23.

This was an action of trespass for an assault and false imprisonment.

The defendant pleaded,—first, not guilty,—secondly, that, shortly before the supposed trespass in the declaration mentioned, to wit, on, &c., at or about 9 o'clock in the evening, in the county of Middlesex, certain goods and chattels of one Joseph Baxendale, to wit, fifty silver forks, fifty silver spoons, &c., of great value, to wit, of the value of 100l., were with force and arms feloniously stolen from the dwelling-house of the said Joseph Baxendale, by some person to the defendant unknown, against the peace, &c.; that the plaintiff, before the committing of the said theft, had been in the service of the said Joseph Baxendale, as coachman, and had been discharged therefrom, and was well acquainted with the said house and premises of the said Joseph Baxendale, and knew that the said plate was in the possession of the said Joseph Baxendale, and where the said plate was usually kept; that the said plaintiff, on the evening of the day on which the said felony was **[142]** committed, and shortly before the same was committed, was seen by a certain person who knew him, and whom he knew, to wit, one Osman, in the neighbourhood of the said house, and not in the place where the plaintiff usually resided or was, or had any lawful business, and that the plaintiff then endeavoured to avoid being seen or recognised by the said person, and affected not to know him, but, upon being then accosted and recognised by the said person, requested him not to inform the said Joseph Baxendale, or any of his family or servants, that the said person had seen him on the occasion aforesaid; that the plaintiff was also, on the evening of the day on which such felony was committed, and shortly before it was committed, seen to go in the direction of the place where it was committed; that, at such time after the committing of the said felony as a person would take to pass quickly from the said house along a certain close of the said Joseph Baxendale, adjoining thereto, and out of a certain gate of and belonging to the said close and house, and which led from the same unto and into a certain public high way,—into which a person who had committed the said felony was likely to have run and escaped,—a person was heard to pass suddenly out of and away from the said house, along the said close, and through the said gate, with a step like that of the plaintiff, and which a certain person, to wit, one Sutton, who heard the same, and who knew the plaintiff, and the sound of his step, believed to be his; that a certain dog of the said Joseph Baxendale, which knew the plaintiff, and would not bark at him, but was accustomed to bark furiously at strangers whom it perceived in the said premises of the said Joseph Baxendale, on the occasion aforesaid perceived a person who so passed away from the said house, over the said close, and through the said gate as aforesaid, whilst in and upon the said premises of the **[143]** said Joseph Baxendale, and then recognised the said person as one whom he knew, and then followed the said person whose step was like the plaintiff's, without barking; that a person resembling the plaintiff was the said person, and was seen to pass, and did pass, through the said gate within a few minutes after the said felony was committed, and in such time as a person might have come swiftly from the place where the said felony was committed, and the said person did then take to flight along the said highway; that the plaintiff, on the occasion and at the time aforesaid, or any part thereof, had not any business or right to be in the said house or close of the said Joseph Baxendale, or to pass through the said gate; that human footsteps were, on the morning of the day after the committing of the said felony, seen near the said house, on the said close, in the direction taken by the said person who so passed through the said gate as aforesaid, which footsteps resembled the plaintiff's, and which the defendant then, and before and at the said times when, &c., believed to be the plaintiff's; that the said felony was committed by the said person who passed through the said gate on the occasion aforesaid; that the defendant never had any reason or ground to believe or suspect that any other person than the plaintiff was guilty of the said felony, and the defendant, before and at the said time when, &c., being informed of and knowing the premises, and having reasonable and probable cause to suppose, suspect, and believe, and then supposing, suspecting, and believing, that the plaintiff had committed the said felony, did forthwith, to wit, at the said time when, &c., cause the plaintiff to be arrested and taken, for the purpose of being carried before a justice of the peace, to answer the premises, and be dealt with according to law in respect thereof; that, for the purposes aforesaid, the defendant, at the said **[144]** time when, &c., necessarily caused the plaintiff to be gently assaulted and laid hold of, and to be gently compelled to go in custody as in the declaration mentioned; that, because it was very late in the evening when the plaintiff was arrested, and an unreasonable time to take him before such justice as aforesaid, the defendant unavoidably detained him for a reasonable time, and in a reasonable manner, in the said house in the declaration mentioned, the same being a reasonable and convenient place; that the defendant did, at and within a reasonable time, and in a reasonable manner, after the said arrest, cause the plaintiff to be taken in custody before the said justice of the peace, to answer the premises and be dealt with according to law; that the defendant, on the occasion aforesaid, did no more than was necessary for the purpose of arresting the plaintiff and keeping him in safe custody until he could be carried before a justice of the peace, to answer the premises, and be dealt with according to law; and that these were the same supposed trespasses whereof the plaintiff had above complained against the defendant,—verification.

To this plea the plaintiff replied de injuriâ; whereupon issue was joined.

The cause was tried before Wilde, C. J., at the sittings at Westminster after Michaelmas term, 1848. The facts which appeared in evidence were as follows:—The defendant occupied a large mansion in the neighbourhood of Finchley. The plaintiff had been in his service in the capacity of coachman, and consequently was well acquainted with the premises, and knew where the plate was kept. The plaintiff was dismissed from the defendant's employ in February, 1848, since which time he had resided at Gloucester Mews, London. On the 6th of March, about 9 o'clock in the evening, the butler missed a tray full of plate from a **[145]** closet in his pantry, where it had been seen safe a short time before, and, notwithstanding immediate search was made for it, it could not be found. On the following morning, the defendant's bailiff, crossing the lawn, discovered the empty tray under a tree in the shrubbery. On the afternoon and evening of the day on which the robbery took place, the plaintiff was seen at Whetstone, in the immediate vicinity of the defendant's house, and had made an appointment to meet a person at a public-house there at a later hour in the evening, but did not keep it. He returned home to Gloucester Mews, on the night in question, in a cab, the horse attached to which appeared very much distressed, as if he had come a considerable distance, and had travelled fast.

It further appeared, that the plaintiff, when he was in the service of the defendant, had the care of the dogs; that, about 9 o'clock on the evening of the robbery, the defendant's then coachman, who lived at the porter's lodge, heard a person coming from the house towards the gate; and that one of the defendant's dogs, which was in the habit of barking at strangers, was heard to "sniff" at the man, as if he recognised him, but did not bark. And a witness who saw the man come out at the gate, but was unable to identify him, described him as having had on a round jacket, resembling one which the plaintiff wore when seen that night at Whetstone.

The only fact in the plea which was not proved distinctly as alleged was, that the plaintiff had been seen by one Osman in the neighbourhood of the defendant's house on the evening in question, shortly before the robbery, and, when accosted by Osman, requested him not to inform the defendant, or any of the family or servants, that he had seen him. The fact itself was proved, but the name of the witness was Hawley, and not Osman.

[146] On the part of the defendant, it was submitted, that the plea was divisible, and that it was enough to prove so much of it as would justify the suspicion that the felony had been committed by the plaintiff: and the learned judge was asked to amend the plea, by substituting the name of Hawley for that of Osman. This was objected to by the plaintiff's counsel, who said they came prepared to cross-examine Osman, but were not prepared to deal with the witness proposed to be substituted for him.

The learned judge declined to allow the amendment, reserving to the defendant leave, on motion, to question the propriety of such refusal.

The lord chief justice told the jury that they must exclude from their consideration what had been shewn to have passed between the plaintiff and Hawley; and he left it to them to say whether the other facts, so far as they had been proved to their satisfaction, and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to justify a reasonable man, acting with ordinary caution, and without prejudice, in suspecting that the felony had been committed by the plaintiff.

The jury returned a verdict for the plaintiff, damages 25l.

Byles, Serjt., in Hilary term last, moved for a new trial, on the ground of misdirection, an improper refusal to amend the plea, and that the verdict was against evidence. Since the case of *Panton* v. *Williams* (2 Q. B. 169, 1 Gale & D. 504), all that is for the jury to determine is, what are the facts, which of them were within the knowledge of the defendant at the time, and did the defendant act bonâ fide; the question of reasonable and probable cause **[147]** being entirely a question of law for the judge. Here, the whole, the law as well as the fact, was left to the jury. The plea,—which was founded upon the case of *Mure* v. *Kaye* (4 Taunt. 34),—was substantially proved. It was clear that a felony had been committed, and that the defendant acted with bonâ fides. [Wilde, C. J. The plea was entirely proved, with the exception of the statement about Osman.] It was not necessary to prove the whole of the facts stated in the plea: it was enough to prove so much of them as shewed reasonable ground for suspicion. The part which was not proved was not material: the defendant was not bound to prove the name of the person with whom the conversation was alleged to have taken place. [Maule, J. Would the plea be a good one, omitting the name?] That is not the true test. [Maule, J. I should say, that, if it is necessary to specify a particular person, the plea must in terms be proved,—like a day that is laid as matter of substance. Wilde, C. J. Suppose the plea had alleged a confession to A. B.; would you have proved your plea, by shewing a confession to C. D.?] It would not be necessary to state in the plea the name of the person to whom the confession was made. The sole object of the plea is, to enable the court to see whether or not the circumstances form a ground of reasonable suspicion. [Maule, J. If you substitute a different person, you prove a different ground of suspicion. You do not allege suspicion, but upon this ground as well as others.] The defendant is not bound to prove all the grounds of suspicion alleged. [Maule, J. In the case of a plea justifying the dismissal of a servant, the cause of dismissal alleged need not be entirely proved. But that is not quite a parallel case: the whole is not tied together as being the ground of one suspicion.] The learned judge clearly erred in leaving **[148]** it to the jury to say whether or not there was reasonable ground of suspicion. In *Wedge* v. *Berkeley* (6 Ad. & E. 663, 1 N. & P. 665, W. W. & D. 271), the direction was in that form: but the law has since been settled the other way, in *Panton* v. *Williams*.

A rule nisi having been granted,

Wilkins, Serjt., Hawkins, and Bailey, now shewed cause. The plea is bad, and therefore, as a verdict for the defendant would not avail him, the court will not send the cause down to a new trial. In *Mure* v. *Kaye* (4 Taunt. 34), it was held that a plea justifying an arrest by a private person, on suspicion of felony, must shew the circumstances, from which the court may judge whether the suspicion was reasonable. [Maule, J. Suppose the plaintiff does not choose to demur? It is not for the judge at nisi prius to inquire whether the plea is good or not.] Whether there was reasonable or probable cause or not, depends upon a variety of facts, all of which must not only exist, but must have been communicated to the defendant, and have been believed by him to be true; and they must be such as furnish ground for the arrest of the plaintiff. The former being found by the jury, the latter is for the consideration of the judge. Here, the lord chief justice told the jury, in effect, that the facts alleged in the plea afforded reasonable ground of suspicion, if they, the jury, were satisfied that they were communicated to the defendant, and he boná fide acted upon them. The jury found that enough was not proved, to amount to a justification. In *Davis* v. *Russell* (5 Bingh. 354, 2 M. & P. 590), the defendant, a constable, being told by one A. that the plaintiff had robbed her, and the information being countenanced by a supposed intercepted letter which was shewn to him, apprehended the **[149]** plaintiff, a respectable inhabitant of Cheltenham, at her lodgings, and took her from her bed, at night, to prison. The charge proving unfounded, the plaintiff sued the constable for the false imprisonment; and the judge at the trial directed the jury to consider whether the foregoing circumstances afforded the defendant reasonable ground to suppose that the plaintiff had committed a felony, and whether, in his situation, they would have acted as he had done: and the court held that this direction was substantially correct. In *Beckwith* v. *Philby* (6 B. & C. 635, 9 D. & R. 487), the direction was almost in terms the same as here. [Williams, J. In *Davis* v. *Russell*, the jury found for the defendant: and, in *Beckwith* v. *Philby* the direction was not objected to. The leading case now upon this subject is *Panton* v. *Williams* (2 Q. B. 169, 1 Gale & D. 504). It was there laid down by the Exchequer Chamber, that, in an action for indicting maliciously and without probable cause, if the defendant set up facts as shewing probable cause, the judge must determine whether the facts, if proved, or any of them, constitute such cause: the jury are only to decide whether the facts, or facts inferred from them, exist; and this, however complicated or numerous the facts may be. Maule, J. The defendant pleads that he had reasonable cause to suspect, and did suspect. The facts were in dispute. The lord chief justice left it to the jury to say whether the facts proved, amounted to such reasonable and probable cause as would justify a reasonably prudent man in suspecting the plaintiff. It may be that the jury found that a number of facts existed, but found for the plaintiff because they thought those facts did not amount to reasonable and probable cause. The summing up certainly does seem, implicitly, to leave the question of reasonable and probable cause to the jury.] The rule is thus laid down by Lord **[150]** Denman, in *Turner* v. *Ambler* (10 Q. B. 252, 260): "The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But, among the facts to be ascertained, is the knowledge of the defendant, of the existence of those which tend to shew reasonable and probable cause; because, without knowing them, he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged; because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding: and, perhaps, whether they did so or not, is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." It was impossible that the lord chief justice could have forgotten the rule now so long and so well settled, that reasonable and probable cause is for the judge only. In substance, it is submitted, the direction was right.

The learned judge was also right in refusing to allow the proposed amendment. The plea alleged the conversation to have taken place with Osman: to have permitted the name of another person to be substituted for Osman's, would clearly have prejudiced the plaintiff in the conduct of his action. In *Boucher* v. *Murray* (6 Q. B. 362), a declaration on a guarantee stated, that, in consideration that the plaintiff would make advances of money by way of loan to B., the defendant promised to repay the plaintiff such sums as he should so **[151]** advance, if B. should make default; and alleged for breach, that B. made default, and that the defendant did not pay the plaintiff. To this the defendant pleaded, that the plaintiff did not make the said advances to B., in manner and form, &c. At the trial, the judge ordered the declaration and plea to be amended, by stating in the count, that, in consideration that the plaintiff would procure the British and Australian Bank, in which the plaintiff was a partner, to make advances, &c. to B., the defendant promised to repay the said bank such sums as the plaintiff should so cause to be advanced, &c.; and, in the plea, that the plaintiff did not procure the said bank to make the said advances: and it was held that such amendment was not warranted by the statute. And in *Bowers* v. *Nixon* (2 Carr. & K. 372), it was ruled by Maule, J., that "the enactments for allowing amendments at nisi prius, were intended to meet variances arising from mere slips or accidents, and that they do not extend to a case in which the party has intentionally and designedly framed his pleading in a manner which gives rise to the objection." [Maule, J. In *Pratt* v. *Hanbury* (19 Law Journ., N. S., Q. B. 17), where there was a plea of justification in an action for a malicious prosecution on a charge of receiving stolen goods, alleging that the goods had been stolen by "some person unknown," and the evidence at the trial shewed that the plaintiff had received the goods from a servant of the defendant, named John Press,—it was held that the judge at nisi prius properly exercised his discretion, in allowing the plea to be amended by striking out the words "some person unknown," and substituting the words "John Press." The statute 3 & 4 W. 4, c. 42, s. 23, contemplates two cases in which amendments are to be allowed,—first, where the variance is in a matter, which, in the **[152]** judgment of the court or judge, is not material to the merits of the case, and one by which the opposite party cannot have been prejudiced in the conduct of his action or defence,—secondly, where it is in a matter not material to the merits of the case, but by which the party may have been prejudiced. In the latter case, the amendment is to be allowed upon reasonable terms. This seems to have been a case falling within the latter branch of the statute, and one in which an amendment might properly have been allowed, if properly asked for.]

Byles, Serjt., and Willes, in support of the rule. The plea shews that a felony had been committed, and it discloses circumstances reasonably calculated to excite the suspicion which the defendant entertained and acted upon. The direction of the learned judge was clearly wrong: he left to the jury what he ought himself to have determined, viz. the existence of reasonable and probable cause. [Maule, J. It was for the jury to say whether the facts pleaded were proved, and for the judge to determine whether or not they amounted to reasonable and probable cause,—reasonable and probable cause, not for suspecting, but for imprisoning the plaintiff.] Whatever is reasonable and probable cause for suspecting, is reasonable and probable cause for arresting. The judge was also wrong in telling the jury to exclude from their consideration all about the communication to Osman (or Hawley): it was at all events admissible to shew that the defendant acted bonâ fide.

MAULE, J. I am of opinion,—and I believe my learned brothers all agree with me,—that the rule must be made absolute for a new trial, on the ground of misdirection. If the direction of the lord chief justice in substance was, that the jury were to consider whether **[153]** the facts stated in the plea were true, and whether they amounted to reasonable and probable cause, then, no doubt, the direction was wrong. That the direction took that precise form, however, is not quite clear. But it seems not to be disputed, that his lordship did go on to say, that, in considering the grounds of the defendant's suspicion, they must exclude from their minds the fact of the alleged conversation with Osman (or Hawley, as it turned out). That clearly was not correct. It was a material fact, and might have influenced their decision. I think the objection an insuperable one. Our decision necessarily involves this—that the plea would have been a perfectly good plea without the allegation about Osman. If the plea, without that allegation, would have been insufficient, the plaintiff would have been entitled to a verdict.

It is unnecessary to decide the other points. I incline to think that the amendment which was proposed, was in a matter not material to the merits of the case, but that it was in a matter, by the amendment of which the opposite party might have been prejudiced in the conduct of his cause; and therefore that it was one which ought to have been made, upon such terms as the judge might think reasonable, under the concluding part of the 3 & 4 W. 4, c. 42, s. 23.

The rest of the court concurring,

Rule absolute accordingly.

[154] BELL, Public Officer of the National Provincial Bank of England, *v.* WELCH AND ADAMS. Jan. 29, 1850.

[S. C. 19 L. J. C. P. 184; 14 Jur. 432.]

The defendants gave the plaintiff the following guarantee:—"We, the undersigned, hereby indemnify the National Provincial Banking Company, to the extent of 1000l., advanced or to be advanced to R. P., by the said company." It appeared, that, at the time the guarantee was given, R. P. was indebted to the bank in a sum exceeding 1000l.:—Held, that the guarantee did not, upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration.—A declaration upon the above guarantee, stated, that, at the time of making the agreement, &c., R. P. kept an account with the company, and was indebted to them in 800l. for money advanced; that it was proposed between R. P. and the company, that the company should advance him divers other moneys not then agreed upon; and that thereupon the agreement (setting it out) was entered into: the declaration then proceeded to allege, that, "in consideration of the premises," the parties mutually promised, &c., that the company did advance to R. P. divers large sums, amounting to 1000l., and forbore and gave day of payment to R. P., &c.:—Held, that the whole of the allegations preceding the mutual promises, formed part of the consideration for the defendants' promise, and were all put in issue by non assumpsit.

Assumpsit on a guarantee. The declaration stated, that, at the time of the agreement thereinafter mentioned, the plaintiff was registered public officer of the National Provincial Bank of England, carrying on business at Blandford, in the county of Dorset; that one Richard Pinney kept a certain banking-account with the said company, at their branch bank at Blandford, and was indebted to the company in 800l., for money advanced by them to the said Richard Pinney, and it was then proposed between the said Richard Pinney and the said company, that the said company should advance to the said Richard Pinney divers other moneys not then agreed upon; that thereupon, afterwards, to wit, on the 4th of October, 1847, a certain agreement in writing was made and entered into by the said company and the defendants, and was signed by the defendants, in the words following:—"We, the undersigned, hereby indemnify the National [155] Provincial Bank of England to the extent of 1000l., advanced or to be advanced to Mr. Richard Pinney, of Hamworthy, shipbuilder, by the Blandford branch of that establishment; but the said indemnity to cease when the said Richard Pinney shall have paid in the said sum of 1000l. to the credit of his account:" Mutual promises: Averment, that the said company did advance to the said Richard Pinney divers large sums of money amounting to 1000l., and forbore to the said Richard Pinney, and gave him day of payment of, the said sum so due to the said company at the time of making the said agreement by the defendants, from the time of making the said agreement, and forbore to him and gave him day of payment of the said sums so advanced to him after the making of the said agreement, from the time when the last-mentioned sums were respectively advanced, until the said Richard Pinney had had a reasonable time to pay the said sum of 1000l. in to his account, to wit, from the said several periods respectively up to the commencement of the suit: that the said company were always from the time of making the agreement and promise by the defendants, until and at and after the said Richard Pinney had had a reasonable time to pay in the said sum of 1000l. to the credit of his account, ready to receive the same,—of which the defendants had notice: that, although the said Richard Pinney, after the making of the said agreement, to wit, on, &c., paid in to his account the small sum of 179l. 10s. 10d., yet he did not pay in the residue of the sum of 1000l., to wit, 820l. 9s. 2d., or any part thereof, and the said agreement and promise of the defendants had been since the making thereof, and were still, in full force, virtue, and effect: that, at the expiration of the said reasonable time for the said Richard Pinney to have paid in 1000l., to wit, on the 1st of January, 1848, he was indebted to the said company in a sum **[156]** exceeding 1000l., to wit, 2000l., for money at the time of the making of the said agreement and promise of the defendants advanced or to be advanced to the said Richard Pinney by the said company, according to the true intent and meaning of the said agreement and promise of the defendants as aforesaid: yet that the said Richard Pinney, although requested so to do, had not paid the said last-mentioned sum, or any part thereof; that of this the defendants had notice, and were then reqested by the said company to pay the last-mentioned sum, to the extent of 1000l., according to the true intent and meaning of the said agreement and promise of the defendants in that behalf; yet that the defendants had not paid the same, or any part thereof.

There was also a count upon an account stated.

The defendants pleaded several pleas, but the only material one was non assumpsit: upon which the plaintiff joined issue.

The cause was tried before Wilde, C. J., at the sittings in London after last Trinity term. The facts that appeared in evidence were, that the plaintiff was the public officer of the National Provincial Bank of England, having a branch establishment at Blandford, in the county of Dorset, the business of which was conducted by one May; that one Richard Pinney had, for some years, banked at the Blandford branch, and had been allowed, on several occasions, to overdraw his account, upon the faith of guarantees, limited in point of time and amount, signed by the defendant Welch; and that on the 8th of July, 1847, May, the manager of the Blandford branch, addressed and sent the following letters to Richard Pinney, and to Welch:—

"National Provincial Bank of England,
"Blandford, July 8, 1847.

"Dear Sir,—We are advised of the payment to your credit, per London Joint, of 350l. this morning; and **[157]** your acceptances will be duly advised. You must be aware that these transactions exhaust the temporary guarantee, and leave the bank comparatively unprotected: and I have, therefore, to beg you will either forward the permanent guarantee, which might be completed in ten minutes, or a fresh temporary one. All the unpleasantness and correspondence of this nature is occasioned by your own neglect, in not providing the promised permanent guarantee: and I have no doubt Mr. Welch will, upon your shewing him this note, give his attention to the matter without further delay.—Yours, &c." (Signed) "J. MAY, Manager.

"R. Pinney, Esq."

"National Provincial Bank of England,
"Blandford, August 27, 1847.

"Dear Sir,—When I saw you in Poole, you told me you would forthwith forward me the permanent guarantee for Mr. Pinney. Your last temporary one has been some time exhausted; and I trust you will at once forward me the permanent guarantee, or a fresh temporary undertaking, as usual.—Yours, &c."
(Signed) "J. MAY, Manager.

"M. K. Welch, Esq."

On the 4th of October, 1847, the following guarantee was given to May, signed by both the defendants:—

"Poole, October 4, 1847.

"We, the undersigned, hereby indemnify the National Provincial Bank of England, to the extent of 1000l., advanced, or to be advanced, Mr. Richard Pinney, of Hamworthy, ship-builder, by the Blandford branch of that establishment; but the said indemnity **[158]** to cease when he shall have paid in the said sum of 1000l. to the credit of his account." (Signed) "M. K. WELCH.
"G. A. ADAMS."

At the time this guarantee was given, Pinney was indebted to the bank in 1400l. After the date of the guarantee, 312l. 11s. was advanced by them to Pinney, and 179l. 10s. 10d. was paid in by him to the credit of his account.

On the part of the defendants, it was submitted, that the guarantee was void for uncertainty, and for want of a sufficient consideration appearing on the face of it; and that the averment of the proposal between Pinney and the bank, that the latter should advance moneys to the former,—which, it was insisted, was put in issue by non assumpsit,—was not proved.

Under his lordship's direction, the jury found for the plaintiff, damages 1000l., leave being reserved to the defendants to move to enter a nonsuit, upon the objections above mentioned, or to reduce the damages by the sum of 179l. 10s. 10d.

Channell, Serjt., in Michaelmas term last, accordingly obtained a rule nisi to enter a nonsuit, or to reduce the damages; or to arrest the judgment, on the ground that the declaration disclosed no good cause of action. He referred to *Raikes* v. *Todd* (8 Ad. & E. 846, 1 P. & D. 138), *Johnston* v. *Nicholls* (ante, vol. i. p. 251), and *Chapman* v. *Sutton* (ante, vol. ii. p. 634).

Shee, Serjt., and James Wilde, shewed cause. The ground upon which a nonsuit is asked for is, that the proposal alleged in the declaration, is part of the con-**[159]**-sideration for the defendants' promise, and that there was no evidence of any such proposal. The guarantee itself, however, it is submitted, affords some evidence of a proposal; and, besides, it was shewn that the defendants had, on several previous occasions, given the bank temporary guarantees in the same form. Further, it is submitted, that it was not necessary to prove that allegation: it was mere matter of inducement. [Maule, J. Is it not made material and necessary to be proved, by the statement that it was part of the consideration for the defendants' promise?] But for the words "in consideration of the premises," there would have been no difficulty. [Maule, J. If it had been, "in consideration of the said proposal," it would have been difficult to say that the proposal was not put in issue.] Non assumpsit puts in issue the making of the promise upon the consideration stated: *Sutherland* v. *Pratt* (11 M. & W. 296, 2 Dowl. N. S. 813). Does it put in issue "the premises," as a matter of fact? [Maule, J. Where the promise is inferred from the consideration, non assumpsit puts it in issue.] The contract is set out in terms in the declaration: the whole consideration must appear upon the face of the instrument. "In consideration of the premises" means no more than "in that state of things." [Maule, J. It means, in truth, merely an averment of notice.] The premises themselves are not in the nature of a consideration. If the proposal is a material allegation, it is admitted: *Bennion* v. *Davison* (3 M. & W. 179).

To make a guarantee good, it is necessary that the consideration should distinctly appear upon the face of it. It will be contended, on the other side, that it is doubtful whether the consideration for the guarantee, was past or future advances. "Advanced *or* to be advanced," must be read "advanced *and* to be ad-**[160]**-vanced;" and then the guarantee would be sufficient; *Johnston* v. *Nicholls* (ante, vol. i. p. 251); *Chapman* v. *Sutton* (ante, vol. ii. p. 634). [Cresswell, J. Was it meant to be a guarantee for the 800l. said to have been already advanced, if no more were advanced?] Clearly not. The declaration states that there had been a proposal by Pinney to the bank to advance money to him, and that 800l. only had been advanced. The promise is, to indemnify the bank to the extent of 1000l. advanced. If it had stopped there, there would have been an implied promise of indemnity. [Maule, J. I doubt that.] "Indemnify" implies a forbearance. [Maule, J. For how long?] For a reasonable time. [Maule, J. What is a reasonable time?] The case which seems to approach the nearest to this is *Raikes* v. *Todd* (8 Ad. & E. 846, 1 P. & D. 138). The guarantee there was,—"I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to D. on his account with you, commencing, &c., not exceeding 2000l." The declaration thereon stated that the plaintiffs had opened an account with, and made advances to, D., commencing on, &c., and that the guarantee was given in consideration of the premises, and also in consideration that the plaintiff, at the request of the party guaranteeing, would continue to advance further sums to D. on his said account with the plaintiffs: and it was held that the consideration did not sufficiently appear by the written instrument, to support the declaration: but two of the judges,—Lord Denman and Coleridge, J.,—seemed to think that the words imported a consideration of forbearance. In construing instruments of this nature, the court will look at the surrounding circumstances. In *Newbury* v. *Armstrong* (6 Bingh. 201, 3 M. & P. 509), Tindal, C. J., says: "We ought not to be too strict in **[161]** the construction of these instruments; for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." In *Tanner* v. *Moore* (9 Q. B. 1), a declaration, in assumpsit, stated that T. had commenced an action against M. for 165l.; and that, in consideration of T.'s "agreeing to stay the said action," the defendant promised to pay T. the 165l. within six months next after the decease of A. The promise, as proved, was, to pay, as above, in consideration of T.'s "having agreed" to stay the action; and it was held that this was no variance, and that a valid consideration was proved. In delivering the judgment of the court, Lord Denman there says: "Here, the declaration speaks of the consideration as the plaintiff's agreeing to stay, &c. Now, that word necessarily implies a continuing agreement till the action is stayed: and the words of the instrument, 'having agreed,' necessarily imply the same; for, it would be absurd to suppose that the defendant bound himself to pay the money, in consideration of the plaintiff's merely having at a past time agreed to stay the proceedings, unless that agreement was continuing at the time of the signing of the instrument, and until the action was actually stayed." So, here, it would be absurd to suppose that the defendants would consent to guarantee the past account, unless something future was to be done by the bank for Pinney's benefit. In *Haigh* v. *Brooks* (10 Ad. & E. 309, 2 P. & D. 477), the guarantee was in these terms:—"Messrs. H. In consideration of your being in advance to L. in the sum of 10,000l. for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf:" and it was held, by the court of error (*Brooks* v. *Haigh*, 10 Ad. & E. 323, 4 P. & D. 288), that the guarantee did not **[162]** necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated. In *Goldshede* v. *Swan* (1 Exch. 154), in an action on the following guarantee,—"In consideration of your having this day advanced to our client, Mr. V. D., 750l., secured by his warrant of attorney, payable on the 22nd of August next, we hereby jointly and severally undertake to pay the same on default, &c. Dated the 22nd of June 1840,"—the declaration stated that, in consideration that the plaintiff would, on the 22nd of June, 1840, lend to one V. D. 750l., on the security of a warrant of attorney, payable on the 22nd of August then next, and would forbear and give time to V. D. until the 22nd of August, the defendant promised, &c.: and it was held, that the instrument was sufficiently ambiguous to admit of evidence to shew that the advance was not a past one, but was made simultaneously with the execution of the guarantee; and that no amendment of the declaration was necessary. Parke, B., there said: "I entertained some doubt, at first, whether the consideration which appears on the face of this guarantee, was sufficiently ambiguous to let in an explanation. But, on the authority of the cases of *Haigh* v. *Brooks* and *Butcher* v. *Stewart* (11 M. & W. 857), I think it is. I think that the evidence was properly admitted, not for the purpose of contradicting the instrument, but to explain the meaning of its terms. It was proved that no money had been advanced before the execution of the instrument: it must, therefore, be read as pointing to future advances: and there is nothing inconsistent or unnatural in this construction. Upon this ground the Queen's Bench proceeded in *Haigh* v. *Brooks*: and nobody can doubt that, in that case, the memorandum might be read as **[163]** referring to a past event. So, in *Butcher* v. *Steuart*, it was shewn that no release had been procured; and the time was held to be a future one. *Butcher* v. *Steuart* was recognised in *Tanner* v. *Moore*. Now, reading this instrument with the facts given in evidence, there is nothing inconsistent with its being for a future event. I, however, found my opinion upon the cases of *Haigh* v. *Brooks* and *Butcher* v. *Steuart*." [Williams, J. Would the present guarantee attach immediately? or only upon future advances being made?] In the latter event, probably. The court will look at the existing state of circumstances, as apparent on the face of the record, in construing the instrument. In *Chapman* v. *Sutton* (ante, vol. ii. p. 631), the guarantee was almost in terms the same as this: it was—"In consideration of advances made and to be made by A. & B., or by any other persons of whom their firm may, from time to time, consist, in the way of loan, &c., we jointly and severally hereby guarantee to A. & B. the repayment of the said advances, and to indemnify them against any loss by reason of such advances; our liability not to exceed 1000l.," &c.: and it was held that it disclosed a sufficient consideration. In *Johnston* v. *Nicholls* (ante, vol. i. p. 251), B. gave A. the following guarantee, —"As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may, from time to time, become indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payment of any sums of money which C. now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of 2000l." There had been considerable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for, and **[164]** goods supplied to, C. by A., the credit upon which had not then expired; and those dealings had been, to a small extent, since continued. The declaration alleged the existence of the prior dealings between A and C., of the three descriptions above mentioned, and then went on to state, that, in consideration that A. would continue such dealings as aforesaid with C., B. promised A. to be responsible for, and to guarantee, the payment of any sums of money which C. then was, or at any time thereafter might be, indebted to A., in the course of such dealings as aforesaid,—that is to say, as well in respect of the said sums of money so lent and advanced on credit as aforesaid, and of the said sums of money so paid, laid out, and expended on credit as aforesaid, and of the said goods so sold on credit as aforesaid, and which respective credits were wholly unexpired as aforesaid at the time of the making of the said promise, as also in respect of such dealings so to be continued as aforesaid, so that C. should not be called on to pay more than 2000l. It was held, that the guarantee disclosed a sufficient consideration for the payment, as well of the past as of the future debt; and that there was no variance between the declaration and the proof. Erle, J., there said: "The written agreement that was produced in proof, required some parol evidence to shew its application; and it might properly be explained, by shewing the nature and character of the dealings prior and subsequent to it: and I think the evidence given was quite consistent with the guarantee itself, and with the expansion of it in the declaration." The meaning of the guarantee in the present case is, that the bank have advanced, and may in future advance, money to Pinney, and that, if they do make future advances, the defendants undertake to indemnify them against the whole, both past and future. Consistently with the nature of the transactions disclosed by the evidence, the court can **[165]** put no other construction upon it. [Maule, J. In that case, you are reduced to this difficulty, that the paper shews no consideration upon the face of it.] It must be assumed that the bank were not at once to sue the customer for the past advances. Unless that were so, the undertaking would have been simply an undertaking to pay the existing debt.

As to the reduction of damages, it appears that 179l. 10s. 10d. had been paid into the bank by Pinney, and the defendants claim to set off that sum in reduction of their liability upon the guarantee. To do this, will be doing violence to the language of the guarantee. [Maule, J. You do greater violence to the sense of the document, if you do not allow the set-off.]

Channell, Serjt., and Barstow, in support of the rule. The allegation in the declaration, which precedes the statement of the defendants' promise, clearly was put in issue by non assumpsit, unless it can be said to be mere surplusage, which, it is submitted, it cannot be. "The premises" are merely a promise for the debt or default of a third person, and therefore the case would be within the statute of frauds. Now, it is quite settled, that the promise as well as the consideration must be collected from the face of the guarantee. The declaration alleges that 800l. was due from Pinney to the bank: the evidence was, that 1400l. was due. It may be conceded that the court, in dealing with an instrument of this sort, will not look at the adequacy of the consideration. It may also be conceded, that, if there had been an engagement on the part of the bank to make future advances, or to forbear to press for payment of past advances, the guarantee would have been good. So, if the contract had been conditional,—to attach, on future advances being made. But, here, there is no contract to forbear, no engagement for future **[166]** advances; nor is the contract conditional; it is alternative. In the cases referred to, the parties confessedly could not have contemplated a liability to arise on the part of the defendant, except in the event of goods being supplied or money advanced. But, here, the parties may have contemplated, and evidently did contemplate, the defendants' being liable, even though no future advances were made. To that contemplation the law will not give effect. In *Newbury* v. *Armstrong*, the whole consideration for the defendant's undertaking was in futuro. [Maule, J. Do you contend, with reference to the statute of frauds, that evidence may not be given of matters of fact in relation to which the contract was entered into?] It is not necessary to go that length. [Maule, J. May not the debt, where its amount is left in doubt, be shewn otherwise than by writing?] It may be conceded that it may, though even that may be subject to some qualification. It is not contended that the written contract can never be explained by parol, or by reference to extraneous circumstances: but it is submitted that the cases where that has been permitted, are no authority for the plaintiff upon the present occasion,—first, because the nature of the ambiguity was different,—secondly, because, here, the explanation that is given, is not the explanation stated upon the record. [Maule, J. The rule is not, I conceive, confined to cases of ambiguity. The admissibility of the fact must depend on something other than ambiguity. If the ambiguity is not apparent on the face of the instrument, you give it in evidence for some other purpose. When the document speaks of some matter of fact existing dehors the instrument, parol evidence must be received.] A patent ambiguity cannot, in general, be explained by evidence: but, where the ambiguity is raised by evidence, there you may explain it. It is to this sort of ambiguity that the cases **[167]** cited rather point. Thus, in *Haigh* v. *Brooks*, a doubt was suggested whether the words "you being in advance," meant to import a past or a future consideration. [Maule, J. Ambiguity means, that the word, or the instrument, is susceptible of two senses, the one exclusive of the other. In *Haigh* v. *Brooks*, the court thought the guarantee comprehended advances both past and future; there was, therefore, no ambiguity in the sense I have mentioned. The argument there was,—this guarantee is not a binding one, because it applies exclusively to past advances. But the court conceived that it might comprehend future as well as past advances, and that, if there were future advances, the guarantee was a binding one.] In *Butcher* v. *Steuart*, the memorandum was as follows:—"Between A. B., plaintiff, and C. D., defendant. In consideration of your having released the above-named defendant from custody, I hereby engage within one month from this date to pay you the sum of 500l., and to hand you over a bond for the residue of the debt, interest, and costs in this action, payable at the expiration of five years, with interest at the rate of 5 per cent. in the mean time, half-yearly, &c.:" and the court held that the contract, as explained by the facts, was not within the statute of frauds. In *Goldshede* v. *Swan*, Alderson, B. says: "If the words had been 'having advanced yesterday,' the evidence would not have been admissible, as it would have been a contradiction." Here, taking the antecedent allegations in the declaration as admitted, they shew only past advances. [Maule, J. The declaration alleges subsequent advances to have been made.] Not in this part of it. [Maule, J. Your argument is, that non assumpsit puts all the preceding allegations in issue, and that all must be proved by writing?] So far as is necessary to constitute a consideration. Whatever constitutes the contract, must be proved by writing. No **[168]** contract for future advances is necessarily to be inferred from this instrument: nor any contract for forbearance. In *James* v. *Williams* (5 B. & Ad. 1108, 3 N. & M. 196, 2 Dowl. P. C. 481), a letter from the defendant to the plaintiff, in these words,—"As you have a claim on my brother for 5l. 17s., for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day,"—was held not to satisfy the statute of frauds.

Wilde, C. J. Looking at this guarantee, there is undoubtedly great difficulty in saying that there is any consideration, construing the instrument by its terms, or with reference to the surrounding circumstances. The terms of the guarantee are,—"We, the undersigned, hereby indemnify the National Provincial Bank of England, to the extent of 1000l. advanced, or to be advanced, Mr. Richard Pinney, by the Blandford branch of that establishment; but the said indemnity to cease when he shall have paid in the said sum of 1000l. to the credit of his account." The words "advanced or to be advanced" might fairly admit of the construction that future as well as past advances were meant: but the facts shew, that, at the time this guarantee was given, there was a debt of 1400l. due to the bank from Richard Pinney; and there is nothing upon the face of the instrument, and certainly nothing when the state of the account between Pinney and the bank is looked at, to shew that the parties contemplated a security for future advances to the extent of 1000l. There was at that time a sum exceeding 1000l. already advanced; and the guarantee in terms binds the defendants to pay 1000l. of it. What is the consideration for that? The argument is, that the word "indemnify" makes the guarantee attach, inasmuch as it imports that the bank incurred some **[169]** future hazard. We can only construe the language used by the parties, according to its ordinary meaning; and, so construing it, the guarantee enures only to secure the bank from loss in respect of moneys advanced or to be advanced. On the face of it, the guarantee does not import that it is to attach upon future advances: future advances are not necessary to make it attach: the full amount of it is absorbed in the debt already due. As to the declaration, the argument urged on the part of the defendants has much weight. It is true, they say, that the allegation that 820l. 9s. 2d. remained due, is not traversed: but they say they did not enter into the guarantee upon the considerations alleged; and this arises upon non assumpsit. And, when we find by the evidence that the debt due was 1400l., it appears to me that the guarantee does not, upon the face of it, disclose any consideration: and, when we look dehors the guarantee, to the facts proved, I think the parties did not necessarily contemplate future advances, and that there is no express or implied contract, either for forbearance in respect of past advances, or for future advances. I therefore think the rule to enter a nonsuit, must be made absolute.

MAULE, J. I am of the same opinion. In order to make this declaration good, reading it according to the natural sense of its words, it imports that the defendants promised to guarantee the National Provincial Bank of England to the extent of 1000l., in consideration of their making future advances to Pinney, that is, provided future advances were made. If the defendants made a promise not upon that consideration, that is put in issue by non assumpsit. The facts are these:—There was a sum of 1400l. due from Pinney to the bank; and the defendants and the bank came to this agreement of guarantee, with reference to the state of the account,—**[170]** the defendants probably not knowing how the account stood,—by which they agreed to indemnify the bank, to the extent of 1000l., advanced or to be advanced to Pinney. It turns out that more than 1000l. had already been advanced. If the sum already advanced had been less than 1000l., the guarantee might have admitted of the construction suggested, viz. that it impliedly contemplated future advances, inasmuch as it could not otherwise operate to the full extent intended. But, when it appears that the 1000l. has already been advanced, and consequently that there is an existing debt to which the guarantee can be at once applied, the meaning of the guarantee is,—We guarantee the existing debt of Pinney, to the extent of 1000l., whether future advances are made or not. If the parties had in terms said so, there cannot be a doubt that the instrument would not have imported any future advances: and I think they do in effect say that. The evidence shews that more than 1000l. had already been advanced by the bank to Pinney. It is, therefore, the same as if the defendants had said—Pinney owes you 1000l.: we will pay you, if he does not. The plaintiff, therefore, fails in two views,—first, on the ground suggested by Mr. Barstow, viz. that, admitting that the declaration shews a good cause of action, the evidence shews that the promise was not made upon the consideration stated, and that arises on non assumpsit,—secondly, that, taking the guarantee and the evidence together, the contract is, to be responsible to the extent of 1000l in all events, whether future advances were made or not. It does not appear to me that the word "indemnify" is to be understood in the sense suggested by Mr. Wilde, viz. to make the guarantee operate, upon the bank giving time or forbearing to sue Pinney. It may be that the defendants undertook, whether time was given or not, to pay the 1000l., if Pinney should make default. Such **[171]** a promise undoubtedly might be made, and would be binding if made upon a good consideration. But it does not appear upon the face of the instrument, as set out upon this record, construed with reference to the state of accounts between the parties, that there was any consideration for that promise. The promise is a promise to pay the debt of a third person, and not for the consideration stated upon this record, or upon any consideration apparent on the face of the instrument; and therefore the defence was admissible under non assumpsit.

Cresswell, J. I also am of opinion that the plaintiff should be nonsuited. Great stress has been laid, on the part of the plaintiff, upon certain preliminary matters stated in the declaration, which it is contended are admitted. But, if those matters are material, and form part of the consideration for the defendants' promise, they are put in issue by the plea of non assumpsit. That being so, the declaration is not proved: it alleges that Pinney was, at the time of the giving of the guarantee, indebted to the bank in the sum of 800l., whereas the evidence shewed that 1400l. was then due. But, supposing it to be left open, and that the consideration may be collected from the guarantee and the surrounding circumstances, then it appears that there was an account between Pinney and the bank, upon which, as the declaration alleges, 800l. was due to the latter, and the defendants give their guarantee for 1000l., and, in consideration of the premises, the plaintiff and the defendants mutually promise to do all things on their respective parts to be performed. In terms, the bank do not promise to do any thing. If the promise was made in reference to an account of 800l. only, the guarantee being for 1000l., it might have been inferred that further advances were **[172]** contemplated: but the evidence negatives that; for, it shews that 1400l. was already due. If, therefore, we are to resort to the surrounding circumstances to ascertain the consideration, there is none in law to satisfy the statute.

Williams, J. For the reasons already given, I am of opinion, construing the guarantee in question with reference to the surrounding circumstances, that there is no sufficient consideration to support it as a binding contract. It is said that the declaration alleges that 800l. only was due from Pinney to the bank, and that that is admitted; and, taking that as an admitted fact, the guarantee does, it is said, disclose a good consideration, inasmuch as it shews that future advances were contemplated. I am of opinion that that allegation was put in issue by non assumpsit. And, when it appeared at the trial that more than 1000l. was due at the time the guarantee was given, the allegation was disproved; for, in no sense could it be said that the defendants' promise was made in consideration of a debt of 800l. I therefore agree that there ought in this case to be a nonsuit.

Rule absolute to enter a nonsuit.

[173] Jones and Another v. Broadhurst. Jan. 31, 1850.

[Distinguished, *Solomon* v. *Davies*, 1883, 1 Cab. & E. 83. Applied, *Thornton* v. *Maynard*, 1875, L. R. 10 C. P. 698.]

Satisfaction of a bill as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee.—To a count on a bill of exchange for 49l., by indorsees against acceptor, the latter pleaded, that, after the indorsement, and before the commencement of the action, the drawer delivered to the plaintiffs and the plaintiffs, accepted, goods of the value of 50l., in satisfaction and discharge of the bill, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, had always held the same against the will and consent of the drawer, and so still held the same; and that the plaintiffs had commenced the action, and prosecuted the same, against, and in opposition to, the will and consent of the drawer:—Held, after verdict for the defendant, that the plea was no bar to the plaintiffs' right to recover against the defendant on the bill.

Assumpsit on a bill of exchange, by indorsees against acceptor.

The declaration charged the defendant as the acceptor of a bill for 49l., drawn by Messrs. W. & C. Cook, payable to order, at three months after date, and indorsed by W. & C. Cook to the plaintiffs.

The fourth plea stated, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, W. & C. Cook, the drawers of the bill, had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods of great value, to wit, of the value of 50l., in full satisfaction and discharge of the said bill of exchange, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied de injuriâ.

[174] At the trial, before Maule, J., at the second sitting in London, in Easter term, 1848, in support of this plea the defendant called W. Cook, one of the drawers. He proved that the plaintiffs' traveller called at his warehouse, and looked out the goods, which were sent to the plaintiffs in satisfaction of the bill. He also admitted that the amount of the bill had been paid to him, Cook, by the defendant.

On the part of the plaintiffs, it was insisted that this evidence did not sustain the plea, inasmuch as it did not shew that the goods were delivered to or received by the plaintiffs in satisfaction of their claim against the defendant as acceptor.

A verdict having been found for the defendant upon the issue on the fourth plea, and for the plaintiffs on all the other issues,

Byles, Serjt., in Easter term, 1848, obtained a rule nisi to enter the verdict upon the fourth issue, for the plaintiffs, or for judgment non obstante veredicto. The learned serjeant submitted that the fourth plea would admit of two constructions,—that it might mean that the goods were delivered and accepted in satisfaction and discharge of all damages and causes of action which the indorsees had against Cook, the party delivering them,—or it might mean, in satisfaction and discharge of the bill and of all damages and causes of action thereon against any party to it; that, if the plea was to be read according to the first of these constructions (which, it was suggested it must be), then it was clearly a bad plea; and that, if it was to be taken in the latter sense, it would raise this question,—whether a payment or satisfaction of a bill by the drawer, the acceptor being no party to such satisfaction, discharges the right of action of the holder against the acceptor.

[175] Against this rule cause was shewn by Channell, Serjt., in Trinity term last, and Byles, Serjt., and Prentice, were heard in support of it. The arguments and the authorities cited are so fully commented upon in the judgment, that it has been thought unnecessary to report them.

Wilde, C. J. The first question which arises upon this motion is, whether the verdict upon the issue joined upon the fourth plea, has been properly found for the defendant. It is said that the fourth plea is equivocal in its language. It states, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, the drawers had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50l., in full satisfaction and discharge of the bill, and all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers. The question is, whether this plea,—whether it is a valid and sufficient plea, or not,—means to allege that the drawers gave to the plaintiffs, at their request, and that the latter accepted, the goods in the plea mentioned, in satisfaction of the bill, and of all damages and causes of action in respect thereof as against any of the parties thereto; or, in other words, whether it means that the goods were delivered and accepted in extinguishment of all right of action of the plaintiffs upon the bill. It is true that the goods might have been given, not in satisfaction and discharge of the bill generally, but in discharge of the liability of the Cooks, and in respect of the causes of **[176]** action by the plaintiffs against them. I do not think that that is the fair meaning of the plea; but I think it means, that the goods were delivered in satisfaction and discharge of all damages and causes of action in respect of the bill, whether against the Cooks, or against any other parties to it. So understanding the plea, was the evidence such as to warrant the finding of the jury? Look at the situation of the drawers. Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claim, against any one upon the bill. It appears that this bill was drawn for value. The drawers received from the acceptor the full amount of the money. It then became their duty to adjust and extinguish all remedies of the holders against any party to the bill. Having a general account with the plaintiffs, the items on the debit side of which, including the bill in question, amounted to 81l., and those on the credit side to 31l., the drawers deliver to the plaintiffs goods to the amount of 50l. Suppose, instead of goods, they had given the plaintiffs 50l. in money, the necessary intendment would undoubtedly be that it was a payment in satisfaction and discharge. The goods having been delivered as money, and so treated by all parties, I see no difference between a payment in money and a payment in goods. The fair meaning of the plea, I think, is, that the goods were delivered in satisfaction and discharge of the liability of every party to the bill: and the evidence warranted the jury in finding for the defendant.

[177] Whether or not enough is disclosed on the face of the plea, to make it enure as a defence, is a matter of more difficulty; and upon that, and the authorities cited, we will take time for deliberation.

COLTMAN, J. I also am of opinion that this plea is large enough to import a payment (in goods) in satisfaction and discharge of the liability of all the parties to the bill. Assuming that it can so enure, it ought to be so construed as to make it a good defence,—the plaintiffs having pleaded over. In that view, it seems to me that the plea is sufficient. Being so understood, was there evidence to warrant the finding for the defendant? It was clearly the duty of the holders, under the circumstances, to discharge the liability of the defendant. I think there was abundant evidence to warrant the jury in finding that the goods were delivered to and accepted by the plaintiffs in satisfaction and discharge of the liability of every party to the bill.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

The declaration in this case charges the defendant as the acceptor of a bill of exchange for 49l., drawn by W. & C. Cook, payable to their order, at three months after date, and indorsed by the drawers to the plaintiffs; and, among other pleas, not material to be noticed on the present occasion, the defendant, by his fourth plea, alleged, that, after the indorsement of the bill of exchange to the plaintiffs, and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50l., in full satisfaction and discharge of the said bill of exchange, and all damages **[178]** and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, to the time of the pleading of the plea, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied de injuriâ; and a verdict was found for the defendant, upon the trial of the issue joined on that plea.

A rule has since been obtained by the plaintiffs, calling upon the defendant to shew cause why judgment should not be entered for them non obstante veredicto, in respect of the insufficiency of that plea.

Upon this record, the bill of exchange must be taken to have been accepted upon a good consideration. The interest of the acceptor, therefore, is not liable to be affected by the state of accounts, or equities, between any other parties connected with the bill: and the only question in which he has any interest is, whether the party seeking to enforce payment by him, is the legal owner of the bill, and whether recovery by, and payment to, such party, will enure as a satisfaction and absolute discharge of his liability upon the bill. By the indorsement averred in this declaration, and not traversed, the plaintiffs became the legal owners of the bill; and the recovery of the amount thereof will have the effect of discharging the defendant from all future liability. The plea does not allege whether such satisfaction was given and accepted before or after the bill became due: nor is it averred to have been at the request, or for or on behalf, of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him: nor does it, in any way, connect the defendant with the transaction, or **[179]** shew any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor.

As the plea did not allege that the satisfaction was made at the request, or for or on behalf, of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained: and therefore the verdict will not warrant an intendment of any such facts (*a*), or of any other fact tending to extend the import of the plea as stated upon the record: and the question raised by the plea, according to its terms, is, whether satisfaction of a bill as between a drawer or indorser, and an indorsee, made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge him from liability to the indorsee.

In support of the rule, it was contended, that the plea did not shew sufficient matter to bar the plaintiffs from judgment, because the satisfaction therein set forth, was not, as before stated, averred to have been made at the request, or for or on behalf, of the defendant, or for or in respect of the cause of action declared upon; and that no legal privity was shewn between the parties who made satisfaction, and the defendant, and therefore the satisfaction made, did not enure as a discharge of the defendant; and that the satisfaction was made by parties who were under a personal liability upon the bill declared on, either absolute or contingent; and that the plea imports that the satisfaction made by them, referred, and was limited, to their own personal liability, and was not shewn to have extended beyond; and that the satisfaction to the indorsee of a [180] bill, made by the drawer or indorser, did not, as a legal consequence, enure as a satisfaction of the bill quoad the acceptor, or any other person, other than those who, if called upon by the indorsee to pay the bill, would have a remedy over against the party who made the satisfaction, and thereby subjecting such party to a liability to make double satisfaction.

It was also insisted that the plea did not shew any legal privity between the drawers who made the satisfaction, and the defendant; and that the plea, therefore, at most, amounted to a plea of satisfaction made by a stranger, and, as such, could not be pleaded in bar against the plaintiffs.

On the part of the defendant, it was contended, upon shewing cause, that, upon principle and authority, satisfaction made by the drawer of a bill, to an indorsee, enured by law as a satisfaction by or on behalf of the acceptor, and might therefore be pleaded in bar to any action afterwards brought by the indorsee against the acceptor; and that the drawer and acceptor's being parties to the same bill, was a sufficient legal privity to make satisfaction by the drawer enure as a discharge of the acceptor, as against the indorsee who received the satisfaction: and, further, it was contended that it was competent to any one to plead in bar satisfaction, even by a stranger, for the cause of action sued upon, which had been accepted by the plaintiffs.

The case was very elaborately argued, and many authorities were referred to on both sides. The court has examined all the authorities referred to, and considered the case, and, in the result, is of opinion that the plea, as proved and sustained by the verdict, does not shew sufficient matter to bar the plaintiffs, and that the rule to enter judgment for the plaintiffs non obstante veredicto, must be made absolute.

In considering the case upon principle, it will be [181] proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers and acceptor are parties to the same instrument, as contractors with each other, and not as joint-contractors with a third person; and that, by the indorsement of the bill, independent and different contracts arise, on the respective parts of the drawers and the acceptor, with the indorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as, presenting the bill according to its tenor, and giving due notice of the failure of the acceptor, or drawee, to pay, upon a proper presentment.

The contracts created by the bill, as regards the drawers and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the indorsee

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(*a*) Vide 1 Mann. & Ryl. 285, n.; 2 Nev. & M. 442; 2 M. & G. 422; 3 M. & G. 697.

of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor.

The competency of an acceptor to pay, may be doubtful; and no valid reason is apparent why the indorsee may not release and discharge the drawer, or an indorser, by competent legal means, either upon consideration more or less valuable, or without, and retain his remedies against the acceptor,—unless in the case of an accommodation bill, in which case, the acceptor is a mere surety, as between him and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship. In such a case, where an indorsee who has received satisfaction from the drawer, with notice, sues the acceptor, a different question may arise: but, upon the record in **[182]** this case, the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought, in all events, to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which, for value, he has contracted to make, by reason of any arrangements between others, to which he is no party, in which he is not shewn to have interfered, or his rights and liabilities are not shewn to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected.

By the indorsement of a bill, the indorsee becomes the legal owner of it; and satisfaction of the contingent or absolute liability of the drawer, or of an indorser, does not necessarily vacate or avoid the effect of the indorsement, or destroy the title of the indorsee to the ownership of the bill. Payment of the bill by a drawer, or an indorser, may or may not, according to circumstances, entitle the party paying, to the possession of the bill: there may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up: it only states that the plaintiffs hold the bill against the will and consent of the drawers,—which is by no means equivalent to a statement that they were entitled to have the bill delivered to them. The plea does not aver that the value of the goods delivered in satisfaction, was equal to the amount of the bill; and it is consistent with the language of the plea, that the drawers may have made satisfaction of the bill, so far as regarded their liability, by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other **[183]** parties to the bill; and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill, or suing the acceptor upon it.

The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up, or be deemed to be satisfied as between the plaintiffs and the acceptor: and, when the nature of the relation in which the respective parties stand towards each other, is considered, no principle is apparent upon which, as a consequence in law, the satisfaction of a bill as between the indorsee and the drawer, should operate as a satisfaction and discharge in favour of the acceptor.

Supposing the effect of the plea to be, that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his cestui que trust. And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea.

But it has, on his behalf, been contended, that the plea ought to be supported, and judgment given for the defendant, upon authority.

We have reviewed the authorities relied upon, and they do not appear to us to entitle the defendant to judgment.

The case of *Bacon* v. *Searles* (1 H. Blac. 88) was cited; and it must be admitted, that, in that case, according to the report, it was held that the indorsee of a bill, who had received from the drawer a part of the amount of the bill, was entitled to recover from the acceptor only the **[184]** balance; and Lord Loughborough, then chief justice, is reported to have said, "that, if the drawer of a bill anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking:" and he adds: "so that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer against the acceptor, to recover back the money so paid." Lord Loughborough concludes his judgment by saying,—"Another reason which weighs much with me is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if, after a bill had been taken up by the drawer, the acceptor should be called upon for payment." The report of this case is not satisfactory. Lord Loughborough is made to say, that, if the drawer anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking: and yet he is said to have added, "that, if the acceptor were to pay the bill, after notice given to him that the drawer had already paid it, an action would lie for drawer to recover it back again;" which, as applied to the facts of the case, is not very intelligible. If it was meant, that, supposing the drawer should sue the acceptor upon the bill, the acceptor could not plead in bar the payment to an indorsee, after notice that the drawer had paid it, it is intelligible, but not, upon the facts stated, very satisfactory. The point in judgment was, whether an indorsee, after having received payment of part of the bill from the drawer, was entitled, in an action against the acceptor, to recover the whole amount of the bill, or only the balance of the bill remaining unpaid; and it was held that the balance only was recoverable. As a decision upon that point, it has been over-ruled. The observations made by the judges, render it uncertain whether it was the case of a bill for **[185]** value, or an accommodation bill: but those observations are of doubtful accuracy, in either view of the case. If it was a bill for value, the remark is not correct, that payment by the drawer discharged the acceptor from his promise; because the acceptor in such a case would be clearly liable to the drawer, who, by his payment to the indorsee, would become entitled to sue the acceptor upon the bill: and, if it was the case of an accommodation bill, the remark is unintelligible, that, if the acceptor, who would be surety only for the drawer, was to pay the bill after notice, the drawer, who was the principal debtor, might recover the money back again from the acceptor, his surety.

It may be that what was intended to be said was, that such a payment by the acceptor would make the indorsee a trustee for the drawer, and liable to refund to him what should be paid by the acceptor: but it is by no means clear that this was intended to be said, because the remarks refer to the acceptor's liability to refund, in terms, and speak of a payment by the acceptor, after notice of payment by the drawer, —which would be quite immaterial, upon the question whether the indorsee would become a trustee for the drawer, in regard to the sum received from the acceptor. The doubt whether it was the case of a bill for value, or an accommodation bill, is increased by the observations of Mr. Justice Wilson, who referred to a case of *Beck* v. *Robley* (*a*).

Considering this case of *Bacon* v. *Searles* with refer-**[186]**-ence to the point decided, —that part of a bill (accepted for value) being paid by a drawer or indorser, disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid,— it has been overruled by modern decisions, and is not now to be deemed to be law: and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise upon this plea.

Mr. Justice Wilson referred to the case of *Beck* v. *Robley*, reported in a note to *Bacon* v. *Searles*, and which, it would seem from the statements in the report, was the case of an accommodation bill. The facts were these:—Brown drew the bill upon Robley, payable to Hodson, and gave the bill to Hodson as security for an advance made to him by Hodson. Robley accepted the bill, and Brown, the drawer, took it up when due, in Hodson's hands, and received back the bill with Hodson's indorsement upon it. Brown, after the bill had become due, paid it to Beck, who brought the action against Robley. The action was held not to be maintainable; and correctly so; as, after the bill had become due, the drawer could only negociate it subject to such equities as existed against him; and, it being an accommodation bill, Brown, the drawer, could not have sued the acceptor, and so neither could a subsequent holder claiming under him after the bill had become due. The decision against the

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(*a*) Note to *Bacon* v. *Searles*, 1 H. Blac. 89, n.; Bayley on Bills, 125. In *Beck* v. *Robley*, A. drew a bill on the defendant, payable to B. or order. The bill not being paid to maturity, B. returned it to A. who took it up, B.'s indorsement remaining thereon. A. gave the bill as a security to the plaintiff, informing him of the circumstances. It was held that the bill was extinguished by being taken up by the drawer, and could not be again negotiated.

plaintiff, therefore, would have been correct, irrespectively of another fact relied upon in that case, viz. that Beck, the plaintiff, was compelled to claim through the indorsement of Hodson, the payee: and the court was confirmed in its decision against the plaintiff, upon the ground, that, if effect were given to Hodson's indorsement under the circumstances, Hodson himself might be rendered liable,—a result which ought not to occur. It is unnecessary to consider the correctness of that opinion: but both the cases of *Bacon* v. *Searles* [187] and *Beck* v. *Robley* would be well decided, if the bills upon which those actions were brought were accommodation bills; and *Beck* v. *Robley*, in that event, might be considered as an authority for the determination of *Bacon* v. *Searles*.

Upon *Bacon* v. *Searles* being cited as an authority, in *Purssord* v. *Peek* (9 M. & W. 196), as deciding that a payment by the drawer of a bill discharged the acceptor pro tanto, Lord Abinger, C. B., said, that, "if that were the principle of that case, it might be a question whether, if it were now considered, it would not be over-ruled."

The case of *Johnson* v. *Kennion* (2 Wils. 262) was cited as an authority, on the part of the plaintiffs, that the contract created by the bill, could not be severed and made the ground of two actions, and that the holder must bring an action for the whole, and be considered trustee for the drawer, for so much as he had paid. Mr. Justice Wilson is said to have referred to the case of *Beck* v. *Robley*, as contrary to that position: but it is not obvious that such is the effect of *Beck* v. *Robley*. *Johnson* v. *Kennion*, however, distinctly decided that the indorsee was entitled to recover the whole amount of the bill, although he had received a part from the drawer: and, unless *Bacon* v. *Searles* and *Beck* v. *Robley* were distinguishable, upon the ground of the actions being upon accommodation bills, it does not appear how the authority of *Johnson* v. *Kennion* was avoided.

Assuming, however, *Bacon* v. *Searles* and *Beck* v. *Robley* to be authorities that the acceptor of a bill for value, is discharged altogether, or pro tanto, by payments made by a drawer or indorser, to an indorsee, who afterwards sues the acceptor, they cannot be considered as binding authorities; and they are inconsistent [188] with *Callow* v. *Lawrence* (3 M. & Selw. 95), where the continued liability of the acceptor is distinctly determined; and *Hubbard* v. *Jackson* (1 M. & P. 11, S. C. 4 Bingh. 390, 3 Carr. & P. 134) is a decision to the same effect, following the authority of *Callow* v. *Lawrence*: and, in both cases, *Beck* v. *Robley* was treated as a decision upon the ground that the plaintiff could not claim through Hodson's indorsement.

Pierson v. *Dunlop* (2 Cowp. 571) was an action against the acceptor of a bill for 300l. The drawer having paid 180l., the plaintiffs took a verdict for the whole amount, which the court compelled them to reduce, at their own cost. There can be little doubt that this also was the case of an accommodation bill; as it appears, that, after the verdict, a bill in equity was filed to obtain a discovery of the payment, and reduction of the verdict; and, if the cestui que trust of the plaintiffs was not entitled to receive the 180l., the court, in its equitable jurisdiction, could not have permitted their trustee to recover it. The case would resolve itself into that of a payment by the principal debtor, in case of the surety.

In the case of *Walwyn* v. *St. Quintin* (1 B. & P. 652), the plaintiffs were required to give the acceptor credit for the amount of the payment made by the drawer, the court holding the bill to be an accommodation bill.

The several other cases which were cited on the part of the defendant, are no authorities for the purpose for which they were cited: indeed, they are rather against him.

In *Purssord* v. *Peek* (9 M. & W. 196), the court held that the plea was bad for duplicity: it alleged that the defendant, the acceptor of a bill of exchange, had accepted it [189] for the accommodation of the drawer, and that the drawer had satisfied the bill: and it further stated, that, at the time of the action, the plaintiff was a holder of the bill without consideration or value.

Reynolds v. *Blackburn* (7 Ad. & E. 161, 2 N. & P. 137) was an action by indorsee against the acceptor of an accommodation bill; and the plea alleged, by way of discharge, notice to the plaintiff, and that, after such notice, he received other bills from the drawer, and agreed to give time upon the bill sued upon, until such other bills should become due, and be dishonored: the plea proceeded to state that the bills were so delivered and accepted in payment of the bills in the declaration, and that the agreement was made without the defendant's knowledge, privity, or assent. The plaintiff replied de injuriâ; to which the defendant demurred, for duplicity. The court said the replication was as good as the plea, which had set up two defences, and gave judgment for the plaintiff.

Sard v. *Rhodes* (1 M. & W. 153, Tyrwh. & Gr. 298, 4 Dowl. P. C. 743, 1 Gale, 376) was also an action against the acceptor of an accommodation bill, in which the defendant pleaded, that the bill was an accommodation bill, and that the drawer had given another note, for a larger sum, in payment and satisfaction, which the plaintiff had accepted. The plaintiff replied, that the note so given was dishonoured. The defendant demurred, and the replication was held ill, and the plea good.

In each of the three last-mentioned cases, the pleas alleged the bills to be accommodation bills,—shewing what is now understood to be the law in regard to payments or arrangements between subsequent parties to the bill; which can have little application to the present case, which is that of a bill accepted for value.

[190] *Field* v. *Carr* (5 Bingh. 13, 2 M. & P. 46) is also inapplicable: it was an action by bankers, as indorsees, against the acceptor; the drawer having delivered the bills to the plaintiffs, his bankers, as security, and the acceptor having paid the amount of the bills to the drawer without obtaining the bills, which remained in the hands of the bankers: and the point really in contest was, whether, upon the application of the rule in *Clayton's case* (1 Meriv. 572, 604), the bills, as against the bankers, the plaintiffs, were to be considered as satisfied: the court held that they ought to be so considered.

The case of *Thomas* v. *Fenton* (5 D. & L. 28) was argued before Mr. Justice Coleridge. It was an action against the drawer of an accommodation bill; and it appeared, that, the bill being dishonored, an action had been brought by one Clark, against the acceptor, and that the plaintiff, as a volunteer,—being the son-in-law of the acceptor,—had paid the debt and costs, and obtained the bill from the then plaintiff, with the defendant's indorsement upon it, and brought the present action upon the bill. One question was, whether the bill ought to be deemed an accommodation bill. A further question was, whether there was a sufficient dispensation of giving notice of the dishonor; also, whether the payment which had been made, supported the plea of payment by the acceptor. An objection was also made, that the bill required a new stamp. Mr. Justice Coleridge held that the bill did not require a new stamp, inasmuch as it had never been paid,—payment meaning payment by the party ultimately liable, and the payment in question not being such a payment. He also held, that sufficient excuse was alleged for not giving notice, the bill being an accommodation bill. And the learned judge dis-**[191]**-tinctly intimates that payment by an intermediate party is no discharge to the acceptor.

Hemming v. *Brook* (Carr. & Marsh. 57) was an action against the acceptor, where the drawer had paid part of the bill. The cause was undefended: the counsel for the plaintiff was instructed as to the payment, but altogether uninformed whether the bill was an accommodation bill, and of every other circumstance respecting it. The judge, therefore, recommended that a verdict should be taken, giving credit for the payment.

Pownal v. *Ferrand* (6 B. & C. 439, 9 D. & R. 603) determined that the indorser of a bill, paying a part of the bill to the holder, might recover from the acceptor the amount so paid, as money paid to his use. It is to be observed, that the plaintiff in that case had paid 40l. on account of a bill indorsed by him, and which had been accepted by the defendant, for 350l. After the payment of 40l. by the plaintiff, the holder of the bill brought an action upon the bill against the defendant, the acceptor, and recovered a verdict for the whole amount of the bill, 350l., but afterwards levied the balance only due to him, giving credit for the 40l. which the plaintiff had paid: and, in consequence of the defendant's having thus derived the benefit of the plaintiff's payment, the action was brought by the plaintiff, to recover the amount as money paid to the defendant's use; when it was contended that the plaintiff could only sue upon the bill: but the court held, that there might be a difficulty in suing upon the bill, by reason of a judgment having been recovered against him for the whole amount of the bill, by a former holder; and that, the defendant having had the benefit of the payment, an action for money paid might be maintained.

[192] *Lane* v. *Ridley* (10 Q. B. 479) was to the same effect as *Reynold* v. *Blackburn*, *Purssord* v. *Peek*, and *Pascoe* v. *Vyryan* (1 Dowl. N. S. 939), viz. that, where the plea is double, it is no objection that the replication is also double.

Reference has thus been made to the several cases which were cited, with some regret, as the only result is, to show that they are inapplicable to this case, and afford no assistance to the court in determining the question raised upon the record; and, in fact, no determination has been brought to the notice of the court, shewing this plea to be good, although there are some expressions in some of the older cases which have that aspect, but which dicta were not necessary to the decision of the cases in which they are to be found; and such dicta are not consistent with subsequent determinations. It certainly has been no rare practice for indorsees of bills of exchange and promissory notes, to take verdicts for the full amount of the instruments, after having received partial payments from other parties to such instruments: and there are reported authorities in distinct affirmation of the right so exercised by the plaintiffs,—*Callow* v. *Lawrence*, before mentioned, *Reid* v. *Furnival* (1 C. & M. 538), and numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes, for the full amount, notwithstanding partial payments made by other parties. In *Ex parte De Tastet, In re Corson* (1 Rose, 10), Warren and Bruce were held entitled to prove against the estate of the bankrupts, who were the acceptors, for 1364l., and take dividends for that amount, notwithstanding they had received payments from other parties, reducing their demand to 420l.

We think, therefore, that this plea is contrary to principle, and that it has no authority to support it.

[193] The plaintiffs stand upon the record the legal owners of the bill, and the defendant as having failed to perform his contract, without any legal excuse for the breach. The defendant was the party primarily liable, and, by his plea, he sets up, by way of discharge, satisfaction by one not in privity with him in relation to such satisfaction, and which we think did not enure to his discharge; and we think the plea, therefore, bad, and the plaintiffs entitled to judgment, as prayed.

Upon the argument of this case, we were much pressed with the objection to the plea upon the ground that it was, in effect, a plea of satisfaction by a stranger; which, it was said, was bad in law. The opinion of the court upon the other objections to the plea, being in favour of the plaintiffs, it has become unnecessary to decide upon the validity of this particular objection. But, as the court has been called upon to consider the law in relation to this subject, it may be a convenience to the profession to mention the authorities which are to be found upon the subject.

It may appear that the law is not perfectly settled. The authorities of the text-books are generally to be found under the title of "Accord and Satisfaction;" and most, if not all, of such text-books, refer to accord and satisfaction by and between the parties to the cause of action, and but very few authorities are to be found upon the subject of satisfaction made by a stranger. Notwithstanding the passages referred to in the text-books, there is very early authority to the effect that satisfaction made by a stranger to a party having a cause of action, and adopted by the party liable to the action, may be used as a good bar to an action for such cause. It is stated in Fitzherbert's Abridgment (*a*)[1], that, "If a stranger does trespass to me, and one of his relations, **[194]** or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. Quod tota curia concessit." A very diligent search has not found any old authority inconsistent with the case in Fitzherbert. In several cases obligations given by strangers to parties having a cause of action, have been held to be no bar to an action between the parties to such a cause: but it will be found that all those cases were decided upon the ground that the obligation, so given, was collateral, and not by way of satisfaction, or in extinguishment or merger. In connexion with this branch of the law, this consideration will always be found material.

In Fitzherbert's Abridgment, title Dette, pl. 83, it is said: "In debt on contract, it is no plea to say that the plaintiff has a bond of a stranger, for the same duty; but, to say, that he has a bond of the defendant himself for the same duty, is a good plea"(*a*)[2]. So, in F. N. B. 121 M., it is said—"If a man contract to pay money for

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(*a*)[1] Title Barre, pl. 166 (Hilary, 36 H. 6). And see Co. Litt. 206 b.

(*a*)[2] Per Shard. (Shardelow, J.), 29 H. 8, Bro. Contract, pl. 29,—"If a man be indebted to me by contract, and afterwards makes to me a bond of the same debt, the debt is thereby determined; for, in debt upon the contract, it is a good plea, that he has a bond of the same debt. But, if a stranger makes to me a bond for the same debt, still the contract remains; because it is by another person; and both are now debtors."

a thing which he hath bought, if he make a bond for the money, the contract is discharged, and an action of debt will not lie upon the contract." "But (*b*)[1] it is otherwise if a stranger makes an obligation for the same debt." 5 Viner's Abridgment, 515, is to the same effect; also Brooke's Abridgment, title Contract, pl. 29. In **[195]** *Pudsey's case*, cited in *Hooper's case* (2 Leonard, 110), it was held, that a bond given by a stranger, pursuant to a stipulation in the original contract, will be a bar; but, otherwise, upon a subsequent contract. The same point was decided in the principal case of Hooper.

Some doubt has arisen upon the point of satisfaction by a stranger, from the case of *Grymes* v. *Blofield* (*b*)[2]. The report in Cro. Eliz. states it to have been an action on an obligation for 20l. The defendant pleaded that J. S. had surrendered a copyhold tenement, in satisfaction, which the plaintiff accepted. The plaintiff demurred to the plea; and it is said that Popham and Gawdy, JJ., held it to be no plea, for J. S. was a mere stranger, and not privy to the condition, and therefore satisfaction by him was not good; and that afterwards, in Easter term, 31 Eliz., Popham and Clench adjudged for the plaintiff, in the absence of the rest of the justices. In Comyns's Digest, the case is stated to the same effect. But, from the report of the same case in Rolle's Abridgment, it is to be inferred that judgment was given for the defendant.

In the case of *Edgcombe* v. *Rodd* (5 East, 294),—which was an action for trespass and false imprisonment, to which satisfaction by another party was pleaded (upon the authority of *Grymes* v. *Blofield*), accrediting the report in Cro. Eliz., because cited in Comyns without disapprobation,—the court seems to have thought the plea bad, as setting up satisfaction by a stranger. In *Edgcombe* v. *Rodd*, however, the plea was held to be bad upon another substantial ground, upon which the judgment rather seems to have been founded.

[196] The rolls of the court have been searched, to ascertain the real state of the case of *Grymes* v. *Blofield*: but without much satisfaction being obtained. There are three rolls, importing three distinct actions upon three obligations for 20l.; and, in each case, a plea of satisfaction by J. S. by the surrender of a copyhold. The rolls are of Trinity term, 36 Eliz., B. R. No. 844, No. 845, No. 846. On the roll 844, the plea was demurred to, and a joinder in demurrer, with a dies datus to Michaelmas term; and there is no further entry upon that roll. Upon the roll 845, the pleadings are to the same effect, with a form of a dies datus in blank, and no further entry upon that roll. Upon the roll 846, there is a declaration and plea to the same effect as in the other rolls, with a replication traversing the surrender of the copyhold in satisfaction, and the acceptance. Issue was joined, and the cause tried, and a verdict found for the plaintiff, which was entered upon the postea. There is then an entry that a new trial was granted, upon the ground that the venire had issued to a wrong county: and a new venire awarded; and there the entry upon that roll ceases.

Upon further inquiry being made, there has been found a report of the case in the MSS. reports in the British Museum, in the Hargrave MSS. No. 7, vol. 2, p. 251, reports by Humphry Were. The case is reported, in substance, as in Cro. Eliz., referring to the roll in B. R. (Trinity term, 36 Eliz.) 844; and it states that Fenner, J., doubted of the opinion of Popham and Gawdy, by reason of the acceptance of the plaintiff, and cites the 36 H. 6, title Barre (36 H. 6, Fitz. Abr. Barre, pl. 166), which is the case referred to in Fitzherbert's Abridgment (*b*)[3]: and it after-**[197]**-wards states, that, upon the case being moved again, Clench and Fenner agreed that the plea was a good bar; and that Gawdy said the case of Trespass, 36 H. 6 (*a*), was good law: and the report then states, that, in Easter term, 39 Eliz., the plaintiff had judgment to recover,—Popham and Clench only being in court.

(*b*)[1] Lord Hale's note, ib., citing Fitz. Abr., H. 35 E. 3, Dette, pl. 83; and referring to 11 H. 4, fo. 79, pl. 79 (*Raufe Baker's case*, T. 11 H. 4, fo. 79, pl. 21); 13 H. 4, fo. 1 (M. 13 H. 4, fo. 1, pl. 3); 10 H. 7, fo. 21 (P. 10 H. 7, fo. 21, pl. 16).

(*b*)[2] Reported in Cro. Eliz. 541, and in Rolle's Abridgment, 471 (translated, 5 Vin. Abr. 296. Condition (F. d.), pl. 1, and in Comyns's Digest, Accord (A. 2), 5). And see M. 28 H. 6, fo. 4, pl. 21.

(*b*)[3] The reference by Fenner, J., is in the form at that time and long since used in citing Fitz. Abr.

(*a*) Not a case in title "Trespass," but the above case of an action of trespass reported in Fitz. Abr. tit. Barre, pl. 166.

There is another report of the same case in the Hargrave MSS., No. 50, in a book said to have been given, in 1618, by Arthur Turnour to Serjeant Calthorpe, in exchange for other books: but that report does not state any judgment to have being given.

In the Lansdowne MSS. in the British Museum, No. 1104, fo. 152 b.—being a report of cases from the 6th to the 41st year of Elizabeth, the same case is reported stating a judgment for the plaintiff; and the report being precisely to the same effect as in the Hargrave MSS.

It appears that Humphry Were was, at a somewhat later period, a reader to the Inner Temple, and afterwards a serjeant.

It seems probable that the report in Croke, stating the judgment to have been given for the plaintiff, is correct; although no answer is suggested to the authority of the 36 H. 6, which seems contrary to the decision, and to have been referred to.

In *Thurman* v. *Wild* (11 Ad. & E. 453, 3 P. & D. 289), the question as to the effect of satisfaction by a stranger, also arose; and the court seemed to recognise the decision in *Grymes* v. *Blofield* as correct: but held that the satisfaction pleaded in that case was a good bar, because made by one who was not a stranger, but a joint trespasser; and it therefore became unnecessary to decide how far satisfaction by a stranger would have been a good bar.

[198] Such seems to be the state of authority upon that question: and the court does not feel called upon to express any opinion upon the point, although it must be obvious that the decision in the 36 H. 6, reported in Fitzherbert, is consistent with reason and justice (*a*).

The court, in this case, is of opinion that the plea is bad upon other grounds; and it is therefore unnecessary further to investigate the general point referred to (*b*).

Judgment for the plaintiffs.

[199] BUTLER *v.* FOX. Jan. 31, 1850.

The court discharged so much of an order for a commission to examine witnesses, as stayed the proceedings, on the ground of an unreasonable delay in the application.

Assumpsit on a sea-policy for 5000l., on wheat, free of average, the question being, whether the loss was total or partial. The action was commenced on the 13th of

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(*a*) Lord Bacon, in the preface to his Rules and Maxims, says that he might have made an ostentation of learning, by vouching authorities, but that he abstained from it, "having the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the Institutions of the Laws of England, whereof the one forbeareth to vouch authority altogether, and the other never reciteth a book but when he thinketh the case so weak of credit in itself, as it needs a surety."

What Bacon here says relates to Fitzherbert's Natura Brevium. Fitzherbert's Abridgment rests wholly on authorities either taken from the Year Books, or from original cases now no where else extant. To the latter class belongs the case 36 in H. 6, above referred to. Another case of the same class in Fitz. Abr., M. 33 E. 1, tit. Annuitie, pl. 51, is to this effect:—"Annuity against heir, upon a deed of grant made by his father until the defendant (the plaintiff) should be advanced to a suitable (covenable) benefice. Tilton. After the death of our father, our mother gave to the plaintiff, at our procurement, and in our discharge, the deanery of T. of which the plaintiff is now seised. Herle. The writing is, 'until he be advanced by the grantor or his heir.' Hengham. Qui per alium facit, per seipsum facere videtur, and awards that he answer over. Herle. The mother of the defendant gave us the deanery for our service, and not in discharge of the annuity: and this he is ready to verify. Et alii e contrà."

(*b*) As to which, see *Roe* v. *Haugh*, 1 Salk. 29; *Buckmyr* v. *Darnall*, 2 Ld. Raym. 1085, 1087; *Anstey* v. *Marden*, 1 N. R. 124, 128; *Ayrey* v. *Davenport*, 2 N. R. 474, 476; *White* v. *Cuyler*, 1 Esp. N. P. C. 200, 6 T. R. 176; *Drake* v. *Mitchell*, 3 East, 251. See the distinction in the Civil Law between the engagement of an expromissor and that of an adpromissor, Vinn. Inst. Imp. Comm. lib. 2, tit. 1, De Rerum Divisione, &c., p. 155; ibid., lib. 3, tit. 1, De Fidejussoribus, p. 726; ibid., lib. 4, tit. 6, § 9, De Constitutâ Pecuniâ, p. 887.

November, 1847, and issue was joined on the 12th of February, 1848. On the 28th of March, 1849, a commission issued, to examine witnesses at Baltimore, both parties joining in it. The defendant being induced by letters from Baltimore, to think he might get additional evidence at New York, obtained an order for the examination of witnesses at the latter place.

Byles, Serjt., on a previous day in this term, obtained a rule nisi to set aside that order, or so much thereof as directed that the proceedings should be stayed in the meantime, on the ground that the defendant had been guilty of laches.

James Wilde, who shewed cause, submitted, that, seeing the length of time the cause had been pending, the defendant's delay in applying for the second commission was not so unreasonable as to disentitle him to have his commission with all its usual incidents,—the delay having only been of twenty days.

Byles, Serjt., in support of the rule, observed that the delay amounted to the whole time necessary for a voyage between London and America.

[200] Wilde, C. J. The court is of opinion that the rule should be made absolute to discharge so much of the order of my brother Talfourd as stays the proceedings,—but without prejudice to an application on the part of the defendant, to the judge, to postpone the trial if the commission should not be returned in time. My own impression, I must confess, is, that, where the plaintiff has so long delayed his proceedings as to shew that his object was not expedition, he has no right to complain of so small an additional delay as twenty days. But the rest of the court being of opinion that such delay, unaccounted for, is unreasonable, the rule will be made absolute in the form I have already stated.

Rule absolute accordingly.

[201] Ex parte John Purdy. Jan. 25, 1850.

An order of commitment under the county-court act, 9 & 10 Vict. c. 95, is not to be construed with the same strictness as a conviction: and such an order is not bad for alleging the offence to be, that the defendant had made "a gift, delivery, or transfer of property, with intent to defraud his creditors."—The order recited a judgment recovered against the defendant in the county-court: it then recited that the defendant, having personally appeared to the said summons, and being present in court, and having neglected to pay the sum recovered, was, upon the application of the plaintiff, then and there examined touching his estate, &c.; that it appeared to the judge, upon such examination, that the defendant had obtained credit from the plaintiff under false pretences, and had made "a gift, delivery, or transfer of property with intent to defraud his creditors," but the defendant requested to be allowed time to produce evidence; that the hearing was thereupon adjourned; that the defendant did not attend on the adjournment day; that it then appeared to the satisfaction of the judge, that the defendant had obtained credit from the plaintiff under false pretences, and had made "a gift, delivery, or transfer of property with intent to defraud his creditors;" and that thereupon the judge ordered and adjudged that the defendant should be committed for forty days, &c.:—Held, that the recitals in the order imported an appearance by the defendant at the trial, and an examination of the defendant at that time, and consequently that it was a valid order within the 101st section of the act; and that a summons under the 98th and 99th sections was unnecessary.—Semble, that a judgment obtained in a county-court, in respect of which the debtor subsequently obtains a final order of protection from the insolvent debtors court, does not thereby cease to be an unsatisfied judgment, within the meaning of the 98th section of the 9 & 10 Vict. c. 95 (*a*).

John Purdy was, on the 16th instant, arrested by virtue of a warrant in the following form:—

"In the Bloomsbury County-Court of Middlesex, holden at Berners Street, Oxford Street, in the said county. Between Archibald Cubitt, Plaintiff, and John Purdy, Defendant.

"To the high bailiff and other bailiffs of the said court, and all constables and

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(*a*) S. P. decided accordingly, *Abley* v. *Dale*, post, T. T. 1851.

peace-officers within the jurisdiction of the said court, and to the governor of the debtors' prison, Whitecross Street, in the said county:

[202] "Whereas, at a court holden at the court-house in Berners Street aforesaid, on the 11th of January, 1849, the above-named plaintiff, by the judgment of the said court, in a certain suit wherein the said court had jurisdiction, recovered against the above-named defendant the sum of 20l. for his debt, together with the sum of 4l. 19s., the costs of the said suit; whereupon, it was then and there ordered by the said court, that the said defendant should forthwith pay to the said plaintiff the said sums of 20l. and 4l. 19s., so recovered against the said defendant: And whereas the said defendant, having personally appeared to the said summons, and being present in court, and having then neglected and refused to pay the said sums so recovered, was, upon the application of the said plaintiff, then and there examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means which he still had, of discharging the said debt and costs, and as to the disposal he had made of any property: And whereas it appeared, upon such examination, to the judge of the said court, that the said defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors; but the said defendant then requested to be allowed time to produce certain evidence; and, upon his, the said defendant's, application, the judge of the said court granted time to the said defendant until the 18th day of January, 1849, and postponed and adjourned making any order, or otherwise adjudicating in respect of the said examination, until the said 18th day of January, 1849: And whereas a court was duly holden by the said judge at the said court-house in Berners Street aforesaid, on **[203]** the said 18th of January, 1849, and the said defendant did not attend at such last-mentioned court, or allege any sufficient excuse for not attending, and did not at such court produce any evidence, or allege any sufficient excuse for the non-production of such evidence: And whereas it then appeared, to the satisfaction of the judge of the said court, that the said defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors; and thereupon the said judge of the said court, by a certain order, bearing date the said 18th day of January, 1849, did order and adjudge the said defendant to be committed, for the term of forty days, to the debtors' prison at Whitecross Street, &c., or until he should be discharged by due course of law: These are, therefore, to require you, the said high-bailiff, bailiffs, and others, to take the said defendant, and to deliver him to the governor of the debtors' prison at Whitecross Street aforesaid; and you, the said governor, are hereby required to receive the said defendant, and him safely to keep in the said prison, for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law; for which this shall be your sufficient warrant. Given under the seal of the court, the 11th day of January, 1850.

"J. Wright, Clerk of the Court."

Parry, on a former day in this term, moved for a writ of habeas corpus, to bring up the prisoner to be discharged, and also for a certiorari to bring up the order upon which the warrant issued.

It appeared from the affidavits on which the motion was founded, that the prisoner was discharged under the insolvent debtors act, on the 2nd of April, 1849,—the **[204]** debt mentioned in the above warrant, being duly inserted in his schedule. It was therefore submitted that the defendant was discharged from that debt, by virtue of the 1 & 2 Vict. c. 110, s. 90, which enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same." The commitment in question cannot be affected by the 102nd section of the 9 & 10 Vict. c. 95, which enacts, "that, whenever any order of commitment shall have been made as aforesaid (s. 99), the clerk of the said court shall issue, under the seal of the court, a warrant of commitment, directed to one of the bailiffs of any county-court, who by such warrant shall be impowered to take the body of the person against whom such order shall be made; and all constables and other peace-officers, within the several jurisdictions, shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law; and no protection, order, or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order." That clause can only apply in cases where the protection, order, or certificate is obtained after the order of commitment by the judge of the county-court. The material sections of the county-court act upon which the question will turn, are, the **[205]** 98th and the 99th. The 98th enacts "that it shall be lawful for any party who has obtained any unsatisfied judgment or order, in any court held by virtue of this act, or under any act repealed by this act, for the payment of any debt or damages or costs, to obtain a summons from any county-court within the limits of which any other party shall then dwell or carry on his business,—such summons to be in such form as shall be directed by the rules made for regulating the practice of the county-courts, as herein provided, and to be served personally upon the person to whom it is directed,—requiring him to appear, at such time as shall be directed by the said rules, to answer such things as are named in such summons; and, if he shall appear in pursuance of such summons, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liability, which is the subject of the action in which judgment had been obtained against him, and as to the means and expectation he then had, and as to the property and means he still hath, of discharging the said debt or damages, or damages or liability, and as to the disposal he may have made of any property; and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiries authorised to be made as aforesaid; and the costs of such summons, and of all proceedings thereon, shall be deemed costs in the cause." And the 99th section enacts, "that, if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by **[206]** examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear, to the satisfaction of the judge of the said court, that the party so summoned, has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt, or damages, or costs so recovered against him, either altogether or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter (s. 100), provided, —it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days." It is submitted that here the debt was extinguished, so far as the county-court was concerned, on the 2nd of April, 1849. [Maule, J. In effect, you contend, that, by force of the order of the insolvent debtors court, this is a satisfied judgment.] Yes. [Maule, J. Should not the defendant have applied for a summons calling upon the plaintiff to shew cause why the order of commitment should not be rescinded?] Notice was given on the **[207]** 12th of April, 1849. [Maule, J. Notice amounts to nothing. I do not think the defendant has made out a primâ facie case for a habeas corpus.]

The warrant of commitment is altogether insufficient in point of law. This is a proceeding of a penal nature: *Ex parte Kinning* (ante, vol. iv. p. 507): *Kinning* v. *Buchanan* (ante, vol. viii. p. 271). [Maule, J. Assume that the judge of the county-court has power to commit for certain offences, and to punish by an imprisonment of forty days.] The warrant should shew jurisdiction: and, to give jurisdiction, it should shew that a summons under s. 98 had been issued, and personally served. In that respect, this warrant is defective: it does not, in terms, state that the defendant was so summoned. The defendant's voluntary appearance might have been for one purpose; his examination and subsequent commitment might have been on another account. [Maule, J. The warrant seems to proceed upon the 101st section, which enacts, "that, in every case where the defendant in any suit brought in any county-court, shall have been personally served with the summons to appear, or shall personally appear at the trial of the same, the judge, at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff, and other parties, touching the several things hereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained, in case the plaintiff had obtained a summons for that purpose after the judgment obtained, as hereinbefore mentioned."] There is no statement in the warrant that the defendant was present at the time of giving judgment. [Wilde, C. J. Was this point **[208]** urged before my brother Erle? (*a*)[1]] It was not; nor was the 101st section at all adverted to. [Wilde, C. J. We think you should have a rule upon this point.]

Another objection to the warrant is, that there is no statement on the face of it, that the defendant was examined on oath. [Cresswell, J. The party is committed for not appearing.] Not so: the commitment proceeds upon the grounds previously set forth in the warrant: it was upon the examination of the defendant that the court adjudicated. [Wilde, C. J. The statement seems rather to import that the investigation took place in his absence.] In the case of *In re Gray* (1 New Sess. Cas. 354), a warrant of commitment (*c*) reciting that "whereas J. G. was duly brought before me, to answer the said complaint, and I, the said justice, duly thereupon, then and there, in the presence as well of the said J. J. (the complainant) as of the said J. G., did examine and inquire into the proofs and allegations of the said parties touching the matter of the said complaint," &c.,—was held bad, inasmuch as it did not shew that the witnesses were examined on oath, or in the presence of the defendant. [Wilde, C. J. Bankrupt commissioners had no authority to examine the bankrupt except upon oath: but, upon an indictment for perjury, Lord Mansfield held that the examination must be assumed to have been upon oath.]

The warrant is also bad for alleging several offences together, and attaching only one penalty. [Maule, J. For anything that appears, the order may have been distributive.] If the warrant recites the order, as it professes to do here, it must recite it correctly. In *Newman* v. *Bendyshe* (10 Ad. & E. 11, 2 P. & D. 340), a conviction under s. 14, of the 11 G. 4, & 1 W. 4, c. 64 (for the general **[209]** sale of beer, &c.), purported to charge the party with the offence of keeping his house open for the sale of beer, and selling beer, and suffering the same to be drunk and consumed in the house at an unlawful time, and convicted him in the penalty of 40s., as upon a single offence,—was held bad, because it included more than one distinct offence, for which the party might have been distinctly convicted. [Maule, J. How does it appear here that the penalty is uncertain? In *O'Connell's case* (*a*)[2], nobody ever suggested, that, if all the counts of the indictment had been good, and each of them had charged an offence which would have warranted an imprisonment for the whole period, the non-distribution of the penalty would have been ground of error. There is clearly nothing in this objection.]

The next objection is, that the offence is stated in the alternative,—that the defendant had made "a gift, delivery, or transfer of property, with intent to defraud his creditors." This involves three distinct and different offences. [Maule, J. Like charging a man with stealing a "horse, mare, or gelding?"] Precisely so. In *The King* v. *John North* (6 D. & R. 143), an information on the 48 G. 3, c. 143, for selling

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(*a*)[1] Who had refused, at chambers, to grant a habeas.

(*c*) Under the 4 G. 4, c. 34, s. 3.

(*a*)[2] *O'Connell* v. *The Queen*, 11 Clark & Fin. 155.

"beer or ale" without an excise licence, was held bad; and a conviction thereon, shewing that the defendant had sold ale only, was quashed, Bayley, J., observing, "This defendant is called upon to answer an alternative charge, which cannot, I think, be made certain by evidence." So, in *The King* v. *Henry Pain* (7 D. & R. 678), an alternative charge in a conviction was held to be bad. That was a conviction, on the 6 G. 4, c. 108, s. 49, for being on board a boat liable to forfeiture, by s. 3, for having casks attached thereto, "of the description used, or intended to be used, for **[210]** the smuggling of spirits:" and the court quashed it for uncertainty; Abbott, C. J., saying,—"Whether the decision in *Rex* v. *Middlehurst* (*a*)[1] is correct, is not a question now before us; but that is a direct authority to shew, that, in an indictment, the objection taken to this conviction would be fatal; and I know of no authority which says that a conviction must not have as much certainty as an indictment. Now, this act of parliament mentions three sorts or descriptions of casks, which, if found on board, or attached to, a vessel, will render it liable to forfeiture. One is, a sort which is used; the second is, intended to be used; and the third, that which is fit or adapted for the purpose. Having mentioned these three, as distinct descriptions of casks, I think the conviction should have set forth under which of the three the casks in question fell. It is a very nice and subtle objection, and quite beside the merits: nevertheless, the party is entitled to the benefit of it, as a defect of form." And, in the case of *The King* v. *Henry Salomons* (1 T. R. 249), a conviction for "the said offence," when there are two offences charged in the information, was held to be bad. [Maule, J. There can be no doubt about that.]

Wilde, C. J. We think the rule should go upon the first and the last objections to the form of the warrant of commitment; and also for a certiorari to bring up the order. As to the objection that the warrant does not state that the defendant was examined on **[211]** oath, that does not seem to us to require any further consideration. Nor do we think that the non-distribution of the forty days, affords any ground of complaint,—the entire period not being greater than might have been affixed to each of the offences pointed at.

Parry suggested that he was entitled to the writ: but

The Court said it had been settled by the Queen's Bench, after argument, that the proper course was, to grant a rule to shew cause why a writ of habeas corpus should not issue,—the rule to be served upon the plaintiff in the suit, and also upon the judge of the court out of which the warrant issued.

Udall now shewed cause. The rule was granted upon two points only,—first, that the warrant under which the defendant was committed, does not state that the defendant was previously summoned to appear in the county-court, pursuant to the 98th section of the 9 & 10 Vict. c. 95, or that he was present at the hearing,—secondly, that the offence is stated in the disjunctive. 1. The warrant is in the form settled by the judges, under the power conferred upon them by the 73rd section of the act (*a*)[2]. It sufficiently shews that **[212]** all that was done, was done strictly in

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(*a*)[1] 1 Burrow, 399. Lord Mansfield there says: "Upon indictments, it has been determined that an alternative charge is not good; as 'forged or caused to be forged,' though one only need be proved, if laid conjunctively (as 'forged and caused to be forged'). But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both. And it makes no difference to him in any respect."

(*a*)[2] Which enacts "that five of the judges of the superior courts of common law at Westminster, including the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, or one of the said chiefs at the least, shall have power to make and issue all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the clerks of the said courts, and from time to time to alter any such rule or form; and the rules so made, and the forms so framed, shall be observed and used in all the courts holden under this act; and, in any case not expressly provided for herein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts."

conformity with the provisions of the statute: it alleges that the defendant appeared at the hearing, and that the whole proceeding took place at the hearing, or at an adjournment thereof. It was not a proceeding under the 98th and 99th sections, but under the 101st, which gives the judge, in cases where the party has been personally served with the summons, or shall personally appear at the trial, the same power to examine and to commit the defendant, as he is enabled to exercise under s. 99, where the party has been summoned pursuant to the 98th section. 2. As to the other point,—the 99th section enables the judge, if it shall appear to him, either by the examination of the party, or by any other evidence, that the defendant has obtained credit from the plaintiff under false pretences, or has made or caused to be made any "gift, delivery, or transfer" of any property, to punish him by imprisonment for a period not exceeding forty days. The statement that the defendant had obtained credit under false pretences alone, would justify the penalty here imposed; and therefore that would be sufficient to sustain this warrant, even if it is to be construed with the same strictness as a conviction. Besides, a gift, delivery, or transfer of property, with intent to defeat creditors, is one substantive offence.

Parry, in support of the rule. The warrant in question neither complies with the 98th nor the 101st sections. The forms made in pursuance of the 78th section, are merely directory to the judges of the county-courts: the judges who framed them had no **[213]** power to give them such force as to make them override the common law. [Wilde, C. J. The statute provides that "the rules so made, and the forms so framed, shall be observed and used in all the courts holden under this act."] The 78th section does not go on to say that no defect of form shall vitiate any order or warrant (*a*). The judge of the county-court had no power to make this order in the defendant's absence, and without a previous summons. This is not warranted by s. 101.

The warrant is clearly bad, for not stating the offence with certainty. *The King* v. *John North*, and *The King* v. *Henry Pain*, are distinct authorities to shew that an alternative charge in a conviction, is bad. [Williams, J. In Paley on Convictions (3rd edit. p. 133, citing *The King* v. *North*), it is said that that is no objection to an order, though it is to a conviction. Maule, J. In *Rex* v. *Middlehurst*, the order described the offence as "removing *or* concealing" goods; and it was held sufficient, though it would have been a fatal objection to an indictment.] There is no distinction between an order and a conviction. [Williams, J. A conviction must state the evidence, an order need not. Maule, J. The party is not prejudiced where the instrument is one which he cannot answer, that is, plead to.] It is essential that the party should know of what he is found guilty. [Wilde, C. J. The order here says the defendant has defrauded his creditors by parting with his property, by means of a gift, delivery, or transfer. He has done the thing complained of, by one of those three modes.] "Gift," "delivery," and "transfer," have very different legal meanings. "With intent **[214]** to defraud his creditors," applies to all three, not to either specifically.

Wilde, C. J. It does not appear to me that either of the objections upon which this rule was granted has been sustained. The first objection was, that it does not appear upon the face of the warrant, that the defendant was summoned, or was present when the order in question was made; and it is said that the order is therefore bad. Now, this warrant issued upon a proceeding under the 101st section of the 9 & 10 Vict. c. 95, which enacts, "that, in every case where the defendant in any suit brought in any county-court, shall have been personally served with a summons to appear, or shall personally appear at the trial of the same, the judge, at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other parties touching the several things thereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained in case the plaintiff had obtained a summons for that purpose after judgment obtained, as thereinbefore mentioned." That refers to the provisions contained in the 98th and 99th

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(*a*) But s. 136 provides, "that no order, verdict, or judgment, or other proceeding, made concerning any of the matters aforesaid, shall be quashed or vacated for want of form."

sections. The 98th section enables parties having unsatisfied judgments, to obtain summonses calling upon the defendant to answer in respect of certain matters, that is "touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liability, which was the subject of the action in which judgment had been obtained against him, and as to the means and expectation he then had, and as to the property and means he still had, of discharging the said debt or damages or liability, and as to the disposal he [215] might have made of any property." The consequences of non-attendance, or not sufficiently answering, are pointed out by s. 99, which enacts, "that, if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by the examination of the party, or by other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made, or caused to be made, any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt, or damages, or costs, so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided,—it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for [216] any period not exceeding forty days." That provision applies where the defendant is summoned after judgment. The 101st section gives the judge the same power where the defendant personally appears at the trial. It is under this latter section that this warrant was issued; and the judge appears to have followed the form provided by the judges pursuant to the 78th section. Forms are generally given for the purpose of getting rid of difficulties arising from immaterial matters, by the misrecital of which justice is often evaded. The form in question only states what was deemed to be material. It is not given for the purpose of being used or not, at the discretion of the judge: the statute makes it imperative to observe it. The warrant begins by reciting, that, on the 11th of January, 1849, the plaintiff, by the judgment of the court, recovered against the defendant a certain sum for debt and a certain sum for costs, and it was thereupon then and there ordered by the court that the defendant should forthwith pay those sums to the plaintiff. It then goes on to recite, that, the defendant having personally appeared to the said summons, and being present in court, and having then neglected and refused to pay the sums so recovered, was, upon the application of the plaintiff, then and there examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action, &c., and as to the disposal he had made of any property. The personal appearance which is recited in the form, refers evidently to the appearance at the hearing. The warrant shews, that the defendant appeared personally to the summons, that, it appearing to the judge, upon the examination of the defendant, that he had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors, but that, the defendant requesting time to [217] produce evidence, the judge postponed the making an order until the 18th of January; and then it goes on to state, that, the defendant failing to appear and produce evidence on that day, and it then appearing to the satisfaction of the judge, that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors,—the judge ordered him to be committed for forty days. The defendant having been present at the trial, when the examination commenced, the judge was justified in proceeding in his absence on the adjournment day. There is, therefore, no ground for the first objection.

The remaining objection to the warrant is, that it states the offence in the alternative,—that the defendant had made a gift, delivery, or transfer of property, with intent to defraud his creditors. The object of the examination, as well under the 101st section, as under the 98th and 99th sections, is, to ascertain whether the debt has been fraudulently contracted, and whether the debtor is fraudulently evading payment, or has fraudulently made away with property, with a view to defeat his creditors. It is often exceedingly difficult to say precisely whether property has been withdrawn from the creditors by a gift, a delivery, or a transfer. One is not surprised, therefore, to find, when the object and the test are the same, that the act of parliament should have used terms large enough to comprehend every description of parting with property. It has been contended on the part of the defendant, that an order of this description is to be construed with the same strictness as a conviction. There is, however, a known and admitted distinction between orders and convictions, in this respect: and the authorities are abundantly sufficient to sustain this order. In *Rex* v. *Middlehurst*, the party was ordered to pay a fine for "wilfully and **[218]** knowingly aiding and assisting in fraudulently removing and carrying away five cows, &c., or in concealing the same. Now, concealment and removal are two very different things; and yet the order was held good. So, in *The King* v. *Lloyd*, articles of the peace were exhibited against a clerk of the peace, charging him with being guilty of several distinct offences; and an order of dismissal stating that the party had been guilty of several of the charges, was held good,—although a forfeiture of a freehold office was worked by means of that conviction. The second ground of objection, therefore, likewise fails.

The rest of the court concurring,

Rule discharged, with costs.

Ex parte William Daggett (late William Daggett Ingledew).

Jan. 19, 1850.

The court of Queen's Bench having allowed an attorney to alter his name on the roll, this court (for the sake of uniformity) allowed it.

Udall moved, on the part of Mr. Daggett, an attorney of this court, for leave to expunge from the roll the surname of Ingledew. The affidavit upon which the motion was founded (that of Mr. Daggett), stated, that the deponent, on the 6th of May, 1848, was duly admitted to be an attorney of this court, by his then name of William Daggett Ingledew; that on the 6th of January, 1824, Henry Ingledew, of, &c., the father of this deponent, intermarried with Jane Daggett, of, &c. who was the only child and heiress-at-law of William Daggett, late of, &c., deceased; that the deponent was the eldest son of such marriage; **[219]** that, on the 7th of December last, the said Jane, the mother of the deponent, died, leaving the deponent her heir-at-law; that, prior to her death, the mother of the deponent frequently expressed her will and desire, as well to the deponent as to his said father, that he, the deponent, should, after the decease of his said mother, use and bear the names of William Daggett only, instead of those of William Daggett Ingledew; and that, in compliance with such wish and desire, the deponent had from and since the 8th of December last, used and borne the names of William Daggett only.

The learned counsel stated that the court of Queen's Bench had already permitted the alteration to be made upon the roll there (1 L. M. & P. 1); and he referred to *Ex parte Hayward* (*b*), where this court had, under similar circumstances, declined to accede to a similar application, and to *Ex parte Benthall* (1 D. & L. 747, 6 M. & G. 722, 7 Scott, N. R. 407), where they had allowed it: and he submitted that it was desirable that there should be uniformity of practice in such a matter.

(*b*) 5 Scott, 712, S. C. per nom. *Ex parte Ware*, 6 Dowl. P. C. 463: and see *Ex parte Ware*, 6 Dowl. P. C. 311, where the rule was granted by the court of Queen's Bench,—being the same case in which this court had declined to accede to the application.

MAULE, J. It certainly is right that there should be no difference of practice in a matter of such trivial importance.

The rest of the court concurring,

Rule absolute (*d*).

[220] EX PARTE THOMAS JAMES. May 1, 1850.

[S. C. 1 L. M. & P. 4; 5 Ex. 310; 19 L. J. Ex. 272.]

The court permitted an attorney who had been admitted in the courts of Queen's Bench and Exchequer by the name of "Thomas James Moses," to sign the roll of attorneys of this court (under the 6 & 7 Vict. c. 73, s. 27) by the name of "Thomas James," on the production of his admission in the Queen's Bench—upon an affidavit shewing the circumstances under which he had changed his name, and also shewing that the courts of Queen's Bench and Exchequer had permitted the entry of his name on the respective rolls of those courts to be so altered.

Simon, on a former day (April 23), moved for a rule directing that "Thomas James" be at liberty to sign the roll of attorneys of this court, on the production of his admission as an attorney in the court of Queen's Bench, by the name of "Thomas James Moses."

It appeared from the affidavit upon which the motion was founded, that the applicant had been admitted an attorney of the court of Queen's Bench in the year 1848, by his then name of "Thomas James Moses," the latter being the surname of his father; that his father had advanced him a sum of money for the purchase of a practice, and was desirous that he should, before entering upon it, cease to use the name of "Moses," and use, and be known by, the name of "Thomas James" only; that he had, accordingly, since the 8th of April instant, ceased to use the name of "Moses," and had used the name of "Thomas James" only; and that he had made this change for no improper purpose, but bonâ fide, solely with the view of complying with the said wish of his said father; and that he was in no way apprehensive, nor did he expect, that any action or proceeding was likely to be taken against him under his said former names of "Thomas James Moses." It was admitted that no royal licence, or other authority had been obtained for the proposed alteration: but it was stated that the courts of Queen's Bench (*a*) and Exchequer (*b*)¹, and the Master of the [221] Rolls had allowed the rolls of their respective courts to be amended in the manner prayed. *Ex parte Daggett* (ante, p. 218) was referred to. [Cresswell, J. That case presented less difficulty than this, for, there, the party had a double surname; and all that he asked for was, to be permitted to abandon a portion of it. Here, however, the alteration contemplated will leave only the Christian name, "Thomas James," which is all one name. It may, therefore, be said hereafter, that this person is not upon the roll at all. Wilde, C. J. "Moses" may come again to-morrow, and with as much reason ask us to allow him to drop "James." Before we grant this application, it will be advisable to consult some of the other judges.]

Cur. adv. vult.

WILDE, C. J., now said that Mr. Justice Cresswell had spoken to some of the other judges upon the subject, and that the result was that they thought the application might be granted.

Rule absolute (*b*)².

(*d*) The rule was drawn up as follows:—"It is ordered that the names of the said 'William Daggett Ingledew,' entered on the roll of attorneys of this court on the 6th day of May, 1848, be altered, by striking out the name of 'Ingledew' therefrom."

(*a*) *Ex parte Thomas James*, 1 L. M. & P. 4, S. C., per nom. *Ex parte Moses*, 19 Law Journ., N. S., Q. B. 345.

(*b*)¹ *James, In re*, 5 Exch. 310, 19 Law Journ., N. S., Exch. 272.

(*b*)² In the case of *Dearden, In re*, 5 Exch. 740, 1 L. M. & P. 666,—where the application was, for a rule directing the master to substitute the name of Josiah Heaton Dearden on the roll, in the place of Josiah Dearden, and that the master might be at liberty to make an indorsement of such alteration of name on the admission of the applicant,—it is said that the court of Exchequer refused to alter the roll,

[223] THORNE *v.* SIMMONS. Jan. 31, 1850.

A writ of prohibition cannot (at least except under special circumstances) be moved for on the last day of term.

Griffiths moved for a prohibition to the judge of the county-court of Bedfordshire. It appeared from the affidavit upon which the motion was founded, that the plaint was levied for the recovery of an unliquidated balance of a partnership account, the plaintiff claiming 7l. 12s. 6½d.; that the hearing took place on the 26th of November last; and that the judge made an order for the payment of the amount on a distant day, with a view to enable the defendant to apply to this court. *Woodhams* v. *Newman* (ante, vol. vii. p. 654) was cited. [Maule, J. I find it laid down in Tidd's Practice (9th edit. vol. i. p. 498), that "a prohibition is not in general grantable on the last

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but directed the master to make a memorandum on the roll, opposite the party's name, stating that he was now known by the name of Josiah Heaton Dearden, and that the memorandum was made by rule of court.

The rule drawn up in that case in the Queen's Bench, was as follows:—"It is ordered, that the name of the said Josiah Dearden, on the roll of attorneys of this court, be altered, by inserting the name of 'Heaton' after that of 'Josiah,' so that the name of 'Josiah Heaton Dearden' stand on the roll of attorneys instead of that of 'Josiah Dearden:' and that the master be at liberty to make an indorsement of such alteration on [222] the admission of the said Josiah Dearden."

In the same case, the rule made by this court (Nov. 8, 1850), was in the following terms:—"It is ordered, that the master be at liberty to amend the roll of attorneys of this court, by altering the name of 'Josiah Dearden' to 'Josiah Heaton Dearden;' and that the said master be at liberty to make an indorsement on his admission in this court accordingly."

The affidavit upon which this court acted in that case, was as follows:—"Josiah Heaton Dearden, one of the attorneys of this court, maketh oath and saith, that he was admitted an attorney of this court, and signed the roll of attorneys, by the name of 'Josiah Dearden,' in Hilary term, 1833, the surname 'Dearden' being that of the defendant's father; that the deponent had ever since practised, and still continued to practise, as an attorney in Manchester; that this deponent's mother, Sarah Dearden, whose maiden name was Sarah Heaton, died in the month of December last; that this deponent, from the great love and respect he felt for his said parent, had assumed her surname of 'Heaton,' in addition to that of 'Dearden,' now using the surnames 'Heaton Dearden;' that this deponent has made this change from no improper purpose, but bonâ fide, and without fraud; and that this deponent is not apprehensive of any proceedings of any kind whatever being taken against him by the name of Josiah Dearden."

The following remarks are suggested by the clerk of the rules:—

Before the passing of the 6 & 7 Vict. c. 73, what was usually referred to as the roll of attorneys in this court was, a book in which the names and addresses of persons admitted attorneys of the court, were—by 2 G. 2, c. 23, s. 18,—inrolled by the clerk of the warrants, with whom all admissions were required to be left for that purpose. Since that statute, in compliance with its 27th section, there is also kept a roll, which is signed by all persons who, being attorneys of one of the other superior courts, and producing their admission in such other court, become attorneys of this court. The book, formerly called the roll, is still kept by the masters, as before. In the case, therefore, of a change of name by an attorney who was admitted in this court before the passing of the 6 & 7 Vict. c. 73, the rule for altering the roll should be in the form adopted in this court in *Ex parte Dearden*. But, in the case of an attorney admitted since the passing of that statute, the proper form is,—"that the master be at liberty to permit A. B. C. to amend the roll of attorneys of this court, by altering the name 'A. C.' thereon to 'A. B. C.' &c."

In *Ex parte Thomas James*, ante, p. 220, the applicant sought for the first time to become an attorney of this court, by signing the roll kept pursuant to the directions of the 6 & 7 Vict. c. 73, s. 27; and there, it will be perceived, that the rule is framed accordingly.

day of term (*c*); but a rule may be obtained, on motion, to stay proceedings till the ensuing term (*d*); and, in one instance (*e*), it was granted on motion the last day of term, leave having been obtained the day before to move it then."]

Wilde, C. J. It appears that this case was heard before the judge of the county-court on the 26th of November last, and that he made an order for payment of the debt by the defendant on a distant day, for the purpose of affording him time to make an application to this court. The defendant delays his application until the last day of the term. Now, it appears to have been the practice of the court for a very long period, not to grant prohibitions on the last day of term, when the **[224]** opposite party can have no opportunity of answering the rule. This case presents no peculiar features to justify a departure from that wholesome practice. I therefore think the prohibition ought not to be granted.

The rest of the court concurring,

Rule refused.

Lewis *v.* Padwick. Jan. 17, 1850.

The court will not set aside a judge's order for a distringas, on the ground that the affidavit on which it was obtained is false.—If the motion is founded on the insufficiency of the affidavit used at chambers, the court will require the defendant to negative the facts that would have justified the order.

A distringas to compel the appearance of the defendant issued under an order of Talfourd, J., dated the 1st instant, upon affidavits which stated the required appointments and calls at the defendant's residence, on the 19th, 21st, and 22nd of December, 1849, and that a copy of the writ of summons was left there on the last occasion, and negatived appearance by the defendant.

J. Brown now moved for a rule nisi to set aside the judge's order, the distringas, and all subsequent proceedings thereon, with costs, on the ground that the affidavits upon which the order was granted were insufficient and false. The motion was founded upon affidavits of the defendant, the defendant's son, his clerk, and one of his domestic servants. The defendant's affidavit stated, amongst other things, that the defendant was absent from home, on business in London, on the 19th of December, 1849, and the three following days; that, upon his return, he was informed by his son that some person had been, to leave a paper "about Lewis's matter," and that it had been used by his **[225]** (the defendant's) daughter, by mistake, to light a candle with; that, from the description of the paper given to him by his son, the defendant concluded that it must have been the copy of a writ; that this was the only intimation he had of an action having been commenced against him; and that he had never avoided service of the said process. The other affidavits severally denied material statements in the affidavits upon which the order was granted. [Wilde, C. J. It certainly is very inconvenient, upon a motion of this sort, to discuss the truth or the sufficiency of the affidavits upon which the judge has exercised his discretion. It seems to me, that, where perjury has been committed, it would be better to leave the party to the ordinary remedy.] Motions of this sort have been repeatedly entertained: *Cooper* v. *Foulkes* (1 M. & G. 942, 2 Scott, N. R. 200, 9 Dowl. P. C. 46); *Toms* v. *Nash* (2 Scott, N. R. 598); *Brough* v. *Eisenberg* (19 Law Journ., N. S., Q. B. 22); Archbold's Practice (10th edit. pp. 171, 182). [Maule, J. I believe there is no case where the motion has been founded upon affidavits simply in contradiction. If you can make out that the affidavits were insufficient, you may perhaps be entitled to a rule.] They clearly are insufficient; for, they do not shew any ground for the inference that the defendant was keeping out of the way to avoid service. All orders made by judges at chambers, are subject to review by the court.

Wilde, C. J. The circumstance of a single deponent's imputing mistake or perjury to another deponent, will not, in my opinion, justify us in setting aside a distringas. In the present case, it is not suggested that the defendant was not correctly informed

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(*c*) Citing an *Anonymous case*, from Latch, 7, 2 Roll. Rep. 456.

(*d*) Citing Latch, 7.

(*e*) Citing *Catchside* v. *Orington*, 3 Burr. 1922.

on the subject of the writ of summons, or that he was not perfectly [226] aware of its contents. I see no ground for the motion.

Maule, J. By the 2 W. 4, c. 39, s. 3, the court or the judge is to order the distringas to be issued, in case it shall be made appear, by affidavit, to their or his satisfaction, that the defendant has not been personally served with the writ of summons, and has not appeared to the action, and cannot be compelled to do so without some more efficacious process,—not, on the fact being so. The judge must make the order upon an ex parte application: and no power is given to him to rescind the order, or to set aside the appearance. Under the statute 1 & 2 Vict. c. 110, where the capias has been improperly obtained, the course is, to apply (on s. 6) that the defendant may be discharged out of custody. No such jurisdiction, however, is given under this act. In *Toms* v. *Nash*, the affidavit upon which the distringas issued, was manifestly insufficient: but still the court said that the order must stand, because it might be that the facts would have sustained it, and, if it were otherwise, the defendant ought to have negatived those facts.

The rest of the court concurring,

Rule refused.

[227] Breach and Another *v.* O'Brien. Jan. 19, 1850.

Held, that, where a rule for a special jury is obtained for delay, the proper course is, not to move to set aside the rule, but, to move that the cause may be tried, in its turn, by a common jury, if the defendant is not ready with his special jury.

This was an action of debt for 65l. 5s. 4d., the balance of an hotel bill. Pleas, nunquam indebitatus, payment, and, as to 2l. 17s. 6d., the tippling act (24 G. 2, c. 40, s. 12).

Issue was joined, and notice of trial given for the first sitting in the present term. On the 14th the plaintiff's attorney discovered that the defendant had marked the cause as a special jury cause, and, upon inquiry, he found that the defendant had obtained a rule for a special jury on the 9th, although he had not served it.

Lush, on a former day, obtained a rule calling upon the defendant to shew cause why the rule for a special jury should not be discharged, on the ground that the defendant had been guilty of laches in not acting promptly upon the rule, and that it had been obtained for delay.

Ball, now shewed cause. He submitted that the defendant had an undoubted right, under the statute (*b*), [228] to have his cause tried by a special jury, provided he complied with the rule of Hilary term, 1 Vict.(*a*); and the proper form of application was, as in the court of Queen's Bench, for a rule calling upon the defendant to shew cause why the cause should not be tried, in its order, by a common jury, if there was no special jury ready to try it.

Lush, contrà, was content to take the rule in that form, but submitted that he was entitled to the costs of the rule. [Williams, J. Why should the defendant pay costs

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(*b*) 3 G. 2, c. 25, s. 15, which enacts "that it shall and may be lawful to and for His Majesty's courts of King's Bench, &c., on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit whatsoever, depending, or to be brought and carried on, in the said courts of King's Bench, &c., or in any of them, and the said courts are hereby respectively authorised and required, upon motion as aforesaid, in any of the cases before mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the said courts,—which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

(*a*) "That no rule for a special jury be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day: provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time."

when he is quite regular?] In *Phelps* v. *Keily* (*b*)[1], it was laid down by this court, upon the authority of *Gunn* v. *Honeyman* (2 B. & Ald. 400, 1 Chitt. Rep. 234), that a rule for a special jury obtained by the defendant (or by the plaintiff in replevin), will be discharged, if there be unnecessary delay in serving it. Here, the defendant has not served the rule for a special jury, or given the plaintiffs any notice that it had been obtained. [Maule, J. Undoubtedly the rule ought to have been served. But, suppose it had been served, how would your position have been altered?] If it had not been followed up in a bonâ fide manner, it might have been set aside.

Maule, J. Bonâ fides is altogether immaterial, if the proceeding is regular. I think the rule should be made absolute for the cause to be tried, in its order, by **[229]** a common jury, if the defendant is not ready with his special jury,—the plaintiffs' costs of this motion, to be costs in the cause.

The rest of the court (*a*) concurring,

Rule absolute accordingly (*b*)[2].

Doe d. Church *v.* Pontifex and Another. Jan. 21, 1850.

Where the consideration for an annuity is a pre-existing debt, no memorial need be inrolled.—The consideration for an annuity was stated in the memorial thus:—"3000l., part of a sum of 3186l. 2s. 3d., due and owing from [the grantor] to [the grantees] at the time of granting the said annuity, as follows,—1882l. 3s. 6d. for work and labour and for goods sold and delivered, and 1303l. 18s. 9d. for money lent and advanced, and interest thereon, in the sums and at the times following,—that is to say, 250l. paid by the cheque of [the grantees] on, and dated, the 29th of December, 1837, and drawn, in the then name of their trading firm, on Messrs. Smith, Payne, & Smith, their bankers,—500l. paid by a like cheque, dated the 24th of February, 1838,—23l. 10s. paid by a like cheque, dated the 28th of February, 1838,—270l. paid by a like cheque, dated the 25th of July, 1838,—200l. paid by a like cheque, dated the 11th of January, 1839,—interest on the above sums respectively up to the 27th of April, 1839 (the date of the grant), 60l. 8s. 9d.:"—Held, that, supposing a memorial to be necessary, the above sufficiently shewed how and when the several sums which constituted the consideration for the annuity, were paid.

This was an action of ejectment brought to recover the possession of a house, brewhouse, and premises at Hackney, in the county of Middlesex.

The cause was tried before Wilde, C. J., at the sittings in Middlesex, after last Trinity term. The facts were as follows:—Towards the close of the year 1837, the **[230]** lessor of the plaintiff applied to Messrs. Pontifex, the defendants, to fit up a brewery for him upon certain premises at Hackney, of which he was possessed for a term; and, accordingly, on the 19th of February, 1838, the following agreement was entered into:—

"Memorandum of agreement made this 19th day of February, 1838, between Joseph Samuel Church, of, &c., brewer, of the one part, and Edmund Pontifex and William Pontifex, of, &c., copper-smiths and engineers, of the other part: Whereas, by an indenture bearing date the 30th of November, 1837, and made between Lawrence Gwynne of the one part, and the said Joseph Samuel Church of the other part, he the said Lawrence Gwynne did demise and lease unto the said Joseph Samuel Church, his executors, administrators and assigns, all that piece or parcel of ground, with the messuage or tenement called Cambridge House, together with the warehouses, coachhouse, stables, and erections thereon, situate on the north side of the Hackney Road, Bethnal Green, with the appurtenances, and together also with the fixtures and things mentioned in the schedule thereunder written, for the term of thirty-five years from the 29th of September then last past, at the annual rent of 100l., payable as

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(*b*)[1] 3 M. & G. 883, 4 Scott, N. R. 376, S. C. per nom. *Phelps* v. *Kirby*, 1 Dowl. N. S. 501.

(*a*) Williams, J., and Talfourd, J., Wilde, C. J., and Cresswell, J., being at the court of Criminal Appeal.

(*b*)[2] See *Chuck* v. *Harris*, 1 M. & G. 940, 2 Scott, N. R. 82, 9 Dowl. P. C. 68. And see *Bush* v. *Pring*, 9 Dowl. P. C. 180; *Gurney* v. *Gurney*, 3 D. & L. 734.

therein mentioned, and under and subject to the covenants therein contained on the part of the lessee to be performed: And whereas the said Joseph Samuel Church, being desirous of erecting a new brewery upon part of the premises comprised in the said indenture of lease, and of fitting up the same with all necessary utensils, fixtures, and plant, for the purpose of carrying on the business of a brewer therein, applied to the said Edmund Pontifex and William Pontifex, and requested them to make or supply the necessary advances or funds for paying for the materials, work, and labour, in erecting the said brewery, and to supply the said utensils, plant, and fixtures; and, in consideration thereof, [231] the said Joseph Samuel Church has proposed to the said Edmund Pontifex and William Pontifex to grant unto them an annuity of such amount, and for such time, and secured in such manner, as hereinafter is agreed upon, and to deposit the said lease as a security for their advances and outlay in the meantime, with interest at 5 per cent. until such annuity shall be granted; and to which proposition the said Edmund Pontifex and William Pontifex have consented and agreed, and have, in pursuance thereof, already advanced the sum of 750l., the sum of 250l., part thereof, on the 29th of December last, and the sum of 500l. on the day of the date of these presents, to the said Joseph Samuel Church, towards the erection of the said brewery, as he the said Joseph Samuel Church doth hereby admit and acknowledge, and the building of which said brewery is now in progress; and the same, together with the utensils, plant, and fixtures for the same, is expected to be completed in or about the month of May now next ensuing: And whereas in pursuance of the said agreement, the said Joseph Samuel Church has deposited the said lease with the said Edmund Pontifex and William Pontifex, as they hereby admit: Now, it is hereby witnessed, agreed, and declared, between and by the said Joseph Samuel Church, on the one part, and the said Edmund Pontifex and William Pontifex, on the other part, in manner following, that is to say, that they, the said Edmund Pontifex and William Pontifex, shall and will furnish and supply all necessary funds for the erection and completion of the said brewery, and also all the necessary utensils, plant, and fixtures to be placed in and about the same, at their usual trade prices, and upon the calculation and dimensions of a ten-quarter brewery; and, further, that the amount due to the said Edmund Pontifex and William Pontifex in respect of such advances and outlay, work, labour, and materials, shall be [232] calculated and ascertained by the parties, if either of them shall require the same, at the end of every fourteen days from the present time, so far as the same shall be then capable of being ascertained, and a memorandum thereof shall be signed by the respective parties, and copies thereof kept by each, and which shall be binding on all parties; and, further, that the said indenture of lease shall remain in the possession of the said Edmund Pontifex and William Pontifex, as, or in the name of, an equitable charge or mortgage for the amount due and to become due to them from time to time as aforesaid, until the brewery and utensils, fixtures, and plant shall be completed, and until the said annuity shall be granted as hereinafter mentioned; and, further, that, as soon as the said brewery, utensils, plant, and fixtures shall be completed, and the amount due to the said Edmund Pontifex and William Pontifex for or in respect thereof, shall be ascertained, he the said Joseph Samuel Church shall and will grant unto the said Edmund Pontifex and William Pontifex, their executors and administrators, one clear annuity or yearly sum of such an amount as will be equal to the sum of 11l. per annum for every sum of 100l., and a fractional part for any sum less than 100l., which shall be then due and owing to the said Edmund Pontifex and William Pontifex, their executors and administrators, for or in respect of the erection and completion of the said brewery, and the advances already made and to be made for that purpose as aforesaid, and for the said utensils, plant, and fixtures as aforesaid, for and during the natural lives of Emily Pontifex, the daughter of William Pontifex, party hereto, and Sarah Pontifex, the daughter of the above-named Edmund Pontifex, and the life of the survivor or longest liver of them, and shall and will charge the same upon the brewery, utensils, plant, and fixtures, and other the premises comprised in the said lease, and shall and will [233] secure the due payment of the said annuity, by a demise of the said brewery, utensils, plant, and fixtures, and all other the premises comprised in the said lease, to a trustee for the said Edmund Pontifex and William Pontifex, for the then residue of the said term of thirty-five years thereby granted, except the last five days thereof, at the rent of a peppercorn, if demanded; and in which said grant of annuity and demise shall be contained the usual covenants by the said Joseph Samuel Church, his executors and administrators, for the due payment thereof, and for the title to the said demised premises, and the usual powers of distress and entry upon the said demised premises, for obtaining payment of the same annuity, in case the same shall be in arrear for the space of twenty-one days; and also with power, in case the said annuity shall be in arrear for the space of one calendar month, for the said trustee, either to levy and raise, by way of sale, mortgage, or other disposition of the said premises, all the arrears which shall from time to time be due in respect thereof, or else, at the discretion of the said trustee, absolutely to sell the whole of the said premises for the then residue of the said term, and invest the purchase-money at interest, and apply such interest towards payment of the arrears and future payments of the said annuity; with such other usual covenants, remedies, and powers for securing the payment of the said annuity as the counsel of the said Edmund Pontifex and William Pontifex shall advise; and, further, that, for better securing the said annuity, the said Joseph Samuel Church shall and will duly execute a warrant of attorney to confess judgment for double the amount of the purchase-money for the said annuity, with the usual defeasance thereunder written, upon the due payment of the said annuity: And it is further agreed, that the said several securities, and a memorial of the inrolment thereof, if the same shall be **[234]** deemed necessary, shall be prepared by the said Edmund Pontifex and William Pontifex, but the costs and charges thereof, and all other costs and charges, as well of these presents, as also of or relating to the granting of the said annuity, shall be borne and paid by the said Joseph Samuel Church; and, further, that, in the grant of the said annuity, power shall be reserved to the said Joseph Samuel Church, his executors and administrators, at any time or times, to re-purchase the said annuity, or any part thereof, not less, at any one time, than one sixth part of the whole, until the whole shall be extinguished, on giving three months' notice thereof, and on payment to the said Edmund Pontifex and William Pontifex, their executors and administrators, of the amount of the said purchase-money for the same, or a proportionate part thereof, from time to time, in proportion to the amount of such re-purchase, as the case may be, and all arrears thereof up to the date of such re-purchase, and all costs to be incurred thereby. In witness," &c.

The statement of the account between the parties was put in, shewing a balance due to Messrs. Pontifex of 3186l. 2s. 3d. The annuity-deed, bearing date the 27th of April, 1839, was also put in. It appeared to have been inrolled on the 2nd of May, 1839. In the memorial of inrolment, pursuant to the statute, the consideration was thus stated, in the column headed "Consideration, and how paid:"—

"3000l., part of a sum of 3186l. 2s. 3d., due and owing from the said Joseph Samuel Church to the said Edmund Pontifex and William Pontifex, at the time of granting the said annuity, as follows:—The sum of 1882l. 3s. 6d. for work and labour and for goods sold and delivered, and the sum of 1303l. 18s. 9d. for money lent and advanced and interest thereon, in the sums and at the times following,—that is to say, the sum of 250l. paid by the cheque of the said Edmund **[235]** Pontifex and William Pontifex, on, and dated, the 29th of December, 1837, and drawn in the then name of their trading firm of 'William Pontifex, Sons, & Wood,' on Messrs. Smith, Payne, & Smith, their bankers,—the further sum of 500l. paid by a like cheque, dated the 24th of February, 1838,—the further sum of 23l. 10s. paid by a like cheque, dated the 28th of February, 1838,—the further sum of 270l. paid by a like cheque, dated the 25th of July, 1838, drawn in the then name of the trading firm of 'E. & W. Pontifex & Wood,'—the further sum of 200l., paid by a like cheque as last-mentioned, dated the 11th of January, 1839,—interest on the above sums respectively, up to the 27th of April, 1839, 60l. 8s. 9d."

The annuity being in arrear, the defendants entered on the property; and the present action was brought by the grantor to recover possession, on the ground that the annuity deed was void, inasmuch as the memorial was defective, the memorial not shewing that the cheques which formed part of the consideration, had been paid, and not stating at what time they were payable. The following cases were cited,—*Rumball* v. *Murray* (3 T. R. 298), *Berry* v. *Bentley* (6 T. R. 690), *Poole* v. *Cabanes* (8 T. R. 328), *Drake* v. *Rogers* (2 Brod. & Bingh. 19. 4 J. B. Moore, 402), and *Abbott* v. *Douglas* (ante, vol. i., p. 483).

For the defendants, it was insisted, that the word "cheque" imported an instrument payable on demand; and, further, that, the consideration being past, it was not necessary to mention in the memorial any consideration at all.

The learned judge expressed no opinion, but directed a verdict for the plaintiff, reserving leave to the defendants to enter the verdict for them, or a nonsuit.

[236] Byles, Serjt., accordingly, in Michaelmas term last, obtained a rule nisi. He referred to Johnson's Dictionary, and to Chitty on Bills (9th edit. (by Chitty and Hulme) p. 511), for the definition of a "cheque"; and also to *Ex parte Mitchell* (2 East, 137), *Kelfe* v. *Ambrosse* (7 T. R. 551), and *Hall* v. *Lack* (1 Exch. 300), to shew that a consideration that is by-gone, need not be stated in the memorial with the same precision and particularity as a consideration paid at the time.

Whateley and J. Brown now shewed cause. The facts are these:—Church, a brewer, in the neighbourhood of London, applied to Messrs. Pontifex to fit up certain premises for him, which they consented to do upon his agreeing to grant an annuity for the lives of two persons named, at the rate of 11 per cent. upon the amount of the moneys to be advanced and the work to be done by them; and, accordingly, the agreement of the 19th of February, 1838, was entered into. The brewery was afterwards completed at a cost of 3186l. 2s. 3d., and for 3000l., part of that sum, the annuity was granted. The question is, whether a proper memorial of the deed by which that annuity is secured, has been inrolled pursuant to the statute 53 G. 3, c. 141, s. 2. It is submitted that there has not. In the column headed "Consideration, and how paid," the consideration for the grant is thus stated:—"3000l., part of a sum of 3186l. 2s. 3d., due and owing from the said Joseph Samuel Church to the said Edmund Pontifex and William Pontifex, at the time of granting the said annuity, as follows:—The sum of 1882l. 3s. 6d. for work and labour and for goods sold and delivered, and the sum of 1303l. 18s. 9d. for money lent and **[237]** advanced, and interest thereon, in the sums and at the times following, that is to say, the sum of 250l. paid by the cheque of the said Edmund Pontifex and William Pontifex, on, and dated, the 29th of December, 1837, and drawn on Messrs. Smith, Payne, & Smith, their bankers,—the further sum of 500l. paid by a like cheque, dated the 24th of February, 1838,—the further sum of 23l. 10s. paid by a like cheque, dated the 28th of February, 1838,—the further sum of 270l. paid by a like cheque, dated the 25th of July, 1838,—the further sum of 200l. paid by a like cheque as last mentioned, dated the 11th of January, 1839,—interest on the above sums respectively, up to the 27th of April, 1839, 60l. 8s. 9d.:" in no one instance stating when the cheques were payable, or that they ever were in fact paid. Upon this ground it has been held, by a long series of cases, beginning with *Rumball* v. *Murray* and ending with *Abbott* v. *Douglas*, that the annuity is void. In *Rumball* v. *Murray*, Lord Kenyon said: "I agree with the construction put at the bar, that money is mentioned in the act, as contradistinguished from goods; and, so far, notes, when paid, are money within the meaning of the act: but still the dates and other particulars of those notes should be set out, otherwise the court cannot see whether a consideration for the annuity was or was not given: for, if they were payable at a distant time, and no allowance made, the true consideration would not appear on the memorial." That case was followed by *Berry* v. *Bentley*, where it was held, that, if the consideration of an annuity be paid by a note or a banker's cheque, the time when it becomes payable must be set forth in the memorial. The same point was decided in *Poole* v. *Cabanes*. In *Drake* v. *Rogers*, the memorial stated the consideration for the annuity to consist of Bank of England notes payable on demand, and of a draft payable at a banker's, **[238]** without specifying the time when: the annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead. The court set aside the securities, on the ground that the memorial did not state when the draft was payable, or whether it had in fact been paid. Dallas, C. J., there said: "In principle, there is a reason why it should appear upon the face of the memorial when the draft was payable, and that reason is given in *Berry* v. *Bentley*. 'The objection was, that the memorial did not set forth when the note was payable, whether immediately or at a distant day; for, if at a distant day, it was not worth 700l., by reason of the discount.' Now, the draft in this case might have been payable at a distant day, and the grantor might have lost so much of his consideration as the discount of the draft for the intermediate time might amount to. In substance, therefore, and on principle, here is a ground why the time at which a bill is payable, should appear on the memorial." The last case where the point came distinctly before this court, was that of *Abbott* v. *Douglas*, where part of the consideration money was stated in the memorial to have been paid by "a draft of even date with the indenture, drawn by the grantor on Messrs. A. B. & Co.," not saying when the draft was payable; and the memorial was held to be insufficient, and the grant consequently void. In delivering the judgment of the court, Tindal, C. J., carefully reviews the earlier cases. After referring to the statute 17 G. 3, c. 26, s. 1, he says: "Under that section, it was held, that all considerations, whether pecuniary or otherwise, must be stated; and that, where a pecuniary consideration, or part of it, was paid by drafts on bankers, or promissory-notes, it was necessary to set them out, and mention the time when they were payable." His lordship then refers to *Rumball* v. *Murray*, *Berry* v. *Bentley*, *Poole* v. **[239]** *Cabanes*, and *Morris* v. *Wall* (1 B. & P. 208); all which decisions were confirmed by this court in *Drake* v. *Rogers*. The learned chief justice then says: "By the 2nd section of the 53 G. 3, c. 141, it was enacted, 'that, within thirty days after the execution of every deed, &c., whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, &c., a memorial of the date of every such deed, &c., the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be inrolled in the high court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may require.' By this enactment, it is not made necessary to mention in the memorial any but pecuniary considerations; but they must be stated in the form prescribed by the act, which contains a column headed 'Consideration, and how paid,' and, under that heading, the words,—'100l. paid in money, 500l. paid in notes of the governor and company of the Bank of England, or other notes or bills of exchange, as the case may be.' If, in the present case, part of the consideration had been paid by a bill of exchange, it could not have been contended that the time when it would become payable need not have been stated, that being necessary to shew the real nature and value of the consideration. The same necessity exists for stating the time when a draft is payable: and the only question is, whether the memorial now under consideration states the time when the draft upon Barnetts, Hoard, & Co. was payable. It does not do so, unless the word 'draft' means draft payable on demand. In several of the cases cited, the courts have refused so to construe it; and those deci-**[240]**-sions are equally applicable to memorials inrolled in pursuance of the 53 G. 3, c. 141, as to those under the 17 G. 3, c. 26. We feel that we are bound by them, and that we must say that the memorial in question is insufficient." *Ex parte Michell* will be relied on, as being at variance with the principle of the decisions above cited: that case was, however, referred to, both in *Drake* v. *Rogers* and in *Abbott* v. *Douglas*. The court must be able to see from the memorial, how and when the consideration was paid. To hold this memorial sufficient, would entirely frustrate the intention of the statute. [Cresswell, J. The consideration stated in this memorial, is a pre-existing debt. In such a case, is it necessary to shew upon the face of the memorial when the debt was created?] *Kelfe* v. *Ambrosse* (7 T. R. 551), which may also be relied on, would have been to the purpose, if in this case the advances had been made without any view to the granting of an annuity. The same observation applies to *Hall* v. *Lack* (1 Exch. 300). [Cresswell, J. What particular annuity was agreed upon in the first instance here?] An annuity equivalent to 11 per cent. upon the amount that might be advanced. [Cresswell, J. All must have been paid before the annuity could be granted. When the amount of the annuity was calculated, the parties must have calculated it upon money before then due, and actually paid.] The parties do not, as in *Kelfe* v. *Ambrosse*, agree to grant an annuity in consideration of an antecedent debt. In equity, the annuity would have been considered as an annuity existing prior to the execution of the deed. [Maule, J. Possibly, if the agreement had been for a specific annuity.]

A cheque, in pleading, is ordinarily described as "a draft or order in writing for the payment of money, **[241]** called a cheque on a banker" (see 2 Chitty, pl. 7th edit. pp. 99, 100). In the stamp-act, 55 G. 3, c. 184, sched. Part I., tit. Bill of Exchange, a "draft" is mentioned as synonymous with "cheque." So, in the 9 G. 4, c. 49, s. 15, cheques are called drafts on bankers. In Byles on Bills (6th edit. p. 10), the definition is given without the learned author's usual accuracy,—"A cheque on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand." In Smith's Mercantile Law (4th edit., by Dowdeswell, p. 188 (*a*)), it is more correctly defined,—"A cheque is a bill of exchange addressed to a banker, and payable to a certain person or bearer,"—omitting the words "on demand." [Wilde, C. J. The author takes that for granted.] Dr. Story, in his treatise on promissory notes (2nd edit. § 487), says: "A cheque is a written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." And in § 490 he again says: "It has already been stated that cheques are payable immediately on presentment, without any days of grace. They are sometimes made, in terms, payable on demand; which language of course imports that they are payable immediately. But they are usually in England, and almost invariably in America, made payable without the addition of the words on demand; and then they are, in contemplation of law, equally payable on demand. It makes no difference in point of law, as between the parties (independent of the stamp-acts), whether a cheque be ante-dated or post-dated: it is still payable on its presentment, at any time after the **[242]** date. But a case may be supposed, of a cheque drawn on a bank, payable on a specified day, as, for example, it may be dated on the 1st day of January, 1845, and be made payable, in terms, on the 10th day of the same January; and the question might then arise, whether it was payable on that very day, without any allowance of the days of grace (*a*). The general understanding among banks is believed to be, that, in such a case, the cheque is payable on the 10th day of January, without grace, and it is treated as a cheque payable on demand on that very day. In any other view, the cheque might be presented for, and require, acceptance; and yet it is understood that such acceptance is never called for or given."

Part of the consideration here is stated to be work and labour and goods sold and delivered,—not saying when the work and labour was done or the goods delivered. If it was necessary to state the particulars of the cheques, it was equally necessary to state when the work was done and the goods delivered.

Bovill (with whom was Byles, Serjt.), in support of the rule. The foundation upon which all the cases relied on upon the other side, rest, is this,—that the statement in the memorial, confirmed by the deed, is simply of an acknowledgment of a cheque or draft having been given at the time of the grant of the annuity, and not of its having previously been paid. A further distinction between those cases and the present is, that, in all of them, the thing is described as a draft on a banker, or a draft payable at a banker's, which is ambiguous; whereas, here, the description is "a cheque," which in ordinary understanding is an instru-**[243]**-ment payable on demand. In *Rumball* v. *Murray*, the consideration was erroneously stated to be in money, whereas it was given by a banker's cheque and a promissory note; in *Berry* v. *Bentley*, the consideration money was described to have been paid by a promissory note, drawn by Hammersley, and payable at Hammersley, Morland, & Co.'s, "which said sum so secured has been since paid,"—that is, after the grant of the annuity, and before the inrolment of the memorial; in *Poole* v. *Cabanes*, part of the consideration was stated in the memorial to be, a draft of a stranger on Messrs. Lockharts, bankers, in Pall Mall, "which said draft was duly honoured,"—that is, which had been duly honoured before the inrolment: *Drake* v. *Rogers*, again, was the case of a draft of a stranger on a banker, with an acknowledgment of the draft only, and not that it had been paid: and in *Abbott* v. *Douglas*, the consideration was stated to have been paid by "a draft of even date with the indenture, drawn by the grantee, on Messrs. A. B. & Co.," not saying when payable. On the other side, the authorities are precise and clear. In *Ex parte Michell* (2 East, 137), the memorial was held good, the consideration being stated to have been paid in money, though part of it was paid by means of a banker's cheque, the value of which had been actually received by the grantor some time before the execution of the deeds. *Berry* v. *Bentley* and *Poole* v. *Cabanes* having been cited there, Grose, J., said: "All the prior cases in which it has been deemed necessary to set out in the memorial the payment of any part of the consideration money by bankers' cheques (where such has been the fact), have been where the cheque was delivered as payment at the time of executing the deeds, when non constat it would ever be paid. But here the **[244]** money had been actually received upon the cheque a month before by the grantor; therefore, at the time of such execution, the consideration might well be stated to be so much money paid to her." In

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(*a*) Citing the case of *The Mohawk Bank* v. *Broderick*, 10 Wend. R. 304, S. C. 13 Wend. R. 133.

O'Callaghan v. *Ingilby* (9 East, 135, 148), Lord Ellenborough says: "It has been determined by several cases, that, where the consideration was not paid in money, but by a draft, the particulars of that draft must be set forth; as in *Rumball* v. *Murray*, *Berry* v. *Bentley*, *Poole* v. *Cabanes*. And it is equally clear, that, if paid by a draft converted into cash before the execution of the deeds, the particulars of the draft need not be stated." In that case, the consideration was stated to have been paid at or before the sealing and delivery of the annuity-deed, by a draft of the grantee on his bankers; and it was held that these statements did not necessarily import, that, at the time of executing the deeds, the drafts only but not the money had been paid to Morland and Hammersley. Here, the consideration is stated to be a sum of money due and owing from the grantor to the grantees at the time of granting the annuity, as follows,—1882l. 3s. 6d. for work and labour and for goods sold and delivered, and 1303l. 18s. 9d. for money lent and advanced, and interest thereon, in the sums, and at the times, mentioned.

The consideration being a pre-existing debt, the case is not within the annuity act at all; and no memorial was necessary. In *Kelfe* v. *Ambrosse* (7 T. R. 551), it was held that money lent and paid at different times for the education and advancement of the defendant, was a good consideration for the grant of an annuity, within the 17 G. 3, c. 26, s. 3; and that such a consideration was sufficiently expressed in the deeds for securing the annuity, under the description of "money lent and ad-**[245]**-vanced and also paid, laid out, and expended to and for the maintenance, education, and advancement in the world of the defendant." Grose, J., there says: "The objection is, that it should have been set forth when the different sums of money were paid; to support which, cases have been alluded to, in which it was ruled that the names of the persons by whom the consideration was paid should be set forth: but what was determined in the latter class of cases, ought not to be applied to such a case as the present, where the grantor himself admitted that the consideration was an antecedent debt due from him to the grantee, arising from different sums paid at different times for his use. It would be extending the act of parliament too far, to decide that this annuity could not be supported, merely because the respective times when these different sums of money were advanced by the grantee are not mentioned, when every thing that passed at the time of granting the annuity is sufficiently set forth." So, in *Hall* v. *Lack* (1 Exch. 300), the plaintiff had advanced to the defendant several sums, amounting to 5000l., less the sum of 250l., which C., the agent of both parties, improperly retained without the authority or knowledge of the plaintiff; and C. received five bills of exchange, accepted by the defendant, to the amount of 5000l., by way of security: the dates of the bills did not exactly correspond with the dates of the advances, nor were the advances in the exact sums for which the bills were given. The plaintiff accepted an annuity from the defendant, in satisfaction of the bills and the 5000l. secured thereby. The memorial, under the head "Consideration, and how paid," was to this effect,—"5000l. made up of five several sums of 300l., 200l., 2000l., 1500l., and 1000l., previously lent and advanced by **[246]** the plaintiff to or for the use of the defendant and E. J. Lack (the defendant's son), and owing to the plaintiff on security of five several bills of exchange drawn by E. J. Lack upon, and accepted by, the defendant, and indorsed by E. J. Lack, the said consideration being paid or satisfied by the cancellation of the said bills; and a release by the plaintiff of the defendant and E. J. Lack from the sum secured thereby, and interest." It was held that the memorial was sufficient; for, that it is not necessary, in the case of existing by-gone debts, to state how each sum constituting the debt, was advanced. It may be conceded, that, if the debt be contracted with the view to the purchase of the annuity, a memorial is necessary. It may also be conceded, that, in 1838, these parties entered into an agreement for the granting of an annuity: but it is equally clear that the annuity now under consideration, was not granted in pursuance of that agreement. [Maule, J. You say that the original agreement was put an end to, and a new one entered into.] Yes. The original bargain was, that the whole debt should be converted into an annuity. Here, the annuity was granted for a part only of the debt. *Marriage* v. *Marriage* (ante, vol. i. p. 761) is also an authority to shew that an annuity granted for a by-gone consideration, is not within the annuity-acts. With regard to the work and labour and goods sold, there is nothing in the statutes to require the times at which the work was done or the goods delivered, to be stated in the memorial.

WILDE, C. J. I had not the advantage of hearing the argument of Mr. Whateley (*b*); but I have heard **[247]** Mr. Brown, who has exhausted the subject. It seems to me that the rule for entering a nonsuit must be made absolute: in other words, that the annuity is a valid annuity, and the memorial sufficient. The objection which was made to the memorial, was, that it does not strictly comply with the statute, in stating the "consideration, and how paid." It appears to me, however, that the statement is sufficient: it is thus:—"300l., part of a sum of 318l. 2s. 3d., due and owing from the said Joseph Samuel Church to the said Edmund Pontifex and William Pontifex, at the time of granting the said annuity, as follows:—The sum of 188l. 3s. 6d. for work and labour and for goods sold and delivered, and the sum of 130l. 18s. 9d., for money lent and advanced, and interest thereon, in the sums and at the times following." The objection is confined to this latter sum, of 130l. 18s. 9d., for money lent, and interest; the mention of the interest rather tends to exclude all doubt as to the moneys having been previously advanced. The memorial then proceeds to state the sums and the times of lending, thus:—"The sum of 250l. paid by the cheque of the said Edmund Pontifex and William Pontifex, on, and dated, the 29th December, 1837, and drawn in the then name of their trading firm of William Pontifex, Sons, & Wood, on Messrs. Smith, Payne, & Smith, their bankers." The date, as it seems to me, is to be referred to the period at which the money was lent and advanced. The memorial then proceeds,—"The further sum of 500l., paid by a like cheque, dated the 24th of February, 1838,"—omitting the statement that it was paid on that day; but that statement in the first instance was wholly unnecessary. It then goes on,—"The further sum of 23l. 10s., paid by a like cheque, dated the 28th of February, 1838; the further sum of 270l., paid by a like cheque, dated the 25th of July, 1838, drawn in **[248]** the then name of the trading firm of E. & W. Pontifex & Wood; the further sum of 200l., paid by a like cheque as last mentioned, dated the 11th of January, 1839; interest on the above sums respectively up to the 27th of April, 1839, 60l. 8s. 9d." The effect of this statement is, that the several sums were paid, by cheques, on the days on which those cheques respectively bear date. One question which has been raised is, as to what is the import of a statement of a payment "by cheque." The general understanding, I take to be, that it imports an instrument payable on its date; for, every cheque properly purports to be drawn on the day of its date; and we are not to assume that a false date is given to it. Looking, therefore, at this memorial, it can hardly be doubted that the parties meant to state the exact days of payment of the several sums. There is no suggestion that any fraud upon the act of parliament was contemplated; and, applying to this memorial a fair and reasonable construction, I think it professes to set forth truly and correctly the sums in which, and the times when, the consideration money was advanced, and therefore that the objection fails.

Further, I think, that, inasmuch as the annuity in question was granted for a bygone consideration, an antecedent debt, no memorial at all was necessary. How stand the facts? There was an agreement between the parties in February, 1838, that certain work should be done and certain moneys advanced by Messrs. Pontifex for Mr. Church, and that the latter should, in consideration of that work and those advances, grant to the former an annuity at the rate of 11 per cent. upon the amount, when such amount, which was necessarily uncertain at that time, should be afterwards ascertained. The work being completed, and the accounts between the parties adjusted, it appears that there is a balance due to Messrs. Pontifex, of 318l. 2s. 3d., comprising 188l. **[249]** 3s. 6d. for work done and goods supplied, and 130l. 18s. 9d. for cash advanced, and interest. What do the parties then do? Do they carry into effect the original agreement? I think not. They enter into a new agreement, to grant an annuity of 11 per cent. on 300l., the 18l. 2s. 3d. having probably been paid. It may be said that the difference is small: but that is immaterial. They agree,—and there is no suggestion that it was colourably done,—that 300l. of what had been incurred in the manner before mentioned, should be considered as a debt due and owing,—and it is clear that work done and goods and money supplied in contemplation only of the grant of an annuity, could not constitute a debt due and

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(*b*) His lordship was, on the day upon which that part of the argument took place, presiding in the court of Criminal Appeal. Mr. Justice Cresswell was also absent on that day, for the like reason.

owing,—and they come to a new agreement, that an annuity at 11 per cent. upon this sum of 3000l. shall be granted; just as, upon the determination of a lease, the parties sometimes come to an agreement for a new tenancy on the terms of the old lease. I think the whole had become a debt, the balance of which would have been recoverable upon an account stated, and that the annuity having been thus granted in consideration of an antecedent debt, no memorial need have been inrolled at all.

The rest of the court concurring,

Rule absolute for a nonsuit.

[250] Mackenzie v. The Sligo and Shannon Railway Company. Jan. 26, 1850.

The court will not make an order for payment of money directed by an award to be paid, so as to enable the party entitled to receive it to avail himself of the 1 & 2 Vict. c. 110, s. 18, except where the case is clear and free from doubt.—An action against a railway company was referred to arbitration. The arbitrator made his award on the 28th of April, 1849,—directing the company to pay to the plaintiff a certain sum, by four instalments, on the 12th of June and 26th of November, 1849, and the 26th of February and 26th of May, 1850. On the 4th of May, 1849, the Vice-Chancellor made an absolute order for the dissolution and winding up of the company, under the 11 & 12 Vict. c. 45, and an official manager was duly appointed. On the 1st of August, 1849, the 12 & 13 Vict. c. 108, passed, declaring that the former act should not apply to railway companies. Under these circumstances, the court refused to make an order upon the company (upon a service and demand upon the secretary and one of the directors), to pay the instalments which had become payable on the 12th of June and 26th of November, 1849, considering the matter to be too doubtful to be disposed of on a summary application.—Quære, whether the joint stock companies winding up act, 1848, (11 & 12 Vict. c. 45), applies to railway companies; and whether the joint stock companies winding up act, 1849 (12 & 13 Vict. c. 108), is retrospective?—Quære, whether an attachment, or an order, can be obtained on non-payment of an instalment.—Attachment does not lie against a corporation (e.g. an incorporated railway company), for non-performance of an award.

An action having been brought by the plaintiff against the Sligo and Shannon Railway Company, to recover a large sum, which he claimed to be due to him for services rendered by him as engineer to the company; and the company having appeared and pleaded, it was agreed (by a judge's order dated the 2nd of April, 1849), that all matters in difference in the cause should be referred to an arbitrator; the costs of the action to abide the event of the award, and the cost of the reference to be in the arbitrator's discretion; and by the order it was directed, that, in case the arbitrator should make his award in favour of the plaintiff, any sum or sums of money which might be awarded to be paid to the plaintiff, should be awarded to be paid to him in manner following, that is to say, one fourth part of the [251] whole amount to be paid on the 12th of June, 1849, one third part of the whole amount on the 26th of November, 1849, and the balance by two equal payments, the first of such payments to be made on the 26th of February, 1850, and the other on the 26th of May, in the same year.

By his award, bearing date the 28th of April, 1849, the arbitrator adjudged and determined, that all further proceedings in the cause should thenceforth cease and be no further prosecuted; that there was due and owing from the said Sligo and Shannon Railway Company to the said William Mackenzie, in respect of plans, plates, engravings, and other causes of action in the declaration mentioned, the sum of 3320l.; that the said Sligo and Shannon Railway Company should well and truly pay, or cause to be paid, unto the said William Mackenzie, or Messrs. Clutton, Cooper, & Ade, his attorneys, for the use of the said William Mackenzie, at, &c., the sum of 3320l. of lawful British money, in full satisfaction and discharge of and for all matters in difference in the cause referred to the said arbitrator as aforesaid, in the manner following, that is to say, the sum of 830l., being one fourth part of the whole amount of 3320l.; to be paid on the 12th of June next, the sum of 1106l. 13s. 4d., being one third part of the whole amount of 3320l., on the 26th of November next, and the sum of 1383l. 6s. 8d., the balance, by two equal payments, the first of such payments, amounting to the sum of 691l. 13s. 4d., to be made on the 26th of February, 1850, and the other, amounting to the like sum of 691l. 13s. 4d., on the 26th of May in the same year; that, upon payment of the said sum of 3320l., in manner aforesaid, the said William Mackenzie should, if required so to do, deliver to the said company, or their solicitors, all copper-plates, copper-plate engravings, and lithographed plans and sections, of or relating to **[252]** the said railway, and then in the custody, possession, or power of the said William Mackenzie; and that the said company should pay, or cause to be paid, the costs of the reference.

The order of reference was made a rule of court on the 10th of May, 1849; and, on the 18th of July, the costs of the reference were taxed and allowed at 98l. 5s.

On the 4th of May, 1849, the Vice-Chancellor of England, upon the petition of certain directors of the company, ordered "that the said Sligo and Shannon Railway Company be absolutely dissolved and wound up under the provisions of the joint stock companies winding up act, 1848; and that it be referred to one of the masters of the court, in rotation, to wind up the affairs of the said company under the provisions of the said act."

On or about the 24th of May, the petitioners, under the direction of Master Senior, caused to be inserted in the *London Gazette*, and also in the *Times*, *Morning Chronicle*, and *Daily News*, a notice of the master's intention to appoint an official manager of the said company on the 7th of June then next, and also the following notice:—

"In the matter of the joint stock companies winding up act, 1848, and of the Sligo and Shannon Railway Company:—

"Notice is hereby given, that all parties claiming to be creditors of this company, are to come in and prove their debts before Nassau William Senior, the master of the high court of chancery charged with the winding up of the said company, at his chambers, Southampton Buildings, Chancery Lane, London: and, until they shall so come in, they will be precluded from commencing or prosecuting any proceeding for the recovery of their debts."

Accordingly, on the 7th of June, the master ap-**[253]**-pointed James Edward Coleman to be official manager of the company: but neither the plaintiff, nor any person on his behalf, had come in and proved his debt before the master.

Upon an affidavit of the plaintiff, stating that he, on the 2nd of January instant, served Abraham Gole, who was, and still remained, the secretary of the company, duly authorised and acting in the affairs of the said company, at his residence at Chelsea, with a true copy of the rule of court of the 10th of May, 1849, and the allocatur thereunder written, and also a copy of the award, at the same time shewing him the originals, and demanded of him payment of the two instalments of 830l. and 1106l. 13s. 4d., due respectively the 12th of June and 26th of November, 1849, and the 98l. 5s. costs, which sums he refused to pay; and also stating a similiar service and demand upon William Galt, one of the directors of the company: and also an affidavit by the plaintiff's attorneys, negativing payment of the money to them or to either of them,

Creasy, on a former day in this term, obtained a rule calling upon the company to shew cause why they should not forthwith pay to the plaintiff, or to Messrs. Clutton & Ade, his attorneys, the several sums of 830l. and 1106l. 13s. 4d., being the respective amounts of the first and second instalments directed by the award to be paid, and also the 98l. 5s. for costs, pursuant to the said award, rule, and allocatur.

Wordsworth appeared to shew cause on behalf of Mr. Coleman, the official manager.

Creasy objected, that it was not competent to the official manager to appear in opposition to the rule, the appointment of an official manager pre-supposing the **[254]** dissolution of the company; 11 & 12 Vict. c. 45, ss. 21, 22; and he not being a party called upon by, or served with, the rule.

Wordsworth. Since the order for the dissolution and winding up of the company, the official manager is the only representative of the company. The 52nd section of the 11 & 12 Vict. c. 45, enacts, "that, where any action, suit, or other proceeding shall be pending against the company in respect of which such official manager shall have been appointed, or against any person authorised to be sued as the nominal defendant on behalf of such company, it shall be lawful for the plaintiff in such action, suit, or other proceeding, to substitute the official manager of such company, by such style or designation as hereinbefore mentioned, as the defendant in such action, suit, or other proceeding, by entering a suggestion on the roll to that effect in such action, and by obtaining an order to that effect in such suit, such order to be obtained on motion or petition, without notice; and that it shall be lawful for the plaintiff in such action, suit, or other proceeding, to prosecute the same thenceforward against the official manager, in the same manner, and with the same effect, to all intents and purposes, and to have the same benefit of any order, decree, judgment, or other proceeding previously made, obtained, and had, as if such action, suit, or proceeding had been commenced against the official manager as defendant under the provisions of this act." [Maule, J. The effect of that section is merely to give an option to the plaintiff.] The 73rd section enacts, that, after the first appointment of an official manager, no creditor or other person shall, except so far as the master shall permit, have power to commence, or to proceed with, any action against the official manager, or against the company, or any other person representing the same, or who is sued as **[255]** a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as thereinafter mentioned; and that it shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after proof shall have been made, or exhibited, before the master (*a*)[1]. [Cresswell, J. If you come here to say that the company does not exist, how can we hear you?] The company, notwithstanding its dissolution, still survives to a certain extent. [Maule, J. That is shewn by the 53rd section, which authorises the prosecution of pending actions on behalf of the company, in the name of the official manager. By what section is the company dissolved?] By the 14th and 16th, the former of which authorises the court of Chancery to make an absolute order for the dissolution and winding up, or for the winding up, of the company; and the latter of which enacts, "that, from the date of any order absolute for dissolution, or from any date to be therein fixed for that purpose, the company therein specified shall be absolutely dissolved." [Maule, J. The whole scope of the act shews that the company is not so dissolved as to be disabled from appearing for itself.] The order for the dissolution operates a complete suspension of all acts and proceedings by the company or any of its members or servants. The 57th section enacts, "that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof; and **[256]** shall be enforced in like manner, as if such judgments had been entered up against such company, or against any person duly authorised to be sued on behalf of the same." All these provisions, it is submitted, shew that the company can only be represented by the official manager, from the time of his appointment down to the final winding up of the affairs of the company. [Wilde, C. J. Upon whom was the rule served? Creasy. Upon the secretary and one of the directors.]

Wordsworth, admitting that he was instructed on behalf of the company, then proceeded to shew cause against the rule. The rule calls upon the company to pay two instalments of a sum awarded against them, and also the costs of the reference, and is objectionable on several grounds,—first, the company has been dissolved under the statute 11 & 12 Vict. c. 45, and therefore a service pursuant to the 135th section of the companies clauses consolidation act, 1845, 8 Vict. c. 16 (*a*)[2], is not a good service,—secondly, assuming the company to be for some purposes a subsisting company, the order prayed by the rule is in the nature of an attachment, which does not lie against

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(*a*)[1] A summons for that purpose had been taken out before the argument of the rule.

(*a*)[2] Which enacts that "any summons or notice, or any writ or other proceeding, at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post, directed to, the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company."

an incorporated company, who can only be made amenable by action or by mandamus,—thirdly, that, supposing an attachment will lie against an incorporated company, it will not lie for an instalment,—fourthly, that, assuming the company to be a subsisting company, and the remedy **[257]** properly prayed, there should have been a demand of the money on the official manager.

1. The service here was upon the secretary of the company, and upon one of the directors. The first winding-up act, 11 & 12 Vict. c. 45, received the royal assent on the 14th of August, 1848, the second, 12 & 13 Vict. c. 108, on the 1st of August, 1849. The dates of the proceedings in this case are as follows:—The order of reference was dated the 2nd of April, 1849. The arbitrator made his award on the 28th, directing the company to pay to the plaintiff 3320l., by four instalments, the first, 830l., on the 12th of June, the second, 1106l. 13s. 4d., on the 26th of November, and the balance, 1383l. 6s. 8d., by two equal payments, on the 26th of February, and the 26th of May, 1850. On the 4th of May, 1849,—after the making of the award, but before the time for payment of the first instalment,—the order absolute was obtained for the dissolution and winding up of the company under the first winding-up act; an official manager has been duly appointed; and the plaintiff has not proved his debt before the master, pursuant to the 73rd section of that act. The first question is,—what is the effect of the Vice-Chancellor's order? The 73rd section of the 11 & 12 Vict. c. 45, in terms prohibits any person from commencing or proceeding with any action against the company, or against any other person representing the company, without the permission of the master, until after proof of his debt or demand as therein provided. The rights of the parties in this case are not varied by the 12 & 13 Vict. c. 108, the 1st section of which enacts, amongst other things, that, "notwithstanding anything in the 11 & 12 Vict. c. 45, contained, importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether **[258]** incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than, and except, railway companies incorporated by act of parliament, to which companies such act shall not apply." The 38th section, however, which provides "that this act shall be taken and construed (so far as practicable) as a part of the said joint stock companies winding-up act, 1848," shews that the provisions of the second act were not intended to override proceedings which had already been taken under the first act.

2. This is a proceeding in the nature of an attachment. [Cresswell, J. Rather, in substitution for it.] An attachment does not lie against an incorporated company. [Wilde, C. J. It is a mere personal remedy.] Precisely so. In *Corpe* v. *Glyn* (3 B. & Ad. 801), a dock company were authorised by statute to sue and be sued by their treasurer, but he was not to be liable in his own person or goods by reason of his being defendant in any such action; and all costs incurred by him in prosecuting or defending any action for the company, were to be defrayed out of the moneys applicable to the purposes of the act. Two actions between the treasurer and Corpe, in one of which the treasurer was plaintiff, and in the other defendant, were referred to an arbitrator, who awarded against the treasurer in both, with costs. The costs and damages being unpaid, and an attachment being moved for against the treasurer,—it was held, that he had not rendered himself personally liable by submitting to an order of reference: and the court refused an attachment, but ordered a mandamus to the treasurer and directors to pay the sums awarded. [Wilde, C. J. Does the plaintiff contend that an attachment will lie against this company?] Creasy. No.

[259] 3. The same rules that are applicable to attachments, will apply to this proceeding. There have been numerous cases of motions for orders for the payment of money, to be rendered available under the 1 & 2 Vict. c. 110, s. 18; and it has uniformly been held that the same strictness of service and other matters is necessary as in the case of a motion for an attachment: *Jones* v. *Williams* (11 Ad. & E. 175, 4 P. & D. 217); *Neale* v. *Postlethwaite* (1 Q. B. 243, 4 P. & D. 623); *Doe* v. *Amey* (8 M. & W. 565, 1 Dowl. N. S. 23); *Kerr* v. *Jeston* (1 Dowl. N. S. 340); *Abrahams* v. *Taunton* (1 D. & L. 319); *Wilson* v. *Foster* (6 M. & G. 149, 6 Scott, N. R. 936); *Hawkins* v. *Benton* (2 D. & L. 465); *Dickenson* v. *Allsop* (13 M. & W. 722); *Winwood* v. *Holt* (3 D. & L. 85). [Williams, J. All these cases only shew, that, to entitle you to an order under the 1 & 2 Vict. c. 110, you must take all the same preliminary steps that would be required to found a motion for an attachment; not that you can only obtain an order in cases where an attachment would be granted.] It is only in cases that are clear and free from doubt, that the court will entertain an application of this sort: *Spence* v. *Clarkson* (1 Dowl. N. S. 837); *Holcroft* v. *Manby* (7 M. & G. 843, 8 Scott, N. R. 473). At all events, an attachment cannot be granted for an instalment: *Leveridge* v. *Forty* (1 M. & Selw. 706); *Atkinson* v. *Bayntun* (1 N. C. 444, 1 Scott, 404. But see *Cooke* v. *Whorwood*, 2 Wms. Saund. 337).

4. There has been no proper demand of the money: the affidavit states a service of the award, rule of court, and allocatur, and a demand of the money upon the secretary and one of the directors; whereas, it should have been, either upon the official manager, or upon the treasurer of the company, the person who, in the contemplation of the act, has the custody of their money. The 135th section of the companies clauses consolidation act applies only to summonses, notices, writs, and rules of court, and not to demands of money, which appear to be omitted. The 50th, 90th, 91st, 109th, and 143rd sections of that statute seem to shew that the treasurer is the person upon whom the demand should have been made. [Wilde, C. J. (addressing Creasy). Is it the practice of the court to proceed by way of attachment, so as to preclude the discussion of that which may amount to a bonâ fide defence, or by rule calling upon a party to shew cause why he should not pay money?]

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Creasy. It may be conceded that the plaintiff is bound to shew that the defendants will sustain no undue prejudice by this mode of proceeding. But, it is submitted that here the company could have no defence, if the plaintiff were to proceed to enforce the award by action. [Maule, J. Might they not set up the vice-chancellor's order?] Clearly not. The defendants cannot be prejudiced by this rule being made absolute: for, suppose an attempt were made to take any of their effects in execution under it, the question would then arise whether or not they had become vested in the official manager, by virtue of the vice-chancellor's order. He would not be concluded by the order of this court. The only object of this proceeding is, to enable the plaintiff to proceed against shareholders; as a preliminary to which he must obtain judgment and execution against the company: *Peart* v. *The Universal Salvage Company* (ante, vol. vi. p. 478, 6 D. & L. 322). [Maule, J. In truth, you wish us to decide a difficult question, upon motion, and so deprive the defendants of the means of reviewing our decision by a writ of error.] Undoubtedly, that would **[261]** be the effect of this motion. Very grave doubts have been entertained, whether the joint stock companies winding up act, 1848, was ever intended to apply to railway companies: and, at all events, the Lord Chancellor seems to have had no difficulty in holding the 33rd section of the 12 & 13 Vict. c. 108, to be retrospective: *In re the North of England Joint Stock Banking Company* (*Sanderson's case*) (19 Law Journ., N. S., Chan. 122). There, a motion, by way of appeal from a decision of a master, made under the winding-up act of 1848, was made to one of the vice-chancellors, and decided by him on the 7th of July. A notice of motion, by way of appeal from the vice-chancellor's decision, was given on the 8th of August, after the passing of the 12 & 13 Vict. c. 108. The motion was refused by the Lord Chancellor, on the ground of the notice of motion having been given more than three weeks after the decision of the vice-chancellor; and that the 33rd section (*b*) of the last-mentioned act, limiting the time within which notice of motion for a re-hearing must be given, applies to orders made under the winding-up act of 1848. [Maule, J. The court will only aid you in the way you ask, where the case is free from doubt. Cresswell, J. You must shew that the company is liable to an execution.]

Wilde, C. J. This rule asks for an order, upon which the plaintiff may proceed to judgment and execution against the property of the company. Now, it is contrary to the usual practice of the court, to give a **[262]** party a summary remedy, which shall have the effect of shutting out a discussion upon the merits, where there exists a reasonable and well-founded doubt. I think this is not a case in which we ought to make the order prayed.

Maule, J. I am of the same opinion. We might do great injustice if we granted

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(*b*) Which enacts "that no notice of motion for a re-hearing before the Lord Chancellor of Great Britain or Ireland respectively of any order of the Master of the Rolls in England or Ireland, or of any of the vice-chancellors in England, under the said act or this act, shall be given after the expiration of three weeks after the order complained of shall have been made."

this rule, and can do but little in refusing it, seeing that the plaintiff has still his remedy by action.

The rest of the court concurring,

Rule discharged, without costs.

STEAD v. ANDERSON. Jan. 31, 1850.

A., a prisoner in the Queen's prison, in execution for the costs of a nonsuit, was, by an order of the insolvent debtors' court made before the passing of the 11 & 12 Vict. c. 7, directed to file a schedule of his property, debts, &c., pursuant to the 36th section of the 1 & 2 Vict. c. 110. After the 11 & 12 Vict. c. 7, came into operation, the keeper of the prison, pursuant to the directions for the classification of prisoners under the 2nd section of that act, removed A. to that part of the prison appropriated to first-class prisoners:—Held, that such removal was proper.—Semble, that, where a prisoner complains of an undue exercise of authority by the gaoler, his proper course is, to apply to the court, or a judge, by petition, for relief under the 32 G. 2, c. 28, s. 11, and not by habeas corpus.

The plaintiff being in custody in execution at the suit of the defendant, for costs, and the defendant having on the 21st of December, 1847, obtained a vesting order under the statute 1 & 2 Vict. c. 110, s. 36, which order was, on the 23rd, served upon the keeper of the Queen's prison, and also upon the plaintiff, the plaintiff was, on the 4th of July, 1848 (he not having in the mean time filed a schedule, in obedience to the order), removed from that part of the prison in which he had before been detained as a prisoner of the third class, and placed in that part which, by the rules framed **[263]** by the secretary of state for the regulation and classification of prisoners, pursuant to the statutes 5 & 6 Vict. sess. 2, c. 22, and 11 & 12 Vict. c. 7, is devoted to first-class prisoners, which is composed of the three following descriptions of prisoners, viz. "First, debtors adjudged under the 77th, 78th, and 96th clauses of the 1 & 2 Vict. c. 110, as not entitled to the benefit of the said act, and to be discharged at some future period; secondly, debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for the relief of insolvent debtors, under the provisons of the 36th section of the 1 & 2 Vict. c. 110; thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud, or contempt of court."

Pashley, in Michaelmas term last, moved for a rule calling upon the keeper of the Queen's prison to shew cause why an attachment should not issue against him for the alleged improper detention of the plaintiff. The statute (11 & 12 Vict. c. 7, s. 2) under which the regulation as to first-class prisoners is made, received the Royal assent on the 28th of March, 1848, which was after the making of the vesting order. Now, by an invincible rule of construction of penal statutes, the words "when ordered," must be limited to an order made after the passing of the act. Thus, Lord Coke, in his Commentary on the statute of Gloucester, c. 3, that, if a man aliene a tenement that he holdeth by the law of England (*a*), his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of mortdauncestor, of the seisin of his mother, although the deed of his father doth mention that he and his heirs be bound to warranty," says (2 Inst. 292): "This extendeth to alienations made after the **[264]** statute, and not before; for, it is a rule and law of parliament, that, regularly, nova constituio futuris formam imponere debet, non præteritis." In *Ashburnham* v. *Bradshaw* (2 Atkyns, 36), there was a devise to charitable uses under a will in 1734; the testator lived till July, 1736, a month after the new statute of mortmain took place, and then died without revoking his will: it was referred by the court of Chancery to the judges for their opinion, whether this was a good disposition to charitable uses; and all of them certified that the devise to these uses was good in law, notwithstanding the act. So, in *Moon* v. *Durden* (2 Exch. 22), it was held by the court of Exchequer (dissentiente Platt, B.), that the 18th section of the 8 & 9 Vict. c. 109, which enacts that "all contracts and agreements by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of

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(*a*) I.e as tenant by the curtesy.

money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made," had not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed. In *Henderson* v. *Sherborne* (2 M. & W. 236, 239), Lord Abinger says: "The principle adopted by Lord Tenterden (*d*), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so." [Maule, J. There is no doubt that, in this country, the liberty of the subject is very much regarded and talked about, and that all statutes are to be so construed as to favour it, **[265]** rather than otherwise.] As to the remedy,—Hawkins, in treating of attachment, says (Hawk. P. C., book 2, § 12): "There being scarce anything of this kind to be met with in the books, I shall only observe, that it seems clear, from the general reason of the law, which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner against any such officer, not only for refusing to execute its commands, or for executing them irregularly, remissly, or oppressively, but also for all kinds of oppression or injustice done by them in the execution of their offices, or by colour of them." In 12 Co. 127, cited in Com. Dig. Imprisonment (I.), is an instance of an indictment against a gaoler—"quod ubi quidem Robertus de Bayons de Tunelby captus fuit, et in prisonâ Castri London' detentus pro quodam debito statuti mercatorii in custodiâ Thomæ Botelier, constabularii Castri de London', ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo gaolo, inter lenones, et vili prisonâ, contra formam statuti, &c. viz. de 1 Ed. 3, et in eodem profundo detinuit quousque idem Robertus fecit finem cum eo de 40s., quos ei solvit, et hoc per exactionem." And in Co. Litt. 260 a., it is said, that, "a man in prison by process of law, ought to be kept in salvâ et arctâ custodiâ, and, by the law, ought not to go out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be custodia, et non pœna; for, carcer ad homines custodiendos, non ad puniendos, dari debet" (*b*).

Wilde, C. J. There was a case in this court, of *Osborne* v. *Angle* (2 Scott, 500), where this matter was discussed. **[266]** By a rule of Hilary term, 3 G. 2, the warden of the Fleet Prison was directed to provide a confined room or dungeon for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor,—"that the general quietness and liberty of the rest of their fellow-prisoners may not be restrained or suffer thereby." A warrant from the Lord Mayor, for the apprehension, on a charge of forgery, of a prisoner in execution in the Fleet, being lodged at the door of the prison, the warden caused the party to be placed in the strong-room. A rule having been obtained, calling upon the warden to shew cause "why the defendant should not be restored to the proper and ordinary custody of the prison," I shewed cause; and, there being a good answer upon the merits, no discussion took place as to the form of the application. There may be some difficulty in granting a rule for an attachment in this case: but, still, the prisoner has a right to have the legality of his custody considered. If you think you can maintain a rule in the form adopted in *Osborne* v. *Angle*, probably it may be granted.

Maule, J. In Tidd's Practice (9th edit. p. 232), I find a statute set out which seems to provide for a case of this sort,—the 32 G. 2, c. 28,—the 11th section of which, "for the more speedy punishing gaolers, bailiffs, and others employed in the execution of process, for extortion, or other abuses in their respective offices and places," enacts, "that, upon the petition, in term time, of any prisoner or person being, or having been, under arrest or in custody, complaining of any exaction or extortion by any gaoler, bailiff, or other officer or person in, or employed in the keeping or taking care of, any gaol or prison, or other place, where any such prisoner or person under, **[267]** or having been under, arrest, or in custody, by any process or action, is or shall have been carried, or in respect of the arresting or apprehending any person or persons, by virtue of any process, action, or warrant, or of any other abuse whatsoever committed or done in their respective offices or places, unto any of His Majesty's

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(*d*) In *Proctor* v. *Mainwaring*, 3 B. & Ald. 145.

(*b*) The case of *The Canadian Prisoners, Leonard Watson and Others*, 9 Ad. & E. 731, was also referred to.

courts of record at Westminster, from whence the process issued by which any person who shall so petition, was arrested, or under whose power or jurisdiction any such gaol, prison, or place, is, or, in vacation time, to any judge of any such courts at Westminster from whence any such process so issued; or to the judges of assise, or justices of great sessions, in their respective circuits; or to the judge or judges of any other court of record where any prisoner or person being, or having been, under arrest or in custody, was arrested or in custody by process issued out of, or action entered in, any such other court of record within that part of Great Britain called England: every such court, judge of assise, and justices of great sessions, and judge and judges of all inferior courts of record, are hereby authorised and required respectively, within their several jurisdictions, to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses which shall, by any such petition, be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the full costs of every such complaint; and all orders and determinations which shall be thereupon made by any of the said courts, or any of the said judges, justices of assise, justices of great sessions, judge or judges of any such inferior court as aforesaid, respectively, in such summary way as is herein prescribed, shall have the same effect, force, and virtue, and obedience thereunto may be enforced by the respective **[268]** courts, judges, justices of assise, justices of sessions, judge or judges of any such inferior court, by attachment, or in any other manner, as other orders of the said respective courts, judges, justices of assise and great sessions, judge or judges of inferior courts of record, may be enforced." If that statute is still in force, the proper way of obtaining redress would seem to be by petition (*a*).

Pashley intimated his intention to proceed in the way suggested; and accordingly, on the 26th of November, he read a note of a case with which he had been furnished by Mr. Robinson, of the Crown Office:—"In the matter of Henry Gompertz, Easter term, 1837. Prosecutor had obtained several attachments against the defendant for not answering a bill in the Exchequer, &c., &c.; and application was made to the court of Queen's Bench for a rule calling on the marshal of the prison to confine the defendant (who had the liberty of the rules) within the walls. The defendant shewed for cause that the marshal had the discretion of giving the defendant the rules, or refusing them; and that the certificates of the defendant's medical men, as to his ill health, justified the marshal in allowing him to remain in the rules. But, per curiam. 'There is a manifest distinction between cases of debt, and criminal cases and cases for not answering. An attachment is a criminal proceeding: in such case, this court, and not the marshal, must exercise their discretion on the special **[269]** circumstances of the case.' And the rule was made absolute, to confine the defendant within the walls."

At the same time, he presented the following petition:—

"In the Common Pleas, between David Stead, Plaintiff, and George Anderson, Defendant.

"To the Right Honorable Sir Thomas Wilde, knight, lord chief justice, and the Honorable the justices of Her Majesty's court of Common Pleas at Westminster.

"The humble petition of David Stead, the above-named plaintiff.

"Sheweth—That, judgment having been given for the defendant in this action, the said defendant, on or about the 5th of October, 1847, caused a writ of ca. sa. to be sued out in this action, and directed to the sheriff of Middlesex, against your petitioner, for 377l., the defendant's costs in this action, and interest thereon; and that your petitioner was arrested by the said sheriff on the said writ, on the 9th of November in that year, and was, at his own instance, on the 25th of that month,

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(*a*) See *Yorke* v. *Chapman*, 10 Ad. & E. 207, 2 P. & D. 493; it was sought to restrain a prisoner from bringing an action of assault and false imprisonment against the marshal of the Queen's Bench Prison, on the ground that he ought to have proceeded, by petition, under the above statute: but the court held that the statute merely gave a cumulative remedy, and did not take away the common law right to proceed by action.

See *Ex parte William Cobbett*, ante, vol. v. p. 418.

delivered over by the said sheriff, on habeas corpus cum causâ, and committed to the Queen's prison, and there, then, and up to the time hereafter mentioned, was duly lodged as a prisoner of the class called Class 3 under the 5 & 6 Vict. sess. 2, c. 22.

"That, on the 4th of July, 1848, the said keeper removed your petitioner from out of the said division of the said Queen's prison, duly appropriated for the said third class, into the division appropriated for the first class, and has ever since detained him there, although your petitioner continued without any other cause of detention than the said commitment in execution; but the said keeper alleged, and alleges, that, the said **[270]** defendant in this action having, on the 23rd of December, 1847, lodged at the prison a vesting order of your petitioner's estate, with a certain indorsement thereon, limiting a time for filing a schedule, and sued out of the court for relief of insolvent debtors by the said defendant, and your petitioner not having filed a schedule according to the said indorsement, your petitioner was and is a prisoner of the first class, from and after the passing of the 11 & 12 Vict. c. 7, intituled 'An act to amend an act consolidating the Queen's Bench, Fleet, and Marshalsea prisons, and for regulating the Queen's prison:'

"That, by the said last-mentioned act, the said first class of prisoners is composed of the three descriptions of persons following, that is to say,—First, debtors adjudged, under the 77th, 78th, and 96th clauses of the 1 & 2 Vict. c. 110, as not entitled to the benefit of the said act, and to be discharged at some future period,—Secondly, debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for relief of insolvent debtors, under the provisions of the 36th section of the 1 & 2 Vict. c. 110,—Thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud, or contempt of court:

"That such removal was against your petitioner's consent, and on threats by the keeper, or his officers, of force, in case your petitioner refused to remove; and your petitioner solemnly protested against such removal, and has continued to remonstrate with him against such detention as a prisoner of the said first class, and frequently required the said keeper to allow him to remain or be in the said division for Class 3, being the general prison to which prisoners are committed on habeas corpus; and, particularly, your petitioner, on the 26th of September, 1848, applied to the said keeper, or his proper officer in attendance, and in his place, by notice **[271]** in writing, whereby your petitioner demanded of him, within the space of six hours after making that demand, a true copy of the warrant or warrants of your petitioner's commitment and detainer in the criminal side and separate division of the Queen's prison appointed for prisoners of the first class, being prisoners confined for other causes than for debt; and that the clerk of the papers of the said Queen's prison sent your petitioner an answer in writing, to the said demand, as follows:—'The Queen's prison is not a criminal prison, and David Stead is not confined or imprisoned therein for a criminal, or supposed criminal, offence. David Stead is confined or imprisoned for debt, and can have a copy of the causes of his detainer, by paying the authorised fee of 3s. 6d.'

"That the said keeper has not in fact any warrant whatever for such removal and detention of your petitioner as a prisoner of the said first class, but acts on his own surmise of the law and fact that your petitioner was so ordered as described in the last-mentioned act of parliament; and your petitioner believes that such surmise is only founded on his, the keeper's, own reading and considering a duplicate copy left with him of the said vesting order and indorsement; and, with respect to the law and fact of your petitioner's so refusing or neglecting, he admits that he has no warrant whatever thereof, but requires your petitioner to produce to him a certificate from the said court that he has filed a schedule:

"That the aforesaid division appropriated to the said third class, being the general prison aforesaid, is a large and comparatively well-accommodated place and habitation, and comprises the far greater part of the original prison, from which the division of the said first class, and a division for confinement of persons under sentence of criminal courts, are small wards; and the **[272]** persons confined in the said first class are in fact effectually cut off from communication with the persons in Class 3; and that iron bars are affixed to the windows of the Class 1; and the only place for air and exercise of the said class is, a narrow dark courtyard, of about one tenth the area of the space enjoyed by Class 3; and that your petitioner has suffered greatly in his health by such further confinement in such narrow prison of punishment, and he feels that his constitution, which was before very excellent, cannot long hold out in such confinement.

"Your petitioner, therefore, humbly prays your lordships to hear and determine the same petition in a summary way, and to make an order thereupon for redressing the abuses by such petition complained of, and for making reparation to your petitioner, as your lordships shall think just, together with the full costs of such complaint. And your petitioner will ever pray, &c."

(Signed) "DAVID STEAD."

This petition was accompanied by the following affidavit of the prisoner:—

"David Stead, a prisoner in the division appropriated for prisoners of the first class in the Queen's prison, the above-named plaintiff, maketh oath and saith, that the name 'David Stead' to the petition hereto annexed, is in the proper handwriting of this deponent; that all the allegations of this deponent as such petitioner in the said petition, are true; that the paper writing hereto annexed, marked A.(*a*), is a true copy of his copy of **[273]** causes furnished to him on the 25th of November last, since which no alteration has taken place in his causes of detention; that the printed book of regulations of the said Queen's prison, and purporting to be approved and signed by Sir George Grey on the 17th of June, 1848, and to bear thereon the seal of the said Queen's prison, now shewn to this deponent, marked B., is a true copy of the regulations in force on the 4th of July, 1848; and this deponent verily believes the same is a true copy of the regulations made by the said Sir George Grey, as secretary of state, under the acts of parliament in that case made and provided, 'for regulating the Queen's prison,' and the same regulations have remained, and remain, in force there, and no other regulations have been made, or are in force there, from or since the said 4th of July, to the best of the knowledge and belief of this deponent."

On the same day,

Pashley moved that the plaintiff might be discharged out of custody, under the 48 G. 3, c. 123, which enacts that all persons in execution upon any judgment obtained in any court, &c., for any debt or damages not exceeding 20l., exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application for that purpose, in the manner therein mentioned, be forthwith discharged out of custody as to such execution, by the rule or order of such court. Although that statute, in terms, applies to defendants only, yet, being remedial, it has been held, **[274]** in *Roylance* v. *Hewling* (3 M. & Selw. 282), to apply to a plaintiff in execution for costs of a nonsuit: and, though some doubt seems to have been thrown upon that case in *Tinmouth* v. *Taylor* (10 B. & C. 114, 5 M. & R. 44), yet it was acted upon in a later case of *Bradley* v. *Webb* (7 Dowl. P. C. 588). The damages in the action in which these costs were incurred, could only have been 40s.

MAULE, J. The cases all treat the costs as a judgment-debt. The plaintiff here cannot, in any sense, be said to be in execution upon a judgment for a debt not exceeding 20l.

The rest of the court concurring,

This rule was refused.

W. H. Watson and Unthank were now heard on behalf of the keeper of the Queen's prison, in opposition to the plaintiff's petition. The 17th section of the 5 & 6 Vict. c. 22, enacted that prisoners in the Queen's Prison should be classed thus,—"1. Debtors remanded by the commissioners of the court for the relief of insolvent debtors, on the ground of fraud, or for refusing to file a schedule of their property; 2. Debtors who do not maintain themselves, and are not included in the first class; 3. Debtors who do maintain themselves, and are not included in the first class; 4. Prisoners committed for libel; 5. Prisoners committed for assault; 6. Prisoners committed by courts-martial; 7. Prisoners not included in one of the foregoing classes. And that it shall be lawful for the secretary of state to make separate rules for each class of prisoners; and that,

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(*a*) The copy of causes stated that the defendant had been committed in execution upon a habeas corpus on the 25th of November, 1847, the return to which stated that he had been taken under a ca. sa. on the 9th of that month, at the suit of Anderson "for 377l. costs and charges in the said suit mentioned;" and that "on the 23rd of December, 1847, an order of the court for relief of insolvent debtors was left with the keeper, made upon the petition of Anderson, vesting the real and personal estate of the plaintiff, in the provisional assignee for the time being, &c."

as far as the construction of the prison will allow thereof, the prisoners of each class shall be sepa-**[275]** rated from each other, and especially the debtors from the prisoners confined for other causes than for debt." The 11 & 12 Vict. c. 7, s. 1, recites that part of the 17th section of the former act which relates to first class prisoners, and that "doubts have arisen as to the construction and application of so much of the above-recited act as sets forth the description of such debtors as shall be comprised in the first class," and repeals that provision: and the 2nd section enacts "that, from and after the passing of that act, the first class of prisoners in the Queen's prison shall be composed of the three following descriptions of persons, viz. First, debtors adjudged, under the 77th, 78th, and 96th clauses of the 1 & 2 Vict. c. 110, as not entitled to the benefit of the said act, and to be discharged at some future period: Secondly, debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for the relief of insolvent debtors, under the provisions of the 36th section of the 1 & 2 Vict. c. 110: Thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud or contempt of court." The vesting order in this case, which was obtained upon the petition of Anderson, was lodged on the 23rd of December, 1847. The 11 & 12 Vict. c. 7, passed on the 28th of March in the following year. It will be contended on the other side, that the 11 & 12 Vict. c. 7, is not retrospective, and therefore does not apply to the plaintiff. That statute, however, merely describes a class of prisoners, to one of which the plaintiff belongs, as a "debtor refusing or neglecting to file a schedule of his property, when ordered to do so by the court for the relief of insolvent debtors." The refusal and neglect is a continuing contempt of court from the time of the making of the order, thenceforward. [Maule, J. Can a man be imprisoned for refusing or neglecting to file a schedule, unless he has **[276]** been brought up, and committed by the court for not doing so?] There is no clause in the act authorising the commissioners to have the prisoner brought up, or to commit him, for such refusal or neglect. By the 69th section, it is provided that the prisoner shall, within fourteen days next after the making of the vesting order, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the court shall think reasonable, deliver in to the court a schedule of his debts, property, &c.: and, by the 70th section, the court is impowered to appoint a time and place for bringing up the prisoner, after his schedule has been filed. [Cresswell, J. The court has no power to compel him to file a schedule, if he chooses to take the consequences of his default.] None (*a*). [Wilde, C. J. How does the gaoler know whether the party has been **[277]** guilty of neglect or not?] He derives his information from the court.

Pashley, in support of the petition. The 11 & 12 Vict. c. 7, repeals the 5 & 6 Vict. c. 22, s. 17, so far as it relates to first class prisoners; and the 2nd section of the repealing act can only apply to future offenders,—"when ordered so to do," clearly

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(*a*) In Cooke's Practice of the Insolvent Court, 2nd edit., p. 28, it is said: "There is no specific penalty, beyond commitment to close custody in the county gaol, for contempt under the 66th section,* denounced as attaching to a prisoner's neglect or refusal to obey this order of the court, requiring him to file a schedule; but the provisional assignee is impowered at once to take possession of the debtor's property of every nature and description. It was, perhaps wisely and considerately, thought by the legislature, that close imprisonment, with forfeiture of all property, was punishment enough for this offence."

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* The 66th section of the 1 & 2 Vict. c. 110, enacts, "that, in case any assignee or other person shall disobey any rule or order of the said court, duly made by the said court for enforcing the purposes and provisions of this act, or made and entered into by the consent of such assignee or other person for carrying into effect the purposes and provisions of this act, it shall and may be lawful for the said court to order the person so offending to be arrested and committed, as for a contempt of the said court, to the prison of the Queen's Bench, or to the common gaol of any county, city, or place where he or she shall be, or where he or she shall usually reside, there to remain without bail or mainprize until such person shall have fulfilled the duty required by the said recited acts or this act, or until the said court shall make order to the contrary."

cannot mean "who may heretofore have been ordered so to do," which is the construction contended for on the other side. The insolvent could not be said to be in default, or, at all events, the keeper of the prison could not know the fact, unless he had been brought up before the insolvent court, and committed for not doing what that court clearly had the power to order him to do. [Maule, J. You say that the new act will not apply where the order is made before, and the default or disobedience takes place after, its passing?] Yes. [In further support of his argument Pashley referred to the authorities before cited, viz. 2 Inst. 292, *Ashburnham* v. *Bradshaw*, and *Moon* v. *Dunden*; and particularly to the judgment of Rolfe, B., in the last-mentioned case.]

Wilde, C. J. This case appears to me to be free from difficulty; and the construction to be put upon the statutes referred to, seems to me to be plain and obvious. By the 36th section of the 1 & 2 Vict. c. 110, it is provided, that, if any prisoner who shall have been committed to any prison or gaol, and charged in execution for any debt, damages, or costs, &c., shall not, within twenty-one days, make satisfaction to the creditor at whose suit he shall have been so committed or charged in execution,—it shall be lawful for the creditor to apply, by petition, to the court for an order vesting the estate and effects of such prisoner in the provisional assignee; and the party or parties present-**[278]**-ing such petition, shall thereby state that he or they is or are desirous that such prisoner should be ordered to file a schedule of his property according to the provisions of this act, and should thereupon be brought up before the said court, to be dealt with according to the provisions of the act; and the said court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to the act, and all things to be done thereupon, or preparatory thereto, as in other cases according to the act. Section 37 vests the prisoner's estate and effects in the provisional assignee, immediately upon the filing of such petition, and the evidence in support thereof. The 69th section enacts, that every prisoner whose estate shall, by an order to be made under the act, be vested in the provisional assignee of the said court for the relief of insolvent debtors (whether upon his own petition, or on the petition of any such creditors as aforesaid), shall, within fourteen days next after such order shall have been made, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the said court shall think reasonable, deliver in to the said court a schedule of his debts, property, &c. The 70th section enacts, that the said court for the relief of insolvent debtors, shall forthwith, after such schedule shall have been filed as aforesaid in the said court by such prisoner, appoint a time and place for such prisoner to be brought up before such court, &c., to be dealt with according to the provisions of the act. The 71st section provides for the giving of notice to the creditors; and some subsequent sections regulate the mode of proceeding at the hearing. These several clauses form a series which seem to me to be perfectly intelligible, shewing that, if the debtor **[279]** does not himself proceed to give his creditors the benefit of the act, the creditors may call upon the court to exercise its jurisdiction, and vest the property in the official assignee. The debtor having filed a schedule in obedience to the order of the court, and a day having been appointed for the hearing, the insolvent may be brought up, and dealt with as in the case of a petition presented by himself. But it no where seems to be contemplated, that the insolvent is to be brought up to be examined or dealt with in any way before he has filed such schedule. The act names a certain time for filing the petition, but superadds a power of extension, the mode of obtaining which extension is pointed out by the rules and practice of the court. Now, the 11 & 12 Vict. c. 7, s. 2, the object of which seems to have been merely to remove doubts as to the construction of the 5 & 6 Vict. c. 22, and not to relax any of its provisions, enacts that the first class of prisoners shall be composed (amongst others) of debtors refusing or neglecting to file a schedule of their property, when ordered so to do by the court for the relief of insolvent debtors, under the provisions of the 36th section of the 1 & 2 Vict. c. 110. Looking at the provisions of the insolvent act, there can be little doubt that the party is not to be brought up until after the filing of his schedule. The question is, whether the words "refusing or neglecting to file a schedule of their property, when ordered so to do by the court," mean that the refusal or neglect shall be a refusal or neglect to file a schedule which the party has been directed to file, by an order made subsequently to the passing of the 11 &

12 Vict. c. 7, or whether, the gaoler, finding him, at the time that act passed, in the position of having been guilty of the particular default, is not justified in placing him amongst the prisoners of that class, without waiting for a second order. I see nothing in the insolvent act [280] rendering it necessary for the court to make any second order: and I cannot conceive that the legislature, in passing a statute having for its object the classification only, and not the punishment, of prisoners, should have contemplated the necessity of bringing up a prisoner, and a second time ordering him to do that which he had already been fruitlessly ordered to do. If they had so intended, they would doubtless have said it in plain and explicit terms. It appears to me that Mr. Stead, is a person in the condition contemplated by the statute, of having refused or neglected to file a schedule when ordered so to do by the insolvent court; and, therefore, that he has properly been removed to that part of the Queen's prison from which he seeks to be relieved. Whether the insolvent court had or had not power to make a second order, it is immaterial for us to consider, inasmuch as I think that none was necessary.

The rest of the court concurring,

Petition dismissed.

Watson asked for the costs to which the keeper of the prison had been put in opposing the petition.

Wilde, C. J. Applications of this sort ought not to be made, except upon reasonable grounds. As it does not appear to the court that there was reasonable ground for complaining of the conduct of the gaoler here, we think the prisoner ought to bear the costs of his speculative attempt.

Petition dismissed with costs.

[281] Dye v. Bennett. Jan. 28, 1850.

[S. C. 1 L. M. & P. 92.]

Distance, and the smallness of the amount of the plaintiff's claim, form no ground for refusing a writ in the nature of a mandamus for the examination of witnesses abroad, on behalf of the defendant, under the 1 W. 4, c. 22.

Hunter, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why a writ in the nature of a mandamus should not issue, directed to the chief justice and the other judges of the Supreme Court of Judicature at Sydney, in New South Wales, commanding them to hold a court for the examination of John Spinks and such other witnesses on behalf of the defendant in this cause, and for receiving other proofs therein, pursuant to the statutes for that purpose made and provided (*a*), as may be within the jurisdiction of that court, and to perform all such matters and things as by the directions of the said statutes were required; and why the depositions to be thereupon taken, should not be transmitted, under the seal of the said court, to the masters of this court; and why the trial of this cause should not be postponed until the return of the said writ, or until the court shall otherwise order.

The motion was founded upon the affidavits of the defendant and his attorney (*b*), which stated that the action was brought for the recovery of 69l. 13s. 8d., the balance alleged to be due from the defendant to the plaintiff, for wages as mate of the ship "Countess of Yarborough"; that issue was joined on the 27th of December last, and notice of trial given for the sittings after this term; that John Spinks, an officer in Her Majesty's Customs at Sydney, in New South Wales, [282] and several persons, are now residing at Sydney aforesaid, who are material and necessary witnesses for the defendant, and without whose testimony the deponents were advised and verily believed that the defendant could not proceed with safety to the trial of the cause.

Haines now shewed cause. The granting a writ under these statutes is not a matter of course: the applicant must shew reasonable ground for it. [Wilde, C. J. Primâ facie, the party is entitled to have his witnesses examined, wherever they may happen to reside. It is for the party objecting, to shew some ground of objection.] In *Lloyd* v. *Key* (3 Dowl. P. C. 253), it was held, that, where a witness resides abroad,

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(*a*) 13 G. 3, c. 69, as to India, extended, by 1 W. 4, c. 22, to all the colonies.

(*b*) See *Healy* v. *Young*, ante, vol. ii. p. 702.

at such a great distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission, on the application of the defendant. [Maule, J. The statutes contemplated that considerable delay would sometimes arise.] The 1 W. 4, c. 22, s. 1, provides that the power thereby given shall only be exercised "when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for." Here, regard being had to the small amount of the plaintiff's claim, and the enormous expense of the writ, the granting it will amount to an absolute denial of justice. In *Cow* v. *Kinnersley* (6 M. & G. 981, 7 Scott, N. R. 892, 1 D. & L. 906), the defendant was required to bring the money into court.

Wilde, C. J. I see no ground whatever for not allowing the writ to go in this case. In *Cow* v. *Kin*-**[283]**-*nersley*, the affidavit did not give the name of a single witness, nor did it even state that the defendant believed there were persons at Bombay who could give evidence in her favour. Here, however, the affidavits present all that the court has ever required. Let the writ be returnable on the 18th of November next.

The rest of the court concurring,

Rule absolute accordingly.

Gadsden *v.* M'Lean. Jan. 31, 1850.

A capias is not grantable to hold the defendant to bail, in an action by the indorsee of a bill of lading against the master of the vessel, for a deceit in the representation in the bill of lading signed by him, that the goods were "shipped in good order and well-conditioned."—The court ordered a bail-bond, which had been taken under a judge's order to hold to bail in such an action, to be delivered up to be cancelled.

A writ of summons having issued against the defendant at the suit of the plaintiff, in an action on promises, a judge's order for a capias to hold the defendant to bail, under the 1 & 2 Vict. c. 110, s. 3, was obtained, upon an affidavit by the plaintiff, to the following effect:—

That this action is brought to recover compensation in damages from the defendant for the loss sustained by this deponent under the circumstances hereinafter mentioned: that this deponent, on the 19th of September, 1849, entered into a contract in writing with Thomas Melladew, as agent of James Scotland, of Memel, merchant, for the purchase of about 3000 qrs. of good conditioned oats, at 9s. 3d. per quarter, free on board at Memel: that, according to the custom of merchants in the said trade, this deponent was to pay for the oats to be shipped in pursuance of the said contract of purchase, by accepting the seller's drafts to be drawn **[284]** upon him, on receipt of a bill of lading for the oats shipped according to the said contract: that, in pursuance of the said contract, and according to the aforesaid custom of merchants, this deponent was called upon by the said Thomas Melladew, as the agent of the said James Scotland, the seller of the said oats, to accept four bills of exchange, amounting together to the sum of 718l. 11s., drawn by the said James Scotland upon this deponent, bearing date, respectively, the 19th of November, 1849, and payable at eight days after date thereof respectively, upon a bill of lading being produced to this deponent as the bill of lading of the pretended shipment of part of the oats sold to this deponent under the said contract, and which was signed by the above-named defendant as the master of the ship "Mercury," and of which the following is a copy:—

"Shipped, by the grace of God, in good order and well-conditioned, by Mr. J. Scotland, in and upon the good ship or vessel called the 'Mercury,' whereof is master, under God, for this present voyage, A. M'Lean, and now riding at anchor in this harbour, and, by God's grace, bound for London, to say, 1563, fifteen hundred and sixty-three quarters of oats, being marked and numbered as in the margin, and are to be delivered, in the like good order and well-conditioned, at the aforesaid port of London, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever, save risk of boats, so far as ships are liable thereto, excepted, unto order, or to assigns, he or they paying freight for the said goods as per charter-party, with primage and average accustomed: In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the [285] other two to stand void: And so God send the good ship to her desired port in safety.

"Memel, Nov. 19, 1849." (Signed) "ALEX. M'LEAN, Master."

(Indorsed) "James Scotland, Nov. 19, 1849."

That this deponent was induced so to accept the said bills of exchange by the tender and delivery to him of the said bill of lading, and upon the faith and reliance that the oats therein acknowledged by the defendant to have been received on board his said vessel in good order and well conditioned, were accordingly in good order and well conditioned when shipped; and that, but for the delivery to him this deponent of a bill of lading containing such acknowledgment of the good order and condition of the oats when shipped, as aforesaid, this deponent would not have accepted the said bills of exchange, or either of them: that he, this deponent duly paid the amount of the said several bills of exchange so accepted by him as aforesaid, to the respective holders thereof, when they respectively arrived at maturity: that the "Mercury" arrived in the port of London, on the 8th of December, 1849; and that he, this deponent, went on board thereof on the 10th, and inspected the said oats shipped on board thereof, which are mentioned in the said bill of lading, and found the same to be in a very damaged state, from heating: that the mate of the said vessel admitted to this deponent, that the said oats were in a bad and heated state when they were received on board the said vessel at Memel: that, on the 12th of December, the deponent again went on board the said ship "Mercury," and saw the defendant, and spoke to him on the subject of the said oats, and their damaged condition, when the defendant admitted that the said oats were out of condition when he the defendant took them on board his vessel, and that, if he had had a long voyage, the oats [286] would before arrival only have been fit to be thrown away; that, if the said oats had arrived in good order and well conditioned, they would have produced such an amount, by the sale thereof, after payment of freight and all expenses, as would have fully reimbursed this deponent the amount of the said several bills of exchange so accepted and paid by this deponent in payment of the contract price for the said oats as aforesaid; but that, this deponent had had the said cargo of oats valued, and that the market value thereof, in their actual condition on arrival, was less, by the sum of 270l. and upwards, than the market value of the same oats if in good order and well conditioned: that, by reason of the premises, and under the circumstances herein set forth, he, this deponent, had sustained damage to the amount of the said sum of 270l. and upwards: that this deponent had caused payment of his said claim to be demanded from the said defendant, but that he had been unable to obtain payment of, or satisfaction for the same, or any part thereof: that the defendant's said vessel was then in the river Thames, and the deponent had been informed by Mr. George Wedd, of, &c., merchant, that the defendant applied to him to charter the ship for Alexandria, and which information the deponent verily believed to be true, and the deponent verily believed that the defendant was negotiating a charterparty for Alexandria aforesaid, or for some other foreign port, and that the defendant was then about to take in his ballast, and that the ballast was then alongside the said ship, in order that he might proceed to such foreign port as soon as he should have arranged the terms of his charterparty; and the deponent verily believed that the defendant intended to leave England in a day or two, on his said voyage, and that he would so quit England, unless he were apprehended and held to bail: and that, unless [287] the defendant were so apprehended and held to bail, the deponent would be in great danger of losing the compensation in damages to which he is advised he is entitled from the defendant; and that he had caused a writ of summons to be issued out of this court against the defendant at the suit of him the deponent.

The defendant was arrested upon a capias issued pursuant to the judge's order, on the 26th of December last, and was discharged from custody on the 31st, upon giving a bail-bond to the sheriff.

Prentice, on a former day, obtained a rule calling upon the plaintiff to shew cause why the judge's order, and the capias issued in pursuance thereof, should not be set aside, and why the bail-bond should not be delivered up to be cancelled, on the ground that the affidavit to hold to bail disclosed no cause of action. He submitted that the bill of lading is a mere contract between the shipper and the ship-owner; *Thompson* v. *Dominy* (14 M. & W. 403); and that the representation therein that the goods are shipped in good order and well conditioned, is not a representation made to an indorsee, whatever might be its effect as between the immediate parties to the contract.

Bovill now shewed cause. The first part of the rule cannot be sustained, all the materials which were before the judge at chambers not having been brought before the court; the defendant can only, at the most, have the bail-bond cancelled: *Needham* v. *Bristow* (4 Scott, N. R. 773, 1 Dowl. N. S. 700). The question is, whether a good cause of action appears upon the affidavit upon which the defendant was held to bail. [Maule, J. Are we to try the existence of a **[288]** cause of action, upon affidavit?] There is no difficulty as to the property in the goods passing by indorsement of the bill of lading: the only question is, whether the master incurs any responsibility when he makes upon the face of the bill of lading a representation which is false in fact, and false within his own knowledge. A host of cases, from *Pasley* v. *Freeman* (3 T. R. 51) down to *Langridge* v. *Levy* (2 M. & W. 519, S. C., in error, *Levy* v. *Langridge*, 4 M. & W. 337) and *Pilmore* v. *Hood* (5 N. C. 97, 6 Scott, 827), has settled the grounds upon which an action for deceit, in making false representations, is maintainable. *Howard* v. *Tucker* (1 B. & Ad. 712) has some bearing upon this case. There, goods being shipped in India for London, on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading signed by the captain, stated the freight to have been paid in Bengal, but it was found, after the above transfer, that the freight never had been paid, through the default of the shipper. It was held that the ship-owners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. If, in the present case, the plaintiff had not been deceived by the representation made by the master, he would not have accepted the bills drawn on account of the oats. [Wilde, C. J. The question is whether the affidavit discloses so clear and distinct a cause of action, as to justify the defendant's being held to bail.] Enough is shewn upon the face of the affidavit, to justify the order (the master having himself acknowledged that the oats were in a bad condition when shipped), and to cast upon the defendant the necessity of applying for his discharge under the 6th section of the 1 & 2 Vict. **[289]** c. 110: and, if so, the affidavits filed in opposition to this rule, abundantly answer the application.

Channell, Serjt., and Prentice, contrà, were not called upon.

Wilde, C. J. The court is of opinion that the affidavit upon which the order for the capias in this case issued, does not disclose any good cause of action. The ground of the action is said to be fraud; but, to constitute fraud, it would be necessary to shew that the master had knowledge of the unsound state of the oats when they were shipped. All that the affidavit states in support of that charge is, a conversation into which the master seems to have been not very fairly entrapped. Upon the whole, we think that remedy enough will be given to the defendant, by ordering the bail-bond to be delivered up to be cancelled, without costs.

Rule absolute accordingly.

WILLIAM ROBINSON *v.* EDWARD FRANCIS BURBIDGE (SUED AS EDWARD FRANCIS BURBRIDGE) AND THOMAS WILLIAM O'KEEFE. Jan. 31, 1850.

It is no objection to an order nisi to charge stock, pursuant to the 1 & 2 Vict. c. 110, ss. 14, 15, that it calls upon the judgment-debtor to shew cause on a day certain.

Judgment having been signed on the 25th of May, 1849, against "Edward Francis Burbridge, and another," upon a warrant of attorney, in which the defendants were described as "Edward Francis Bur-**[290]**-bidge and Thomas William O'Keefe," the following order was obtained ex parte, in pursuance of the 1 & 2 Vict. c. 110, ss. 14, 15:—

"*William Robertson* v. *Edward Francis Burbidge, sued as Edward Francis Burbridge and Thomas William O'Keefe.*—Upon reading the affidavit of the plaintiff, I do order, that, unless cause be shewn to the contrary before me, or such other judge as shall be in attendance at the judges' chambers, Rolls Gardens, Chancery Lane, on Monday, the 14th of January instant, at 3 o'clock in the afternoon, by the defendant Burbidge, his attorney or agent, that the sum of 27,064l. 16s. 11d. Bank 3 per cent. Annuities, remaining on the credit of the cause of *Burbidge* v. *Burbidge*, pending in the high court of Chancery, in the name of the Accountant-General of that court, "The Legacy Account," shall be, and shall in the meantime stand, charged with the payment of the sum of 4000l. to the plaintiff, being the amount for which judgment has been recovered in this cause, and 3l. 10s. costs, and interest thereon, pursuant to the statute 1 & 2 Vict. c. 110.

"Dated, the 3rd day of January, 1850. "T. N. TALFOURD."

On the 5th of January, Burbidge's attorneys gave notice to the plaintiff's attorney that they would attend, by counsel, on the 9th, at 12 o'clock at noon, to shew cause against the above order. The plaintiff's attorney declining to attend on the 9th, pursuant to this notice, Burbidge appeared by counsel on that day before Maule, J., for the purpose of shewing cause; but that learned judge declined to hear him: and, on the 14th, the original order of the 3rd was made absolute, no one appearing to oppose it. On the 16th, these two orders were made a rule of court. On the 21st,

[291] Whateley, on behalf of Burbidge, obtained a rule nisi to set aside the above orders and rule of court, with costs, on the grounds, that there was no such judgment as that mentioned in the first order, and that the order did not comply with the statute.

Humfrey now shewed cause. This court has no jurisdiction in the matter, be the order as bad as it may. In *Witham* v. *Lynch* (1 Exch. 391), a judge at chambers having made an order charging an annuity payable out of the suitors' fund, by order of the lord chancellor, in pursuance of the provisions of the 46 G. 3, c. 128, the court of Exchequer, considering it doubtful whether or not the judge's order was valid, refused to set it aside, as, by so doing, they would deprive the party of the right of appeal. [Cresswell, J. The conclusion you draw from that case, is not warranted by the judgment of the court. Maule, J. Mr. Baron Parke expressly says that the court has a general jurisdiction, unless there be something in the context that is repugnant to that construction.] At all events, there is no ground for setting aside the order in question. [The court called on]

Honyman to support the rule. The order was clearly bad. There is no judgment in a cause intituled as the judge's order is intituled: and these orders, being in the nature of writs of execution, must correspond with the judgment. The cases of *Reeves* v. *Slater* (7 B. & C. 486. 1 M. & R. 265), *Fisher* v. *Magnay* (1 D. & L. 40), *Tagg* v. *Simmonds* (4 B. & L. 582), shew how strict the practice is in this respect.

The learned judge had no authority to make the order in the form in which it is framed: instead of **[292]** limiting the defendant to a particular day for shewing cause, he should, according to the words of the 15th section, have afforded him the opportunity of coming to shew cause at any time within a given period,—"within a month," or "within six calendar months," as in *Fowler* v. *Churchill* (11 M. & W. 57), and *Morris* v. *Manesty* (7 Q. B. 674). That the court has jurisdiction to entertain an application of this sort, is clear, from *Brown* v. *Bamford* (9 M. & W. 42), and *Witham* v. *Lynch*; though, in the latter case, some members of the court express themselves very guardedly.

WILDE, C. J. I am of opinion that this rule should be discharged. It seems to me that no sufficient objection to the order of my brother Talfourd has been pointed out. The statute which authorises the making these orders for charging stock (*d*),

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(*d*) The 14th section of the 1 & 2 Vict. c. 110, enacts, "that, if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the provides, that, unless the judgment-debtor shall, within a time to be mentioned [293] in such order, shew to a judge of one of the superior courts sufficient cause to the

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judgment-debtor: provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

And section 15, "in order to prevent any person against whom judgment shall have been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment-creditor, under an order of a judge," further enacts "that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this act, shall be made, in the first instance, ex parte, and without any notice to the judgment-debtor, and shall be an order to shew cause only; and such order, if any government stock, funds, or annuities, standing in the name of the judgment-debtor, in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the mean time and until such order shall be made absolute or discharged; and, if any stock or shares of or in any public company, standing in the name of the judgment-debtor, in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall, in like manner, restrain such company from permitting a transfer thereof; and that, if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then, and in such case, the corporation or person or persons so permitting such transfer, shall be liable to the judgment-creditor for the value or amount of the property so charged or so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment-debtor in the mean time shall be valid or effectual as against the judgment-creditor; and, further, that, unless the judgment-debtor shall, within a time to be mentioned in such order, shew to a judge of one of the superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment-debtor, his attorney or agent, be made absolute: provided, that any such judge shall, upon the application of the judgment-debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application, as he may think fit."

And see the 3 & 4 Vict. c. 82, s. 1, which, reciting the 1 & 2 Vict. c. 110, s. 14, and that "doubts have been entertained whether the said provisions extend to the cases hereinafter mentioned," declares and enacts "that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and, whenever any such judgment-debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, or annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment-debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities, or shares, or payment of the interest, dividends, or annual payments thereof, in such manner as the court of Chancery or the court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment-creditor, with the amount of the sum to be mentioned in such order."

contrary, the said order **[294]** shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute. It is contended that the proper construction of this provision is, that the order shall mention a certain space of time for shewing cause, and that it is open to the defendant to come in and shew cause at any moment he pleases, within that interval. The proposition is perfectly anomalous: the great inconvenience that would result from such a construction, accounts for its never having been suggested before. The obvious meaning of the statute is, that the order shall provide for cause being shewn within a certain and reasonable period; and, according to the invariable practice of the courts, such time must be a fixed time. If the time limited be an inconvenient one, the proper course for the defendant to adopt is, to apply to the judge, upon a statement of the circumstances, **[295]** to vary his order in that respect,—that being a power which the judge possesses, in all cases, by the practice of the court. If the judge refuses to vary the order, I apprehend it is competent to the judgment-debtor to appeal to the court. Now, what has the party done here? The time mentioned in my brother Talfourd's order for cause to be shewn, being the 14th of January, the judgment-debtor appears by counsel before another learned judge on the 9th, and asks, not to have the original order varied, but to be permitted to shew cause ex parte. The learned judge, however, declined to hear him. Instead of coming to the court to complain of that refusal, or (which would probably have been the better course) going to my brother Talfourd, and asking him to vary his order, the judgment-debtor lets the time for shewing cause go by, and then comes here to complain that the order did not comply with the terms of the statute. I think he has not succeeded in shewing any impropriety in the order, or that any injustice has been done. The objection is one of a strictly technical nature, and should be made out very clearly. I think my brother Maule did perfectly right in refusing to allow cause to be shewn at any other time than that mentioned in the order. And, moreover, I think the order was strictly in conformity with the act.

There is no pretence for the other objection. The judgment appears to have been properly signed in pursuance of the authority given by the warrant of attorney.

Maule, J. I entertain no doubt that the court has jurisdiction, whether in the case of an order nisi or an order absolute; but, I agree with the Court of Exchequer in *Witham* v. *Lynch*, that, where there is the slightest doubt, it is better to leave it to the chancellor to decide it. There is nothing in the 15th section of **[296]** the 1 & 2 Vict. c. 110, as I conceive, to shew that there is any thing wrong in the frame of this order. If it had directed cause to be shewn "within next week," probably it would have done very well. Here, the order is "unless cause be shewn to the contrary on the 14th of January instant." The terms of this order expressly exclude a hearing in the interim. There is, then, a regular order, calling upon the judgment-debtor to shew cause on the 14th. He does not think proper to shew cause on that day: and therefore, I apprehend, the order was properly made absolute. The party has let slip the proper time for taking his objection.

Cresswell, J., signified his concurrence in the reasons above given.

Williams, J., had gone to chambers.

Rule discharged, with costs (*a*).

End of Hilary Term.

[297] Cases Argued and Determined in the Court of Common Pleas, and upon Writs of Error, in Hilary Vacation, in the Thirteenth Year of the Reign of Victoria.

The Judges who sat in banco during this vacation, were—Maule, J., Cresswell, J. Williams, J., and Talfourd, J.

Howard *v.* Shepherd. Feb. 16, 1850.

[S. C. 19 L. J. C. P. 249.]

The indorsee of a bill of lading cannot maintain an action upon the case for the non-

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(*a*) No objection was taken to the order, on the ground, that, while it contemplates the possibility of cause being shewn before the same judge by whom the order is made, yet no place, and apparently no time, is fixed for that purpose.

delivery of the goods at the port of delivery.—The declaration stated, that the defendant was owner of a ship bound for Bombay, and received on board the same divers goods and merchandises, to wit, &c., then shipped on board thereof by J. S. to be carried by the defendant to Bombay for freight; that the master signed and delivered to J. S. two bills of lading, acknowledging the shipment of the goods, and undertaking to deliver them, at Bombay, to the order of J. S., or to his assigns, for certain freight; that, at the time of the shipment of goods, and of the signing and delivering of the said bills of lading, there was, and is, a custom amongst merchants, traders, and ship-owners at London at Bombay, that, when goods are shipped for conveyance on board ship for freight, and for and relating to which goods a bill of lading is signed and delivered to the shipper by the master, such goods are deliverable at the place in that behalf therein mentioned, by the master, to the bonâ fide holder, indorsee, and assign of the bill of lading, on production thereof by him, according to the terms thereof, and that the duty of the owner of such ship by whose captain and servant such bill of lading hath been so signed and delivered is, to deliver the goods, at the said place, to the bonâ fide holder, indorsee, or assign of such bill of lading, on production thereof by him, according to the terms thereof; that J. S. upon the delivery to him of the said bills of lading, bonâ fide, and for valuable consideration, indorsed, assigned, and delivered the said bills of lading to the plaintiff, as a security for moneys advanced to J. S.; that the plaintiff then became and was, and still continued to be, the bonâ fide holder and indorsee and assign of the bills of lading, and of the said goods, and lawfully entitled to the possession of the bills of lading and of the said goods; that the freight, &c., were duly paid in London; that the ship sailed for Bombay with the goods on board, and it became the duty of the defendant, according to the terms of the bills of lading, and the custom, to deliver the goods to the bonâ fide holder and indorsee and assign of the said bills of lading, according to the terms of the said bills of lading and the custom of merchants in that behalf; yet, that, although the ship arrived at Bombay, having the goods on board, and although the plaintiff was the bonâ fide holder and indorsee, and lawfully entitled to the said bills of lading, and was the assign of the said bills of lading, and of the said goods, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the goods, on production of the said bills of lading, the defendant, wrongfully, and contrary to the terms of the said bills of lading, and contrary to his said duty, and to the custom of merchants in that behalf, delivered the goods to other persons, to the plaintiff unknown, not being the bonâ fide holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or any person on his behalf,—whereby the goods were lost to the plaintiff, &c.:—Held, that the declaration was bad in substance,—bad, as a declaration in case, as founded upon a supposed breach of duty arising out of a contract not by law transferable; and bad as a count in trover, as it did not allege a conversion, or state any facts which amounted to a conversion.—The defendant pleaded, that J. S. was the agent of M. & Co., merchants at Bombay, and in the habit of receiving consignments, and purchasing goods in London on their account; that the plaintiff was employed by J. S., as a broker, to purchase a ship, and did purchase and ship, the goods in question for M. & Co., in J. S.'s name, under the bills of lading in the declaration mentioned; that the plaintiff sent an invoice to J. S., and gave him notice of the shipment, in order that he might advise M. & Co. of the purchase and shipment, and transmit them a copy of the invoice,—which invoice J. S. did send out to M. & Co., with a letter of advice of the shipment; that, upon the shipment, the bills of lading were delivered by the master to the plaintiff as agent for J. S.; that the plaintiff did not deliver the bills of lading to J. S., nor did he transmit the same, or suffer J. S. to transmit them, to M. & Co.; but that he, after the ship had proceeded on her voyage with the goods on board, fraudulently procured J. S. to indorse the bills of lading, for the purpose of securing a debt alleged to be due from J. S. to the plaintiff; that, upon the ship's arrival at Bombay, the master, during the space of four months, used all reasonable diligence to discover the holder, indorsee, or assign of the bills of lading, but was unable to do so, and there was during all that time no person ready at Bombay to produce the bills of lading, and receive the goods; and that, at the expiration of that time, the vessel being about to leave Bombay, and M. & Co. producing the invoice and letter of advice of the shipment so sent to them by J. S., and demanding the goods, the master delivered the goods to M. & Co.:—Held, that the plea was bad.

This was an action upon the case against a ship-owner, for the non-delivery of goods pursuant to certain bills of lading.

[298] The declaration stated, that theretofore, and before the committing of the grievances thereinafter mentioned, the defendant was a merchant and ship-owner, and was possessed of a certain ship or vessel called the "Sophia Moffat," bound for certain parts beyond seas, to wit, Bombay: That thereupon, to wit, on the 14th of September, 1847, the defendant received in and on board his said vessel divers goods and merchandise, to wit, **[299]** thirty casks of cochineal, then shipped on board thereof by one George Rennie, to be by the said defendant carried in his said vessel to Bombay aforesaid, for certain freight, moneys, and reward to be paid to the defendant in that behalf: That thereupon, and upon the shipment of the said goods and merchandise, one Henry Poole, as master and captain, and then being master and captain, of the said vessel for the said voyage, and the servant of the said defendant in that behalf, and by him then duly authorised in that behalf, signed and delivered to the said George Rennie, divers, to wit, two, bills of lading of and relating to the said goods and merchandise, and by which said bills of lading the defendant, to wit, by his said captain, acknowledged the shipment of the said goods and merchandise on board of the said vessel, and undertook to deliver the same at Bombay aforesaid, to **[300]** the order of the said George Rennie, or to his assigns, for certain freight in that behalf, according to the terms of the said bills of lading,—and which said bills of lading were and are in the words and figures following, to wit, "Shipped, in good order and well conditioned, by George Rennie, in and upon the good ship called 'Sophia Moffat,' whereof is master for this present voyage Henry Poole, and now riding at anchor in the port of London, and bound for Bombay, to say, twenty-seven casks merchandise, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Bombay (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto order or his assigns. Freight for the said goods to be paid in London, lost or not lost, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the other three to stand void. Dated, in London, the 14th of September, 1847. Contents unknown. H. Poole." And the other of the said bills of lading was and is in the words and figures following, to wit, [setting out the second bill of lading, which was for "three casks of merchandise"]: That the said goods and merchandise in the said bills of lading mentioned were and are the goods and merchandise so shipped in the defendant's said vessel, to be carried to Bombay for reward and freight, as aforesaid: That, before and at the time of the shipment of the said goods and merchandise, and of the signing and delivering of the said bills of lading, and continually thenceforward to the time of the committing by the defendant of the grievances thereinafter mentioned, **[301]** there was, and still is, a good and approved custom and usage among merchants, traders, and ship-owners, to wit, at London and Bombay, that, when goods and merchandise are shipped for conveyance on board ship, for freight and reward in that behalf, and for and relating to which goods and merchandise, a bill of lading is signed and delivered to the shipper by the captain of such ship, such goods and merchandise are and shall be deliverable, at the place in that behalf therein mentioned, by the captain of such ship, to the bonâ fide holder, indorsee, and assign of the said bill of lading, on production thereof by him, according to the terms thereof, and that the duty of the owner of such ship, by whose captain and servant in that behalf such bill of lading hath been so signed and delivered, is, and shall be, to deliver the said goods and merchandise, at the said place, to the bonâ fide holder, indorsee, or assign of such bill of lading, on production thereof by him, according to the terms thereof: That the said George Rennie, upon the said delivery to him of the said bills of lading, to wit, on the day and year last aforesaid, bonâ fide, and for valuable consideration in that behalf, indorsed, assigned, and delivered the said bills of lading to the plaintiff, to wit, as a security to him, and in order that the plaintiff should be entitled to the possession of, and have a lien upon, the said bills of lading and the said goods and merchandise, for and until the payment to him of divers large sums of money, to wit, 2000l., to wit, for moneys owing to him by the said George Rennie, that is to say, for moneys theretofore, to wit, on the 25th of June, 1847, by the said plaintiff advanced to and for and on behalf of the said George Rennie, at his request, to wit, for payment, on behalf of the said George Rennie, of the price of the said goods and merchandise, on the purchase thereof theretofore **[302]** made by the said plaintiff for and at the request of the said George Rennie, and for the expenses of shipping the said goods; and the plaintiff then became, and thenceforward continually had been, and then was, the bonâ fide holder and indorsee and the assign of the said bills of lading, and of the said goods and merchandise, according to the terms of the said bills of lading, and according to the custom and usage of merchants on that behalf, and lawfully entitled to the possession of the said bills of lading, and of the said goods and merchandise: That the said freight in the said bills of lading mentioned, was duly paid in London, with primage and average accustomed, according to the terms of the said bills of lading, to wit, upon the day and year last aforesaid; and the said ship sailed and departed from London for Bombay aforesaid, having the said goods and merchandise on board thereof, to be carried and delivered as aforesaid, to wit, on the day and year last aforesaid: And that it became and was the duty of the defendant, according to the terms of the said bills of lading, and the custom of merchants in that behalf, to wit, the custom and usage aforesaid, to deliver the said goods and merchandise to the bonâ fide holder and indorsee and assign of the said bills of lading, according to the terms of the said bills of lading, and the custom of merchants in that behalf, to wit, the custom and usage aforesaid,—of all which the defendant had notice, to wit, on the day and year last aforesaid: Yet, that, although the said ship, afterwards, to wit, on the 1st of February, 1848, arrived at Bombay aforesaid, having the said goods and merchandise on board thereof; and although the plaintiff was then, and at the time of the committing of the grievances by the defendant thereinafter mentioned, the bonâ fide holder and indorsee of, and lawfully entitled to, the said bills of lading, and was then, and at the time of the committing of the said grievances, the assign of the said bills of lading, and of **[303]** the said goods and merchandise, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, to wit, the custom and usage aforesaid, and lawfully entitled to the possession of the said goods and merchandise, on production of the said bills of lading; yet the defendant wrongfully, and contrary to the terms of the said bills of lading, and contrary to his said duty, and to the custom of merchants in that behalf, to wit, the custom and usage aforesaid, delivered the said goods and merchandise to certain other persons, to wit, certain persons to the plaintiff unknown, not being the bonâ fide holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or any person on the plaintiff's behalf; and thereby the same, and every part thereof, had been and then were wholly lost to the plaintiff; and thereby also the plaintiff had lost and been deprived of his security and lien aforesaid, and had been and then was by the defendant wrongfully deprived of the possession of the said goods and merchandise, and had lost and been deprived of the moneys so advanced by him as aforesaid, for and at the request of the said shipper of the said goods as aforesaid, the whole and every part of which said moneys still remained due and unpaid and lost to the plaintiff.

The defendant pleaded,—seventhly, as to twenty-seven casks of cochineal, parcel of the said goods and merchandise in the first count mentioned, the same being the goods and merchandise in the bill of lading in the said first count first above mentioned, that theretofore, and before the committing of the said alleged grievances in that behalf mentioned, and before and during the time in that plea thereinafter mentioned, the said George Rennie was a merchant carrying on business in this kingdom, to wit, at Liverpool, and during all that time he the said George Rennie acted **[304]** as agent for divers foreign merchants, and, among others, for certain foreign merchants then carrying on business in parts beyond the seas, to wit, at Bombay, in the East Indies, under the name and style of Mhowjee D'harsey & Co., but whose names are not otherwise or further known to the defendant; and the said George Rennie during that time had been used to receive in this kingdom, to wit, at Liverpool aforesaid, goods and merchandise consigned to him by the said Mhowjee D'harsey & Co., from Bombay aforesaid, to be sold and disposed of by him the said George Rennie for and on behalf of the said Mhowjee D'harsey & Co., and also to buy other goods and merchandise in this kingdom for and on behalf, and according to the order, of the said

Mhowjee D'harsey & Co., and to ship and send the same, when so bought, from this kingdom to the said Mhowjee D'harsey & Co., to parts beyond the seas, to wit, to Bombay aforesaid,—of all which the plaintiff, during all that time, had notice: That the plaintiff during that time had been and was engaged in business, to wit, as broker and merchant and commission agent, to wit, in London, and had been and was, as such broker and merchant, from time to time employed by the said George Rennie in and for the purpose of purchasing goods and merchandise for exportation, and of shipping the same, in the name of the said George Rennie, to be conveyed to divers foreign markets and ports: That, before the shipment in the said first count mentioned, to wit, on the 15th of April, 1847, a certain order was sent from the said Mhowjee D'harsey & Co., and was then, to wit, on the day and year aforesaid, received by the said George Rennie, to wit, for the purchase by him, on behalf of the said Mhowjee D'harsey & Co., of a certain large quantity of goods and merchandise, to wit, 2000 lbs. of black cochineal and 2000 lbs. of silver-coloured cochineal, and for the sending of the [305] same, when so purchased, to the said Mhowjee D'harsey & Co., to Bombay aforesaid,—of all which the plaintiff then had notice: That the plaintiff thereupon, to wit, on the day and year aforesaid, was employed by the said George Rennie, as the agent of the said George Rennie, to purchase the said goods and merchandise so ordered as aforesaid, and to ship the same on the behalf and in the name of the said George Rennie, to be conveyed to the said Mhowjee D'harsey & Co., to Bombay aforesaid, pursuant to the said order; and the plaintiff then, to wit, on the day and year aforesaid, in pursuance of the said employment, did purchase the said last-mentioned goods and merchandise, and did then cause the same to be shipped in and on board the said vessel in the said first count mentioned, under a certain bill of lading, to wit, the bill of lading in the said first count first mentioned; and the said last-mentioned goods and merchandise, and the said twenty-seven casks merchandise described in the said bill of lading in the said first count first mentioned, were and are the same identical goods and merchandise, and the said shipment of the said goods and merchandise so purchased by the plaintiff as aforesaid, pursuant to his said employment as the agent of and for the behalf of the said George Rennie, was and is the same shipment of the said goods and merchandise mentioned and described in the bill of lading in the said first count first above mentioned, in and on board the said vessel in the said first count mentioned, and under the said bill of lading in the said first count mentioned: That the plaintiff, upon the making of the said purchase and shipment, to wit, on the day and year aforesaid, sent a certain invoice, to wit, an invoice of the said goods and merchandise so purchased and shipped as aforesaid, to the said George Rennie, and then gave notice to him of the said shipment, for a certain purpose, that is to say, that he [306] the said George Rennie might advise the said Mhowjee D'harsey & Co. of the said purchase and shipment, and transmit to them a copy of the said invoice, a copy of which said invoice he the said George Rennie did afterwards, to wit, on the day and year aforesaid, so send out, together with a letter of advice of such purchase and shipment, to the said Mhowjee D'harsey & Co.,—of all which premises the plaintiff then had notice: That, upon the said shipment being made as aforesaid, the said bill of lading in the said first count first mentioned was delivered by the said Henry Poole to the plaintiff as the agent of the said George Rennie; and the said delivery to the plaintiff as such agent, was and is the delivery of the said last-mentioned bill of lading to the said George Rennie in the said first count mentioned; nevertheless, the plaintiff did not deliver the said last-mentioned bill of lading, or any part thereof, to the said George Rennie, nor did he transmit the same, or any part thereof, nor did he suffer or permit the said George Rennie to transmit the same, or any part thereof, to the said Mhowjee D'harsey & Co.: but, on the contrary thereof, after the said shipment, and after the said vessel had proceeded on her said voyage, with the said goods and merchandise so on board the same as aforesaid, to wit, on the 10th of October, 1847, the plaintiff fraudulently caused and procured the said George Rennie to indorse, and the said George Rennie fraudulently indorsed, the said bill of lading to him, the plaintiff, to wit, for the purpose of securing a certain debt then alleged to be due from the said George Rennie to the plaintiff, which said last-mentioned indorsement was and is the said indorsement, assignment, and delivery of the said bill of lading to the plaintiff in the said first count first mentioned: That, afterwards, to wit, on the 10th of January, 1848, the said vessel arrived at Bombay aforesaid, and the said

[307] vessel there remained at Bombay from and after the said arrival thereof there as aforesaid, for a long space of time, to wit, for the space of four months then next following, the same being a sufficient and reasonable time for the holder, indorsee, or assignee of the said bill of lading to produce the same to the said Henry Poole, who during all that time was the master of the said vessel, and the agent of the defendant in that behalf, to wit, until the 10th of May, 1848; and, during all that time, the said Henry Poole, so being such master as aforesaid, was ready and willing to deliver the said last-mentioned goods and merchandise to the holder, indorsee, or assignee of the said last-mentioned bill of lading, on production thereof by him, and during all that time he the said Henry Poole used all reasonable care and diligence to discover the holder, indorsee, or assignee of the said last-mentioned bill of lading, but was wholly unable so to do, and, during all that time, no holder, indorsee, or assignee of the said last-mentioned bill of lading was ready, at Bombay aforesaid, to produce the last-mentioned bill of lading, and to receive the said last-mentioned goods and merchandise, or any part thereof: That afterwards, and at the expiration of such reasonable time as aforesaid, to wit, on the 10th of May, in the year last aforesaid, because it then became and was necessary for the said vessel to leave Bombay aforesaid, and to proceed with and prosecute the further voyage of the said vessel, and because the said Mhowjee D'harsey & Co. produced the last-mentioned copy of the said invoice of the said goods and merchandise in the said last-mentioned bill of lading mentioned, together with the said letter of advice of such shipment as aforesaid, so sent by the said George Rennie as aforesaid, and then demanded the said last-mentioned goods and merchandise from the said Henry Poole, so being such master as aforesaid, and then [308] affirmed that they were the true owners of the said last-mentioned goods and merchandise, he, the said Henry Poole, on the faith of the said invoice and letter of advice, and being persuaded by the contents thereof, that the said last-mentioned goods and merchandise were the goods and merchandise of the said Mhowjee D'harsey & Co., and that they had been so shipped as aforesaid for and on behalf and for the benefit of the said Mhowjee D'harsey & Co. by the said George Rennie, as the agent of the said Mhowjee D'harsey & Co., he, the said Henry Poole, as he lawfully might, then, to wit, on the day and year aforesaid, delivered the said last-mentioned goods and merchandise to the said Mhowjee D'harsey & Co.; which was the delivery of the said last-mentioned goods and merchandise by the plaintiff in that behalf in the said first count complained of,—verification.

The eighth plea was similar to the seventh, and applied to the three casks of cochineal in the second bill of lading mentioned.

To these pleas the plaintiff demurred specially, assigning for causes (as to each), that the said plea is double and multifarious, in this, to wit, that it sets up and offers several separate and distinct defences to the said action, that is to say, that the plaintiff was not the bonâ fide holder, indorsee, and assignee of the said bill of lading in that plea mentioned, and also states that the defendant was excused from delivering the said goods and merchandise in that plea mentioned to the holder, indorsee, and assignee of the said bill of lading, by reason of the laches and default of the holder thereof, in not producing the same to the master of the said vessel, and not being ready to receive the said goods and merchandise within a reasonable time for that purpose, and also that the said goods and merchandise in that plea mentioned were delivered to the consignee and [309] true owner thereof, who, as such, was entitled to the delivery thereof, and also that the holder and assignee of the said bill of lading in that plea mentioned, was the agent and consignee and true owner thereof, to whom the goods and merchandise in that plea mentioned were in fact delivered;—that the plea was an argumentative traverse and denial of the averment in the first count, that the plaintiff was the bonâ fide holder, indorsee, and assignee of the said bill of lading in that plea mentioned;—that the plea was an argumentative traverse of the usage and custom of merchants in the first count mentioned, to deliver the said goods and merchandise to the bonâ fide holder, indorsee, and assignee of the bill of lading;—that the plea was an argumentative traverse of the duty alleged in the first count, to deliver the same to the bonâ fide holder, indorsee, and assignee of the said bill of lading;—that the plea confessed the matters and causes of action in the first count mentioned, but did not sufficiently, or at all, avoid the legal effect and consequences thereof.

The defendant joined in demurrer.

Cowling, in support of the demurrers (*a*)[1]. The seventh and eighth pleas are bad in form and in substance. **[310]** [Maule, J. We all think the pleas are bad. For the present, you may confine yourself to the declaration.] It is submitted that the indorsee of a bill of lading may maintain an action for a breach of the duty resulting from the contract on the part of the ship-owner; and that this declaration may be sustained, either as an informal count in trover, or as a count founded upon that duty. The facts, as they appear upon the record, are these: The defendant, a ship-owner, receives goods from Rennie; his agent, the captain, signs a bill of lading, admitting the receipt of the goods from Rennie, and undertaking to deliver them, at Bombay, to Rennie's order, on payment of freight. The declaration states that the freight was paid, and alleges a well-known usage, of which, as part of the law-merchant, the court will take notice. [Maule, J. Such a usage must be alleged as part of the contract; otherwise, it is a mere statement of evidence (*a*)[2].] The plaintiff became an indorsee of the bill of lading for a valuable consideration; and of that fact the defendant had notice. The result is, that the defendant having received the goods, to be delivered to Rennie's order, and Rennie having, by indorsing the bills of lading, conveyed the goods to the plaintiff, of which the defendant had notice, the latter is estopped from denying the plaintiff's right to the possession of them. [Maule, J. All this history of the goods and the bills of lading, is like the allegation of the finding in trover.] The declaration might possibly be bad on special demurrer, for stating all these facts; but it is clearly sufficient, on general demurrer: and it goes on to allege a conversion. The defendant having, by his agent, signed the bills of lading for a valuable consideration, and they having been, with his knowledge, indorsed over to the plaintiff, an implied duty arose, on the part of the defendant, to deliver the **[311]** goods to the plaintiff, as such indorsee; and case lies against him for a breach of such implied duty. [Maule, J. There seems to me to be a manifest want of privity. Have you any authority to fortify your position?] *Levy* v. *Langridge* (4 M. & W. 337) is an authority for it. There, the declaration, in case, stated that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, for the use of himself and his sons; that the defendant then, by falsely and fraudulently warranting the gun to have been made by Nock, and to be a good, safe, and secure gun, sold the said gun to L., for the use of himself and his sons, for 24l.; whereas, in truth and in fact, the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by Nock, nor was a good, safe, and secure gun, but, on the contrary thereof, was made by a very inferior maker to Nock, and was a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials,—of all which the defendant, at the time of such warranty and sale, had notice; and that the plaintiff, knowing and confiding in the said warranty, used the gun, which but for the warranty he would not have done; and that the gun, being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded, whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the plaintiff, lost the use of his hand: and it was held, on error (after verdict for the plaintiff on not guilty, and on other pleas denying the warranty, and that the gun was unsafe, &c.), that the action was maintainable. Lord Denman,—in giving the judgment **[312]** of the court of error, there says: We agree with the court of Exchequer, and affirm their judgment, on the ground stated by Parke, B., "that, as there is fraud, and damage, the result

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(*a*)[1] The points marked for argument on the part of the plaintiff, were—"that the pleas respectively were multifarious, as raising several distinct defences; that they respectively contained argumentative traverses of material averments in the first count of the declaration; and that they confessed the duty alleged, and the breach of it, as charged in the first count, and shewed no sufficient legal avoidance of or excuse for such breach: and,—if it were intended to be argued that the first count of the declaration was bad,—that the action lay by the assignee of the bill of lading, in respect of the duty attaching upon the ship-owner, as averred in that count; or, at all events, that it was sufficient, on general demurrer, as a special count in trover, inasmuch as it shewed the legal property in the goods to have been vested in the plaintiff, and a conversion by a tortious misdelivery."

(*a*)[2] And see ante, vol. viii. p. 967, Note A.

of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud, is responsible to the party injured." Here, there was no fraud: but there was something that was equivalent, viz. the signing a bill of lading, contemplating the goods to be deliverable to the shipper's order. The two cases, therefore, in effect, contain the same ingredients; and the same objection applies to both,—there was no contract with the plaintiff. [Maule, J. They seem to put it on the ground of a public wrong. A public wrong, from which a private and particular injury results to an individual, gives that individual a right of action. But, where there is a private wrong, it is hard to say that one who sustains a private injury (but with whom no contract is made), can maintain an action. Any friend of the plaintiff in that case might bring an action,—any assignee, except one claiming through a thief, might equally maintain an action for a resulting injury, if the gun was sold for the use of the plaintiff and his assigns!] The action was founded upon the breach of duty. [Maule, J. No. The court held that the defendant below knew that the son (the plaintiff below) would use the gun,—and put it on the ground of a false representation being made, to the prejudice of the person who acted upon it. It was put upon the ground, not of breach of duty at all, but of tort. The plaintiff was one of the very persons for whose use the gun was understood to be sold.] In this case, the defendant knew that the bills of lading had been indorsed to the plaintiff for a valuable consideration. Williams, J. If there had been any fraud or misrepre-**[313]**-sentation here, the case of *Levy* v. *Langridge* would have been in point. But this is purely matter of contract. Cresswell, J. In *Levy* v. *Langridge*, the defendant below did wrong in the first instance, in selling a bad gun. But, here, the defendant did no wrong in signing the bills of lading.] The defendant has, by his conduct, induced a third person to give value for the bills of lading. [Maule, J. The utmost that can be said is, that he has induced the plaintiff to imagine that he had a right which the law did not give him. Can your view be sustained, without considering the indorsement of the bills of lading to transfer the property in the goods to the plaintiff? If that be so, it comes round to trover.] That might have been so, if this had been a case of negligence, and not of misfeasance. In *Boorman* v. *Brown* (3 Q. B. 511, 2 Gale & D. 793), the declaration (in case) stated, that the defendant was an oil-broker, and that the plaintiffs, linseed-crushers, retained him, as such broker, to sell and deliver for them thirty tons of linseed oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to the defendant in that behalf, which retainer he accepted; that he, as such broker, in pursuance of the retainer, made a contract between the plaintiffs and P., by which the plaintiffs sold to P., and he bought of them, the thirty tons, at the price, &c., to be delivered by parcels at a place and times named in the declaration, each parcel to be paid for in ready money; that the plaintiffs consigned two of the parcels to the defendant, and he delivered them to P., on payment; and that, after the making of the contract, and in pursuance thereof, and of the retainer, the plaintiffs consigned to the defendant, as such broker, the residue of the thirty tons, to be delivered by him to P., on **[314]** payment; that the oil arrived, &c., of which the defendant had notice, and took upon himself the delivery according to the contract; and thereupon it became and was the defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P., or any other person, without the price being paid to the defendant, according to the contract; yet that the defendant, not regarding such duty, did not use reasonable care, &c., that the oil should not be delivered, &c., without the price being paid, but neglected and refused so to do, and so negligently and carelessly behaved in the premises, that, by the defendant's mere carelessness and negligence, the last-mentioned oil was delivered to H. & Co., without the price being paid by P., or any other person, to the defendant; by reason whereof, and of P. having become bankrupt and unable to pay, the plaintiffs lost the said oil, and the price thereof, &c. It was held by the court of Queen's Bench, after verdict for the plaintiffs, that the duty was laid in the declaration as resulting from the defendant's character of broker; but that the duties of a broker, as defined by statute and common law, did not include those said to have been violated by the defendant; and the judgment was arrested. But it was afterwards held by the court of Exchequer Chamber, on error, that the duty resulted from an express contract described in the declaration, and did not arise simply from the defendant's character of broker, and that, for the breach of such duty, an action of tort lay: and the judgment of the court below was reversed. [Williams, J. The judgment of the Exchequer Chamber in that case was affirmed by the House of Lords (a)1.] This view of the case is not inconsistent with *Thompson* v. *Dominy* (14 M. & W. 403), where it was held that the effect of an indorsement **[315]** of a bill of lading is, to transfer the property in the goods, but not the contract. Nor is *Berkley* v. *Watling* (a)2 any authority against the plaintiff.

Hugh Hill, contrà (*b*). The declaration is clearly bad on general demurrer: it cannot be sustained as for a breach of contract, for, there is no contract; neither is it good as an informal count in trover. [Maule, J. Confine yourself to the latter point.] The declaration alleges that the goods in question were shipped by Rennie: it is not alleged that he was the owner of them. It then sets out a usage or custom,—differing somewhat from the ordinary usage and custom of merchants, of which, according to *Brandão* v. *Barnett* (ante, vol. iii. p. 519, 12 Clark & Fin. 787), **[316]** and other cases, the court will take judicial notice. [Maule, J. It is stating a piece of evidence merely (supra, 310).] The question how far contracts are affected by customs and local usages, was very much discussed, and many of the authorities adverted to, in *Hutton* v. *Warren* (1 M. & W. 466, Tyrwh. & G. 646). It was there held that a custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to recover from the landlord or incoming tenant, a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it,—is not excluded by a stipulation in the lease under which he holds, that he will consume three fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread, on the land, for the use of the landlord, on receiving a reasonable price for it. Here, the allegation of notice is, in effect, without date,—the day and year last aforesaid, refers to a time anterior to the shipping of the goods. The declaration then goes on to allege, that, although the ship afterwards arrived at Bombay, with the goods on board, and although the plaintiff was the bonâ fide holder and indorsee of, and entitled to, the bills of lading, and was the assignee of the said bills of lading, and of the said goods and merchandise, according to the terms of the bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the goods, on production of the bills of lading,—yet that the defendant wrongfully delivered them to other persons, not being the bonâ fide holders, or indorsees, or assigns of the said bills of lading, and thereby they were lost to the plaintiff. All this is consistent with **[317]** the plaintiff's having kept the bills of lading in London, and with there being no person at Bombay authorised or ready to receive the goods,—or with the goods being warehoused, the master having no notice who was the

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(*a*)1 See *Brown* v. *Boorman*, 11 Clark & Fin. 1.

(*a*)2 7 Ad. & E. 29, 2 N. & P. 178, W. W. & D. 429. There, the declaration (in assumpsit) stated that the defendants W. and N. were owners of a ship; that, in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him, W. and N. promised to deliver: breach, non-delivery. N. pleaded separately, and traversed the shipment. On the trial, the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by W., stating the goods to be shipped by W., to be delivered to the plaintiff or assigns. Evidence also was given to shew that the plaintiff held the bill of lading for value. W. was the managing owner. It was held that N. might produce evidence that the goods were not shipped in fact, and was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as the plaintiff could support his issue only by making W. his agent, and, if W. was so, the plaintiff was cognisant, through him, of the fact.

(*b*) The points marked for argument on the part of the defendant, were,—"that the seventh and eighth pleas respectively were not open to the objections raised by the demurrers; that the declaration was bad, in this, that the custom therein set out was unreasonable, and contrary to law; that it was not alleged in, nor did it appear from, the declaration, that the plaintiff ever was ready at Bombay to receive the goods, or that he had any agent there, or that there was any person there to whom the goods could have been delivered on behalf of the plaintiff, or that the defendant, or the master of the vessel, ever had notice of the indorsement of the bill of lading to the plaintiff."

holder of the bills of lading, and with their having been destroyed by fire, in the hands of the warehousekeeper with whom they were so deposited.

Cowling, in reply. The allegations in the declaration are clearly not consistent with the last suggestion. [Maule, J. Assuming this to be a count in trover, would the statement as to the non-delivery of the goods be a good averment of a conversion?] It is submitted that it would. [Cresswell, J. It does not appear that the plaintiff ever put himself in a condition to demand the goods, by producing the bills of lading: nor does the declaration state facts to shew that the defendant has put it out of his power to deliver the goods, when the plaintiff is in a condition to demand them. Williams, J. Could we have adjudged the facts here stated, if found on a special verdict, to amount to a conversion? Maule, J. You neither aver the production of the bills of lading, nor allege any excuse for not producing them.] The declaration shews that the defendant has incapacitated himself from delivering the goods, and that they are wholly lost to the plaintiff. [Cresswell, J. That is an inference of law which does not arise from the facts stated.] It is an inference of fact; though, undoubtedly, it might have been alleged with greater accuracy. [Maule, J. The declaration does not shew that the goods were the goods of the plaintiff, or that they were converted.] Having received the goods as Rennie's, the defendant is estopped from denying the title of Rennie or his assignee. The case is somewhat analogous to *Hawes* v. *Watson* (2 B. & C. 540, 4 D. & R. 22, R. & M. 6): there A., on the 26th of Septem-**[318]**-ber, sold to B., by contract, one hundred casks of tallow, then lying at a wharf, at so much per cwt., and on the same day gave him a written order to the wharfingers, "to weigh, deliver, transfer, and re-house" the same; and, on the next day, B., who had previously entered into a contract with C. & Co. for the sale of the three hundred casks of tallow, in part fulfilment of that contract, obtained from the wharfingers, and sent to C. & Co., the following acknowledgment:—"Messrs. C. & Co. We have this day transferred to your account (by virtue of an order from B.) one hundred casks of tallow, &c., with charges from the 10th October:" and, upon receipt of this, C. & Co. paid B. the full amount of the tallow, and shortly afterwards the wharfingers delivered twenty-one of the casks to the order of C. & Co.: on the 11th October, B. stopped payment, and, on the 14th, A., the original vendor, sent notice to the wharfingers not to deliver the remainder of the tallow to B. or his order, although the tallow had not been weighed. It was held, in trover by C. & Co. against the wharfingers, that, after their acknowledgment that they had transferred the tallow to C. & Co.'s account, they held it as the agents of C. & Co., and therefore were estopped, and could not set up as a defence a right in A. to stop it in transitu. *Smith* v. *Marsack* (ante, vol. vi. p. 486, 6 D. & L. 363), recently decided in this court, is, in principle, the same. There, the second count stated that C. W. made her bill of exchange, payable to her order, and directed the same to the defendant; that the defendant accepted the bill; and that C. W. indorsed it to the plaintiff. The defendant pleaded that C. W., before and at the time of the indorsement, was, and still continued, the wife of one E. W., and that E. W. never authorised, or consented to, the indorsement of the **[319]** bill by her. And it was held, that the plea was bad in substance, inasmuch as it is not competent to the acceptor of a bill made payable to the order of the drawer, to say that the latter has no power to indorse, when he himself has, by his acceptance of the bill so drawn, asserted that the drawer has such power: and that notwithstanding that the acceptor may, in such case, be compelled to pay the bill twice,—the husband's property in the bill not being changed by the indorsement of the wife, unauthorised by him.

Maule, J. I am of opinion that the declaration in this case is bad, and consequently that the defendant is entitled to judgment. The declaration certainly is a very strange one: and the pleas appear to me to be still more strange. Assuming the declaration to be in case, it has been attempted to be supported, on the authority of a case of *Levy* v. *Langridge*, in the Exchequer. If, however, the declaration is in case, it proceeds upon a supposed liability arising out of a contract transferred by the indorsement of certain bills of lading. Now, it is perfectly clear that a contract cannot be transferred so as to enable the transferee to sue upon it. Generally speaking, the law has endeavoured to assimilate actions of tort arising out of contracts, with actions on contracts, giving the plaintiff the election to adopt either form of remedy; as in the case of actions against carriers, and the like. Now, here, the duty, the breach of which is complained of, entirely arises out of contract. I do not think, under these circumstances, that a right to sue can be transferred: therefore, the declaration, as a declaration in case for a breach of duty, is clearly bad.

Considering it, as I thought at first it might be considered, as an informal count in trover, I also think it substantially bad. It does not shew that the goods [320] mentioned in the bills of lading, were the plaintiff's goods. It states that the goods were shipped by Rennie, and that the defendant, upon their shipment, signed bills of lading, undertaking to deliver them at Bombay, to Rennie, or his assigns. Assuming that the defendant is estopped from denying all that is admitted on the face of the record, it is not admitted that the goods were once the property of Rennie, or that they afterwards became the property of the plaintiff. If I were to hazard a conjecture on the subject, I should say that they were not Rennie's goods; for, if they had been, the plaintiff would, no doubt, have so alleged. It is quite consistent with what is alleged, that the goods were not the goods of Rennie, and that the plaintiff has no property whatever in them. Another essential property of trover is also wanting here. It appears that the plaintiff claims to be the indorsee of two bills of lading, which were signed by the defendant, making the goods deliverable at Bombay; but it does not appear that the bills of lading were ever transmitted to Bombay, or presented to the defendant there. The duty of the defendant, as ship-owner, was, to keep the goods until some person presented the bills of lading to him at Bombay. But it is said, that, although, on the arrival of the ship, with the goods on board, at Bombay, the plaintiff was the bonâ fide holder and indorsee of the bills of lading, and was then, and at the time of the committing of the grievances, the assignee of the said bills of lading, and of the goods, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the said goods, on production of the said bills of lading,—yet the defendant wrongfully, and contrary to his duty, and to the custom of merchants in that behalf, delivered the goods to certain other persons, to the plaintiff unknown, not being the [321] bonâ fide holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or to any person on the plaintiff's behalf, and that the goods thereby were wholly lost to the plaintiff. It was, however, the defendant's duty to keep the goods from the plaintiff, until he, or some person on his behalf, produced the bills of lading. Then, the fact of the ship-owner not keeping the goods on board the ship for an indefinite time, clearly does not amount to a conversion. He has a right to deliver them to some one, until the bill of lading is produced. There is nothing in this declaration to shew that this defendant has done anything else: the declaration, therefore, is clearly bad as a count in trover; and there must be judgment for the defendant.

Cresswell, J. I am of the same opinion. It was insisted, in the first place, that this is an action of tort arising out of a contract. The breach of a contract may be a wrong in respect of which the party injured may sue in case, instead of suing upon the contract. This is properly a case of that sort. But it is difficult to imagine that such a cause of action can be conveyed to one to whom the contract is not transferable. Assuming, however, that that may be, does the declaration here shew any such breach of duty towards the plaintiff, as to entitle him to sue the defendant? The duty that is alleged is, to deliver the goods upon the production of the bills of lading; but it is not alleged that the bills of lading were produced.

As to the other view of the case,—treating the count as an informal count in trover,—the plaintiff has carefully avoided alleging that Rennie had any property in the goods. The case stands thus:—Goods are shipped by Rennie, and the defendant contracts to deliver them at Bombay to Rennie or assigns. That contract is not [322] transferable: and, assuming that the property in the goods would pass, by the indorsement of the bills of lading, to assigns, there is no averment here that the goods were the property of Rennie, and nothing to shew that the property is in the plaintiff. But, supposing the property to be in the plaintiff, and the declaration can be construed as containing an averment to that effect, it clearly contains nothing that amounts to an averment of a conversion.

Williams, J. I am entirely of the same opinion. Whether or not this declaration is sustainable as shewing a cause of action in case, has been rested upon the case of *Levy* v. *Langridge*. It is to be observed, however, that, when that case was cited in *Winterbottom* v. *Wright* (10 M. & W. 109), Alderson, B., said that the decision there proceeded upon the ground of fraud and knowledge in the defendant,—wholly irrespective of contract. *Brown* v. *Boorman*, which was referred to in the course of the argument, simply establishes, that, if there be a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured,—that is the party to the contract,—may recover either in tort or in contract.

As to the other point,—whether the count may be treated as an informal count in trover,—it is to be remarked, that, in order to constitute a good count in trover, there must either be the usual allegation of a conversion, or such a statement of facts as must inevitably lead to the conclusion that there has been a conversion. There is no distinct averment of a conversion here, nor any statement to warrant the conclusion that the defendant has been guilty of a conversion. The declaration, therefore, is essentially bad.

[323] TALFOURD, J. I also think, for the reasons given by the rest of the court, that this declaration is equally bad, whether considered as a count in case or as an informal count in trover. If the declaration alleges that the property in the goods was in the plaintiff (which I do not think it does), it does not allege a conversion. It states that the plaintiff, as the bonâ fide holder and assignee of the bills of lading, was entitled to the possession of the goods, upon the production of the bills of lading: but it does not allege the production of the bills of lading, or shew that the goods were destroyed, or that it had become impossible, by any act of the defendant, to deliver the goods. Our judgment must, therefore, be for the defendant.

Judgment for the defendant.

[324] OVERTON AND ANOTHER *v.* HARVEY. Feb. 15, 1850.

[S. C. 19 L. J. C. P. 256; 14 Jur. 902.]

In assumpsit by indorsees against the acceptor of a bill of exchange, the defendant pleaded,—that the plaintiffs had brought a former action against him upon the same bill (setting out the declaration in such former action),—that the defendant pleaded to the count on the bill, that, after the acceptance and indorsement thereof, and whilst the plaintiffs were the holders, and before it became due, it was agreed between the plaintiffs and the defendant, that, in the event of the bill being dishonoured, the plaintiffs should receive from the defendant a warrant of attorney for the amount of the bill, with interest and expenses, and that judgment should be entered up thereon, but that no execution should issue upon such judgment until the 25th of December, 1848, and that the time for payment of the bill should be extended until that day; that the bill became due on the 22nd of September, 1847, and that the defendant was ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney, pursuant to the agreement, and requested them to accept the same, and to extend the time of payment of the bill until the 25th of December, 1848, but that the plaintiffs refused and neglected so to do, and, in violation of the agreement, sought to enforce payment of the bill: that the plaintiffs replied de injuriâ to such plea; and that the defendant obtained judgment in the said action. The plea then proceeded to aver the identity of the bill and the causes of action in both cases.—To this plea, the plaintiffs replied, that they did extend the time for payment of the bill until and after the said 25th of December, 1848, and that they had not, since the said recovery in the said plea mentioned, sought to enforce the payment of the bill, which still remained unpaid, and that the defendant had not given or executed to the plaintiffs a warrant of attorney:—Held, on demurrer to the replication, that the plea, though containing unnecessary details of the pleadings in the former action, was a good answer to this action; and that the replication was bad.

This was an action of assumpsit, commenced by writ of summons, dated the 9th of January, 1849.

The first count of the declaration stated, that, theretofore, to wit, on the 19th of June, 1847, one Robert Remmett made his bill of exchange in writing, bearing date, to wit, the day and year aforesaid, and then directed the same to the defendant, and thereby required the defendant to pay to the order of the said Robert Remmett the sum of 575l. 1s., for value received, three **[325]** months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then accepted the said bill of exchange; and the said Robert Remmett then indorsed the said bill of exchange to one Owen Parry; and the said Owen Parry then indorsed the said bill of exchange to the plaintiffs; and the defendant then, in consideration of the premises, promised the plaintiffs to pay them the amount of the said bill of exchange, according to the tenor and effect thereof, and of the said acceptance and indorsements thereof.

There was also a count upon an account stated.

Plea,—to the first count,—that the plaintiffs ought not to be admitted or received to declare against the defendant, or to implead him, in respect of the several causes of action in the declaration mentioned, because the defendant said that the plaintiffs, theretofore, and before the commencement of the suit, and after the said bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of October, 1847, in the court of our lady the Queen, before her justices at Westminster, impleaded the defendant in an action on promises, and afterwards, to wit, on the 25th of October, in the year aforesaid, declared against the defendant in the said action, for that the said Robert Remmett, on the said 19th of June, 1847, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said Robert Remmett, three months after the date thereof, (which period the plaintiffs therein averred had elapsed before the commencement of the said action), the sum of 575l. 1s., for value received, and that the defendant then accepted the said bill, and that the said Robert Remmett then indorsed the same to the said Owen Parry, who then indorsed the same to the **[326]** plaintiffs, and that the defendant then, in consideration of the said premises, promised the plaintiffs to pay them the amount of the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement thereof; and also that the defendant, on the 1st of October, 1847, was indebted to the plaintiffs in 1000l. for money found to be due from the defendant to the plaintiffs on an account then stated between the plaintiffs and the defendant; and that the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, promised the plaintiffs to pay them the said last-mentioned sum of money; yet that the defendant had disregarded his promises, and had not paid the amount of the said bill of exchange, or any part thereof, or any of the said several sums of money in the declaration mentioned, or any part thereof; to the damage of the plaintiffs of 1000l.: That, the plaintiffs having so declared in the said action as aforesaid, the defendants afterwards in due course, and according to the practice of the said court, to wit, on the 8th of November, 1847, by H. F. Holt, his attorney, pleaded to the said action, in manner following, that is to say, to the last count of the said declaration in the said action, the defendant then pleaded that he did not promise in manner and form as therein alleged, &c., and to the said first count of the said declaration in the said action, the defendant then pleaded, that, after he accepted the said bill of exchange in that count mentioned, and after the indorsement thereof by the said Robert Remmett to the said Owen Parry, and after the indorsement thereof by the said Owen Parry to the plaintiffs, and whilst the said plaintiffs were the holders thereof, and before the same became due and payable, to wit, on the 19th of June, 1847, it was agreed by and between the plaintiffs and the defendant, that, in consideration that the defendant would, in the **[327]** event of the said bill of exchange being dishonoured by the defendant when the same should become due and payable, then give and duly execute to the plaintiffs his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575l. 1s., and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of December, 1848, with interest, at the rate of 5l. per cent. per annum, payable half-yearly, to be computed from the day when the said bill should become due and payable, and would also allow judgment to be then immediately entered on such warrant of attorney, and registered: that they the said plaintiffs would then accept such warrant of attorney from the defendant, and would not issue any execution thereon until the 25th of December, 1848, and would not enforce the said bill as against the said defendant, but would extend the time for payment of the same until the day and year last aforesaid; that the said bill became due and payable on the 22nd of September then last past, and was then dishonoured by the defendant; that, when the said bill became due and payable, to wit, on the day and year last aforesaid, he, the defendant, in pursuance of the agreement, was, and from thence until the time of pleading the said last-mentioned plea, had been, and still was, ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575l. 1s., and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of December, 1848, and was also then, and from thence until the pleading of the said last-mentioned plea had been, and then still was, ready and willing, and then offered, to allow judgment to be then immediately entered on such warrant of attorney, and registered,—of all which premises, the plaintiffs, to wit, on the day and **[328]** year last aforesaid, had due notice, and were then requested by the defendant to accept such warrant of attorney as aforesaid from the defendant, and to extend the time of payment of the said bill until the said 25th of December, 1848; yet that the plaintiffs did not nor would accept the said warrant of attorney from the defendant, but wholly refused and neglected so to do, and then unjustly, and in violation of the said agreement, sought to enforce payment of the said bill of exchange by the defendant; and the defendant then, in and by the said last-mentioned plea, offered and alleged that he was ready to verify the same: That he, the defendant, having so pleaded to the said action as aforesaid, the plaintiffs, afterwards, to wit, on the 8th of November, 1847, in due course, and according to the practice of the said court, replied to the said pleas of the defendant in the said action, in manner following, that is to say, by joining issue upon the said first plea of the defendant, and replying to the said last plea of the defendant, that the defendant, of his own wrong, and without the cause by the defendant in the said plea alleged, broke his said promise, and did not pay the amount of the said bill in the said first count of the said declaration in the said action mentioned, in manner and form as the plaintiffs had above in the said first count in that behalf complained; and the plaintiff in and by the said replication prayed that the same might be inquired of by the country, &c.: That the defendant then, to wit, on the day and year last aforesaid, joined issue upon the said last-mentioned replication: That, issue having been so joined in the said action as aforesaid, such proceedings were thereupon had in the said suit, that afterwards, and before the commencement of this suit, to wit, on the 18th of November, 1847, at Westminster-Hall, in the county of Middlesex, before the Hon. Sir C. Cresswell, knight, one of the justices of our said lady the **[329]** Queen of the Bench at Westminster aforesaid, in the absence and in the place and stead of the Right Hon. Sir Thomas Wilde, knight, the chief justice of the said court of our said lady the Queen at Westminster aforesaid, the said issues joined between the said parties in the said action, in due course, and according to the practice of the said court, came on for trial; and at the said last-mentioned time and place came the plaintiffs in their own proper persons, and the defendant, by H. F. Holt, his attorney; and the jurors of the jury, being summoned in the said action, also came; who, to speak the truth of the matters in issue in the said action, being chosen, tried, and sworn, according to the form of the statute in such case made and provided, did, as to the first issue joined between the said parties as aforesaid, upon their oath say that he, the defendant, did not promise as in the last count of the said declaration in the said action alleged; and, as to the last issue joined between the said parties as aforesaid, the jurors aforesaid did, upon their oath aforesaid, say that the defendant did not, of his own wrong, or without the cause by the defendant in the said last plea of the defendant alleged, break his said promise, and that the defendant, for the causes by him in his said last plea in that behalf alleged, did not pay the amount of the bill in the said first count of the said declaration in the said action mentioned, in manner and form as in that plea was alleged: That thereupon, afterwards, and after the said trial of the said action, and before the commencement of this suit, to wit, on the 2nd of December, 1847, by the consideration and judgment of the said court, it was considered that the plaintiffs should take nothing by their said writ in the said action, but that they should be in mercy, &c., and that the defendant should go without day, &c.; and, by the like consideration and judgment, it was further considered by the court **[330]** there that the defendant should recover against the plaintiffs 31l. 1s. 1d. for his costs and charges by him about his defence in that behalf laid out and expended, by the court there adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided: and that the defendant should have execution thereof, &c.,—prout patet, &c.: That the said bill of exchange in the said first count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said bill of exchange in the first count of the declaration in this action mentioned, were one and the same, and not other or different bills of exchange; and that the said supposed account stated in the last count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said account stated in the said last count of the said declaration in this action mentioned, were one and the same account, and not other or different accounts stated; and that the said supposed promises and causes of action in the said declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said promises and causes of action in the declaration in this action mentioned, were the same promises and causes of action, and not other or different promises or causes of action; and this the defendant was ready to verify by the said record; wherefore, the defendant prayed judgment whether the plaintiffs ought to be permitted to implead the defendant for the alleged breach of promises in the said first count of the declaration in this action mentioned, or to say that he, the defendant, promised as in the last count of the said declaration in this action mentioned, &c.

To this plea, the plaintiffs replied, that they, the plaintiffs, ought not to be barred from declaring against the defendant, or from impleading him in respect of the [331] causes of action in the said first count of the said declaration in this action mentioned, because they said that they, the plaintiffs, did extend the time, and give the defendant time for payment of the bill of exchange in the said first count of the declaration in this action mentioned, until and after the said 25th of December, 1848, and the plaintiffs had not, since the said recovery in the said plea mentioned, until the commencement of this suit, sought to enforce the payment of the bill of exchange in the said first count of the declaration in this action mentioned, and the amount of the bill of exchange was still unpaid to the plaintiffs; that the said 25th of December, 1848, had elapsed and passed long before the commencement of this suit; and that the defendant had not, at any time hitherto, given or executed to the plaintiffs any warrant of attorney for the amount of the said bill, or any part thereof, or otherwise howsoever; and that this the plaintiffs were ready to verify, wherefore the plaintiffs prayed judgment if they ought to be barred from impleading the defendant for the said breach of promise in the said first count of the declaration in this action mentioned.

As to the second count, there was a nolle prosequi.

Special demurrer to the replication to the first count, assigning for causes,—that, although the said replication confesses that the judgment in the said plea mentioned, was given by the said court therein also mentioned, and that the same remains in full force and effect, and not in the least reversed or made void, yet the said replication does not state or shew any cause or reason why the said judgment should not, and does not, estop the plaintiffs to declare against the defendant, or to implead him in respect of the several causes of action in the said first count of the declaration in this action mentioned;—that an existing and unreversed judgment in the defendant's favour, upon a plea in bar given by a [332] court of competent jurisdiction, in an action of contract, precludes and estops the plaintiffs from again vexing or suing the defendant by a further action or suit, upon or in respect of the same identical cause of action as that to which such plea was pleaded;—that, the said judgment on the said plea of the defendant, being and remaining in full force and effect, and not in the least reversed or made void, the plea upon which the same was given, must be taken to be a good and valid one in law; and that it can be so only upon the ground that the agreement therein stated and set forth operated as a suspension of the plaintiff's right of action upon or in respect of the said bill in the first count of the said declaration mentioned, and which said right of action having been suspended by the act and agreement of the plaintiffs, is altogether gone and destroyed in law:—that it appears from the said plea pleaded in the said previous action, and the said judgment given thereon as aforesaid, that the right of action upon or on account of the said bill in the said first count of the declaration mentioned, hath been released and extinguished; —that the said replication is repugnant, contradictory, and absurd, in this, to wit, that, although the said replication confesses the several allegations in the said plea of the defendant, and that such action as therein mentioned was brought by the plaintiffs against the defendant before the said 25th of December, 1848, yet the said replication alleges that the plaintiffs did extend the time, and did give the defendant time, for the payment of the said bill in the said first count of the declaration in this action mentioned, until and after the said 25th of December, 1848;—that the said last-mentioned allegation operates as an argumentative denial of such action as in the said plea of the defendant mentioned, having been brought, as in the said plea alleged;—that it is not stated nor alleged, nor doth it appear, in or by the **[333]** said replication, that the plaintiffs ever called upon or required the defendant to give or execute to the plaintiffs the said warrant of attorney for the amount of the said bill, or that the defendant ever refused to give or execute the said warrant of attorney:—that, even had the defendant refused, such refusal would not have conferred upon the plaintiffs the right to declare against the defendant, or implead him, in respect of the causes of action in the said first count of the declaration in this action mentioned, whilst the said judgment remained in force and not reversed.

Joinder in demurrer.

C. Wood (with whom was Manning, Serjt.), in support of the demurrer. The plea, though perhaps it contains statements that are unnecessary (see 1 Wms. Saund. 5th edit. p. 91 a. n. (2)), is nevertheless a good plea of judgment recovered; and the replication affords no sufficient answer to it. The plea is a good estoppel, and is conclusive; and it is not competent to the plaintiff to shew that the judgment is bad: *Treviran* v. *Lawrence* (1 Salk. 276, 6 Mod. 256, 2 Lord Raym. 1036); *Vooght* v. *Winch* (*b*); *Doe* v. *Huddart* (2 C. M. & R. 316, 4 Dowl. P. C. 437); *Doe* v. *Wright* (10 Ad. & E. 763, 2 P. & D. 672); 2 Smith's Leading Cases, 445. If the judgment be improper, it can only be reversed on writ of error: *Holmes* v. *Walsh* (7 T. R. 458). It may be said that the agreement stated in the plea in the former action, only amounted to an agreement to suspend the right of action: but the recent case of *Ford* v. *Beech* (*g*) shews that such an agreement operates as a total ex-**[334]**-tinguishment of the right, and is therefore pleadable in bar.

The replication admits that the judgment in the former action is good, and stands unreversed, and that the action was brought in respect of the same causes of action as those for which this action is brought. The only answer that is sought to be given to the plea is, that the plaintiffs did extend and give time for the defendant to pay the bill until after the day named, and that that day had elapsed before the commencement of this suit. That is repugnant to the admission involved in the replication. The replication goes on to allege that the defendant did not give or execute to the plaintiffs a warrant of attorney for the amount of the bill: but it does not state that the defendant was ever called upon to do so, and that he refused. The allegation, therefore, is a negative pregnant with the affirmative that the plaintiffs demanded and the defendant refused to give such warrant of attorney. In *Ripley* v. *M'Clure* (*a*), a declaration stated an executory contract whereby the plaintiff agreed to sell, and the defendant to buy, on arrival by a certain ship, one third of a cargo of tea, to be consigned to the plaintiff, and delivered in Belfast from the ship to the defendant, at a certain price, payable after delivery. The declaration then averred that the ship arrived at Belfast with a cargo of tea consigned to the plaintiff; that the plaintiff was ready and willing to deliver the cargo in Belfast to the defendant, according to the agreement; yet the defendant, before the arrival of the ship with the cargo at Belfast, discharged the plaintiff from delivering the cargo, and thenceforth refused to perform the agreement. The third plea, as to so much of the breach as **[335]** related to discharging the plaintiff from delivering the cargo, traversed the discharge: the fourth plea, which was pleaded as to so much of the breach as related to the defendant's having, before the arrival of the ship with her cargo at Belfast, discharged the plaintiff from delivering the cargo, stated, that, before the cargo arrived at Belfast, the defendant retracted his discharge: the fifth plea, as to the residue of the breach, denied that the plaintiff was ready and willing to deliver the cargo. It was held,—first, that the defendant was not bound, before the arrival of the cargo, to give the plaintiff a distinct answer whether he would fulfil the contract or not;—and, secondly, that a refusal by the defendant, before the arrival of the cargo, to perform the

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(*b*) 2 B. & Ald. 662. And see 3 N. & M. 273; 5 N. & M. 212; 3 M. & G. 737; 4 M. & G. 216, n.; ante, vol. vii. pp. 331, 338.

(*g*) 11 Q. B. 852, 5 D. & L. 610. And see *Gibbons* v. *Vouillon*, ante, vol. viii. p. 483.

(*a*) 4 Exch. 345; affirmed on error, *M'Clure* v. *Ripley*, 5 Exch. 140.

contract, was not a breach of it; but that such refusal unretracted down to, and inclusive of, the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal, and a waiver of the condition precedent of delivery; and, consequently, that the defendant was liable for the breach of contract. So, here, the replication must be taken to admit that the defendant has been continually offering to execute the warrant of attorney.

Peacock (with whom was Hugh Hill), contrà. The plea is clearly bad. This action was commenced on the 9th of July, 1849; and the answer attempted to be set up is, that the plaintiffs ought not to be permitted or received to declare against the defendant, or to implead him in respect of the several causes of action in the declaration mentioned, because, before the commencement of this suit, and after the bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of October, 1847, the plaintiffs impleaded the defendant in the court of **[336]** Queen's Bench in respect of the same bill and causes of action; and because the defendant obtained judgment in that action upon a plea alleging an agreement to suspend the plaintiffs' right to sue in respect of the bill until the 25th of December, 1848. [Maule, J. The plea avers that the causes of action in both actions are identical. Then it appears that an action was brought, and that the defendant pleaded to the action, and obtained a judgment that he go thereof without day. Does not that shew a sufficient bar to the present action?] It is submitted that it does not. [Maule, J. The proper answer to the plea would have been, that the present action was not brought for the same cause as the former. The effect of an agreement to suspend the remedy operating as a total bar, was very much considered in *Ford* v. *Beech, in Error*,—where the case of *Stracy* v. *The Bank of England* (6 Bingh. 754, 4 M. & P. 639) was explained and materially qualified (11 Q. B. 874).] It sufficiently appears on the face of the pleadings here, that this is not for the same cause of action as the former. An estoppel operates to prevent a party from alleging a fact contrary to what he has before alleged or admitted. [Cresswell, J. Are you suing in this action for the same cause as in the first action?] No. [Cresswell, J. Then, why not traverse the allegation of identity?] It could not be necessary, when the record as it stands clearly shews that the two causes of action are different. Would it be for the jury to say whether or not the two declarations were the same? [Maule, J. I think it would.] Suppose a first action brought by the plaintiff as executor, and it turned out that he now claimed under letters of administration? [Cresswell, J. In that case, he would be a different person: the cause of action would be totally different. *Robinson's case* (5 Co. Rep. 32 b.) is an authority to shew, **[337]** that, in the case put, the judgment in the former action would be no bar to a second.

Wood, in reply, was stopped by the Court.

Maule, J. It appears to me that the plea in this case is good, and that the replication is a bad one. The action is brought, in the ordinary form, upon a bill of exchange. The plea, in effect, states that the plaintiffs had brought a former action against the defendant for the same cause of action, and that in that action the defendant obtained judgment. The plea goes, perhaps unnecessarily, into a detail of the grounds on which the judgment in the former action was given. I think, that, upon whatever ground that judgment was given, the causes of action being alleged to be the same as in the present case, and that allegation not being traversed, and there being no incongruity in assuming the two causes of action to be the same, the judgment operates as a bar. When a court of competent jurisdiction has given judgment that the defendant go without day, and that judgment remains unreversed, it must be taken to have been rightly given, and the plaintiff cannot have a second action for the same cause. The replication, therefore, in the present case, not denying that the cause of action in respect of which the plaintiffs now declare, was the same as that for which the defendant has obtained judgment, affords no answer to the plea; and consequently there must be judgment for the defendant.

Cresswell, J. I am of the same opinion. The plaintiffs have sued and have failed, the defendant having obtained judgment. The declaration in the present action seems to be for the same cause of action as the former: the plea avers that it is so; and the **[338]** replication does not deny it. In *Robinson's case*, it appeared upon the face of the pleadings that the two causes of action could not be identical.

Talfourd, J. I am of the same opinion. The causes of action must have been the same or different. If the same, the judgment in the former action is a bar: if different, the allegation of identity might properly be traversed by the replication. The plaintiff not having adopted that very obvious course, there must be judgment for the defendant.

Judgment for the defendant.

EX PARTE KEIGHLEY, IN RE KEIGHLEY v. GOODMAN. Feb. 25, 1850.

The 91st section of the county-court act, 9 & 10 Vict. c. 95, does not preclude an attorney from recovering from his client a reasonable remuneration for his work and labour done out of court, before the institution of a suit, or take away the right of the superior courts to allow on taxation a reasonable remuneration for this description of labour.

On the 28th of November, 1848, Keighley delivered to Goodman two bills of costs,—the one, of 73l. 9s. 2d., for general business; the other, of 20l. 19s. 2d., for business done in relation to a suit in the Edmonton county-court, wherein Goodman sought to recover damages against one Martin for an excessive distress upon goods in the possession of Goodman under a mortgage-deed. In the suit in the county-court, Goodman claimed, and recovered, 19l. 19s., being 12l. 10s., the sum levied beyond the amount due for rent, and 7l. 9s. for damages,—that sum having been charged by Keighley for investigating the matter on his behalf,—together with 6l. 2s. 4d. for costs.

On the 5th of April, 1849, Keighley brought an action against Goodman, in this court, to recover the sum of 56l. [339] 1s. 6d., the balance alleged to be due to him upon the above bills. On the 14th, the first bill was taxed by Master Methold, under an order of Coltman, J., and 9l. 6s. 6d. struck off. On the 23rd of April, Maule, J., made an order for the taxation of the second bill; and, on the 10th of May, the parties attended before Master Park, who disallowed the whole bill, making the following indorsement on the order:—"I certify that I have disallowed the whole of the bill of costs (20l. 19s. 2d.) under this order, because I consider that the act 9 & 10 Vict. c. 95, s. 91, limits the remuneration of the attorney to 15s."

The master's allocatur was as follows:—

"14th May, 1849. Amount of bill ordered to be taxed by this order		£73 9 2
Ditto of bill under order of 23rd April		20 19 2
		£94 8 4
Taxed off first bill	£9 6 6	
Disallowed on second bill	20 19 2	30 5 8
		£64 2 8
Add costs of action		2 6 6
		£66 9 2
Deduct costs of taxation		10 2 4
		£56 6 10
Cr. by cash of Mr. Murrell	£12 5 6	
,, of county-court	26 1 4	38 6 10
Balance due to Mr. Keighley		£18 0 0"

When the parties were before the master, Goodman claimed credit only for the sum of 12l. 5s. 6d. received of Mr. Murrell, and 19l. 19s., the damages awarded to him in the county court, making together 33l. 4s. 6d.; but Mr. Keighley insisted upon giving credit for the whole amount received from the clerk of the county court, —26l. 1s. 4d; and, after the taxation, Goodman [340] tendered to Keighley the amount found due by the allocatur, and the further sum of 6l. 2s. 4d., together, 24l. 2s. 4d.; which sum Keighley refused to accept.

J. Brown, in Trinity term last, moved, on behalf of Keighley, for a rule calling upon Goodman to shew cause why the master should not be at liberty to review his taxation. He submitted that the master had taken an erroneous view of the 91st section of the 9 & 10 Vict. c. 95 (*a*), the scale of fees in schedule (D.) shewing that more than the sums mentioned in that section must be actually disbursed before a judgment could be obtained in the county-court. [Maule J. How much is charged in the bill for "appearing and acting" in the county-court?] The bill is not so framed as to shew what is the precise sum charged for the attorney's mere **[341]** appearance in court. The court of Queen's Bench, in a case of *Ex parte Clipperton, In re Green* (12 Jurist, 1044), decided that this section of the act applies to costs between attorney and client, and includes every thing that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing. That clearly is not a correct view of the statute. [Maule, J. I should certainly say that appearing and acting in court, must be something different from business done in the attorney's office. Wilde, C. J. These regulations would seem to be applicable only as between party and party. Maule, J. It is not incident to a court to tax costs as between attorney and client.]

A rule nisi having been granted,

Byles, Serjt., in the course of the same term, shewed cause. The words of the 91st section are clear and precise, that the attorney shall in no case be allowed, on taxation, more than 15s., for appearing or acting on behalf of any other person in the county-court. [Maule, J. Is he to have 15s. only, or 15s. plus the expenses out of pocket?] Fifteen shillings plus the expenses out of pocket. The court of Queen's Bench has, in the case referred to, put a construction upon the statute, which must govern this case, viz. that the prescribed fee includes every thing that is done by the attorney in relation to the suit, whether before, or at, or after the hearing. Patteson, J., in delivering the judgment of the court, there says: "The words of the section are very clear,—'that no attorney shall be entitled to have or recover therefore' (that is, for appearing or acting on behalf of any other person in the county-court,) more than the sums there specified, which have been allowed by the master. We are of **[342]** opinion that the legislature did not intend to make any distinction between an attorney's right to recover from the opposite party, and from his own client. We think that the costs intended to be allowed between party and party, in regard to the attorneys, are, all such costs as such attorneys are entitled to receive from their clients; and that the latter part of the section, which requires the order of a judge for the allowance of such costs as between party and party, was meant as a further check against the unnecessary employment of attorneys, but does not limit and control the preceding part of the clause. We are further of opinion that the words 'acting for any other person in the county-court' include every thing that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing." [Wilde, C. J. I must confess I should have thought that the 91st section applied

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(*a*) Which enacts "that no person shall be entitled to appear for any other party to any proceeding in any of the said courts, unless he be an attorney of one of Her Majesty's superior courts of record, or a barrister-at-law instructed by such attorney on behalf of the party, or, by leave of the judge, any other person allowed by the judge to appear instead of such party; but no barrister, attorney, or other person, except by leave of the judge, shall be entitled to be heard to argue any question as counsel for any other person in any proceeding in any court holden under this act: and no person not being an attorney admitted to one of Her Majesty's superior courts of record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court: and no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 5l., or more than 15s. in any case within the summary jurisdiction given by this act; and in no case shall any fee exceeding 1l. 3s. 6d. be allowed for employing a barrister as counsel in the cause: and the expense of employing a barrister or an attorney, either by plaintiff or defendant, shall not be allowed on taxation of costs, in the case of a plaintiff, where less than 5l. is recovered, or, in the case of a defendant, where less than 5l. is claimed, or, in any case, unless by order of the judge."

only to taxations in the county-court, and had nothing to do with costs as between attorney and client.] The case of *In re Green*, is plainly in accordance with the real intention of the legislature. [Wilde, C. J. The clause seems to contemplate that the attorney would be no more employed before the hearing than the barrister is.] It may be so. [Wilde, C. J. Suppose the attorney does not appear at all in court, is he to have nothing for his trouble in investigating and advising?] The policy of the statute was, to discourage the employment of professional men in these local courts. [Wilde, C. J. The effect of your construction of the 91st section would be, to drive the suitors into the hands of parties who certainly are not the best calculated to promote their interests.] Whatever the consequence may be, the court will not, with a view to avoid a supposed inconvenience, reject the natural and obvious construction of the clause.

[343] J. Brown, in support of his rule. The 91st section clearly applies only to costs incurred after the levying the plaint in the county-court. The case of *In re Green* could not have been well considered; and it is not exactly parallel with this case: the items that were objected to there, were, for writing two letters, and for instructions to sue.

Wilde, C. J. Considering that the point is one of very general interest, and that the case referred to is somewhat loosely reported, we will take time to deliberate, and to ascertain what was really decided by the court of Queen's Bench.

Cur. adv. vult.

Maule, J., now delivered the judgment of the court (*a*):—

This was a motion to review the taxation of an attorney's bill. The master had disallowed certain items for business done in conducting preliminary inquiries before commencing a suit in one of the county-courts established under the act of 9 & 10 Vict. c. 95. The ground of the disallowance was, that the 91st section of that act prevented the attorney from having or recovering, for the services in question, any larger sum than 15s. And this construction of the section appears to have been adopted by the court of Queen's Bench, in the case of *Ex parte Clipperton, In re Green*, for which we were referred to the Jurist, vol. 12, p. 1044.

Having heard the case argued on this question, and having taken time to consider it, we find ourselves compelled to adopt a different construction of the **[344]** section in question. That section begins by providing that no person but an attorney, or a barrister instructed by one, or a person allowed by the judge to appear instead of such party, shall be entitled to appear in a county-court for any other party: and such person is, by the next clause, restricted from being entitled to be heard to argue a question as counsel, without leave of the judge. This is followed by a clause in the following words,—"and no person, not being an attorney admitted in one of Her Majesty's superior courts of record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court; and no attorney shall be entitled to have or recover *therefore* any sum of money, unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 5l., or more than 15s. in any case within the summary jurisdiction given by this act." The section then goes on to provide that no fee exceeding 1l. 3s. 6d. shall be allowed for employing a barrister "as counsel in the cause," and that the expense of employing a barrister or attorney shall not be allowed, on taxation of costs, unless 5l. is recovered or claimed, or without the order of the judge.

The first clause,—regarding the description of persons who may be allowed to appear in the county-court, for another party, or instead of such party,—seems very clearly to apply only to the appearance in the court as a representative of a party who would otherwise be obliged to appear for himself. The next provision, restricting the right to be heard to argue as counsel, also evidently applies only to a proceeding in court. The clause in question begins with this provision,—"and no person, not being an attorney, admitted, &c., shall be entitled to have or recover any sum of money for appearing or acting on behalf of any **[345]** other person in the said court." These words, certainly, in their literal construction, apply only to what is done in the court: and this is not only the literal

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(*a*) The judges present at the argument, were, Wilde, C. J., Coltman, J., Maule, J., and Williams, J. Coltman, J., had died before the judgment was prepared.

sense, but the natural and obvious sense of the words; and the subject of the preceding part of the section being matters in court only, confirms this construction: indeed, it would be difficult, by affirmative words, more expressly to confine the enactment to what is done in court, than by those actually used,—"appearing or acting on behalf of any other person in the said court." The words next following, on which the present question immediately arises, are,—"And no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs unless the debt or damage claimed shall be more than 5l., or more than 15s. in any case within the summary jurisdiction given by this act." Here, the word "therefore" clearly is intended to refer to the preceding words, "for appearing or acting on behalf of any other person in the said court:" so that the right to have or recover anything in cases not above 40s., is also taken away only in respect of the appearing or acting in court on behalf of the party to the suit. It is true that the word "therefore" is not repeated in the provision as to cases where 10s. or 15s. may be had or recovered; the words being,—to have or recover more than 10s. "for his fees and costs," without saying "therefore." But it appears to us that this provision is to be considered as applying to fees and costs for appearing and acting on behalf of any other person in the said court. If this were not so, it would follow, that, in cases not exceeding 40s., an attorney might recover for what was done out of court, but not in cases exceeding that amount (*a*). Indeed, the **[346]** court of Queen's Bench, as reported in the Jurist, seem to have considered that the restriction of fees to 10s. and 15s., as well as the preceding one, which deprives the attorney of any claim in cases not exceeding 40s., should be understood of fees "for appearing and acting in court on behalf of another," and expressed that opinion in the commencement of their judgment; observing that "the words of the section are very clear, that no attorney shall be entitled to have or recover *therefore* (that is, for appearing or acting on behalf of any other person in the county-court,) more than the sums therein specified."

It appears, therefore, on considering the words of the enactment, taking the language of the legislature in its ordinary sense, that the restriction in question does not apply to business done out of court, before a suit is commenced: and we think that, looking at the general scope of the enactment, we ought to come to a similar conclusion.

The subject of the section is, proceedings in county-courts,—a very fit subject of regulation in an act for establishing such courts. The act certainly contemplates that the hearing of cases in the county-courts will usually be short and summary. The limitation of fees for acting for a party at such a hearing, is a natural incident to such courts; and such limitations are not unusual in respect of proceedings in courts. But, where one man employs another to do work and labour for him, for a reasonable remuneration, it seems unreasonable to say the contract shall not be binding if the employment end in a suit in a county-court, but will be binding if it do not. We think such a restriction as this would be, on the liberty of entering into such contracts as the parties think fit, ought not to be implied, unless by a necessary implication: and there is none such here.

[347] The court of Queen's Bench is reported to have said, in *Ex parte Clipperton, In re Green*, that the legislature did not intend to make any distinction between an attorney's right to recover from the opposite party, and from his own client: but we think there is no reason for construing the act as abolishing the existing distinction between the costs which may be allowed between party and party, and the remuneration which an attorney may recover from his client. The framers of the act use appropriate words, in speaking of both kinds of claim,—the attorney's claim against his client being described as a right "to have or recover," while costs between party and party are described as costs "allowed on taxation."

On the whole, we think there is nothing in this section to take away the right of an attorney to be paid a reasonable amount for work done out of court, before the institution of a suit, or to take away the right of the superior courts,—which alone have jurisdiction to tax attorneys' bills,—to allow a reasonable remuneration for this description of labour. The rule must, therefore, be made absolute.

Rule absolute.

(*a*) Quære.

[348] TEMPLE *v.* SLEIGH. Jan. 25, 1850.

A certificate under the debtors' arrangement act (7 & 8 Vict. c. 70, s. 13), must certify the filing of the petition, and not merely that a resolution or agreement was duly assented to, and approved and filed by the commissioner.—Quære, whether a certificate under this act requires confirmation,—or whether a plea setting up such a certificate, need shew that the debt is not of the excepted classes mentioned in s. 2?

Assumpsit on a bill of exchange for 150l., bearing date the 25th of July, 1846, drawn by the defendant upon one W. W. Sleigh, payable one month after date, and indorsed to the plaintiff; with a count upon an account stated.

The defendant pleaded, amongst other pleas, that, after the bill of exchange in the first count of the declaration became due and payable according to the tenor and effect thereof, and after the making of the promise in the last count of the declaration, and after the passing of a certain act of parliament made and passed in a session of parliament holden in the seventh and eighth years of the reign of Her present Majesty, intituled "An act for facilitating arrangements between debtors and creditors," and before the commencement of this suit, to wit, on the 18th of October, 1847, the defendant, being a debtor unable to meet his engagements with his creditors, and not being a trader within the meaning of the statutes in force relating to bankrupts at the time of the passing the said act, with the concurrence of one third in number and value of his creditors (testified by their having signed his petition), did present to the court of bankruptcy a petition setting forth a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and particularly stating the name, residence, and occupation of the plaintiff, and an account of the plaintiff's alleged debt, and the consideration thereof, and also a full account of his, the defendant's, estate and effects, whether in possession, reversion, or **[349]** expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him, and also setting forth that he was unable to meet his engagements with his creditors, and the true cause of such inability, and also setting forth a certain proposal which he, the defendant, then made for the compromise of his said debts and engagements, and also setting forth that one third in number and value of his creditors had assented to his said proposal; and which petition prayed that his said proposal, or such modification thereof as by the majority of his creditors should be determined, should be carried into effect under the superintendence and control of the said court, and that he, the defendant, should in the meantime be protected from arrest, by order of the said court: That the said petition was afterwards, to wit, on the day and year last aforesaid, and before the commencement of this suit, duly filed of record in the said court; and that H. J. Shepherd, Esq.,—the said H. J. Shepherd then being one of the commissioners of the said court, and the commissioner acting in the matter of the said petition,—did, upon the presentation of the said petition, to wit, on the day and year last aforesaid, privately examine into the truth of the several matters alleged in the said petition; and that the said H. J. Shepherd,—being satisfied of the truth of the said several matters in the said petition alleged, and that the debts of the defendant had not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat in bankruptcy, or malicious **[350]** trespass, and that the defendant had made a full disclosure of his debts and credits, estate and effects, and was desirous of making a bonâ fide arrangement with all his creditors, and that his proposal to that effect was reasonable and proper to be executed under the direction of the said court,—did thereupon direct a meeting of all the creditors of the said defendant to be convened according to the provisions of the said act, and that such meeting should be holden, to wit, on the 3rd of November, 1847, at the office of G. J. Graham, at No. 25 Coleman Street, in the city of London,—the said G. J. Graham then being one of the official assignees of the said court of bankruptcy; and that the defendant should give notice in writing to every creditor of him the defendant, not less than seven or more than twenty-eight days before the holding of such meeting: That afterwards, and before the commencement of this suit, to wit, on the said 18th of October, 1847, the said H. J. Shepherd did appoint the said G. J. Graham (the said G. J. Graham then being one of the official assignees of the said court of bankruptcy) to preside at such meeting of creditors, and to report the resolutions thereof to the said H. J. Shepherd, Esq.: That, in pursuance of such direction of the said H. J. Shepherd, as aforesaid, and according to the provisions of the said act, he, the defendant, gave notice in writing to every creditor of him, the defendant, and particularly to the said plaintiff, of such intended meeting, and of the time and place of holding the same, not less than seven, or more than twenty-eight days before the holding of such meeting: That a meeting of the creditors of the said defendant was afterwards, and before the commencement of this suit, to wit, on the 3rd of November, 1847, at the office of the said G. J. Graham, No. 25 Coleman Street, in the city of London, convened and held; at which meeting the said G. J. **[351]** Graham did preside: That, at the said meeting, the major part in number and value of the creditors of the said defendant did assent to the proposal of the said defendant; and that thereupon the said G. J. Graham did, according to the provisions of the said act, appoint another meeting of the creditors of the said defendant to be convened and held under the provisions and directions of the 4th section of the said act, not earlier than seven or later than twenty-eight days from such last-mentioned meeting: That of such second meeting, and the purpose thereof, he, the defendant, did give notice in writing, and did personally serve the same on every creditor who was not present, by himself or his appointed agent, at such first meeting, and particularly on the plaintiff, three clear days at least before the day appointed for such second meeting: That such second meeting was convened and held according to the provisions of the said act; and, at the said second meeting, three fifths in number and value of all the said defendant's creditors then present,—the said creditors so present being one full third in number and value of all the creditors of the defendant,—did agree to accept such composition as was assented to at the said first meeting of creditors: That the said creditors so present at such second meeting,—the same being three fifths in number and value of all the creditors of the defendant,—did reduce the terms of the said composition into writing, and signed the same: That, afterwards, and before the commencement of this suit, and within fifteen days next after the said agreement for acceptance of the said composition, and the signing of the same at the said second meeting of creditors, the same agreement was submitted to the said H. J. Shepherd, the commissioner acting in the matter of the said petition; and the said H. J. Shepherd did afterwards, and before the commencement of this suit, to **[352]** wit, on the 18th of November, 1847, cause the said agreement and resolution to be filed and entered of record in the said court of bankruptcy, and did grant to the said defendant a certificate of such filing, and indorsed on such certificate his protection of the said defendant from arrest: That, afterwards, and before the commencement of this suit, to wit, on the 18th of December, 1847, the said agreement was carried into effect, and the creditors of the said defendant were satisfied according to the tenor of the same; and that thereupon the said H. J. Shepherd, the commissioner acting in the matter of the said petition, did cause a meeting of the said creditors of the defendant to be held before him on the 25th of February, 1848, at which meeting the said H. J. Shepherd,—the same meeting being before the commencement of this suit, and the said H. J. Shepherd, then being the commissioner of the court of bankruptcy acting in the matter of the said petition,—did give to the said defendant a certificate under his hand and seal, certifying *that he, the said H. J. Shepherd, had caused such meetings of the creditors of the defendant to be held as are directed by the said act, and that a certain resolution or agreement had been duly assented to at such meeting, as he the said H. J. Shepherd thought reasonable and proper to be executed under the direction of the said act, that he the said H. J. Shepherd had caused the same to be filed and entered of record, and that the said resolution or agreement had been fully carried into effect* (*a*),—verification.

To this plea the plaintiff demurred specially, assigning for causes,—that it does not appear in and by the plea, that the said petition of the defendant set forth such proposal as he at the time of presenting his said petition **[353]** was able to make for

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(*a*) See note (*a*) at the end of the case.

the future payment or the compromise of his debts or engagements, or that the proposal in the said petition set forth was the proposal which, at the time of the prosecuting the said petition, the defendant was, most beneficially to his creditors, able to make; that it appears thereby that the said petition only set forth a certain proposal which he the defendant then actually made for the compromise of his said debts and engagements, and that it is quite consistent with the said plea, that the defendant was, at the time of presenting his said petition, able to carry into effect a proposal more beneficial to his creditors than the proposal in the said petition set forth, or that he was unable to carry into effect the said proposal, or any modification of the same,—That it is not averred in, or shewn by, the plea that the said resolution or agreement therein mentioned, embodied the very terms of, or was equivalent to, the proposal in the said petition of the defendant mentioned, or was in fact a modification of such proposal, and it is quite consistent with the plea, that the said resolution or agreement was neither substantially identical with, nor a modification of, the said proposal:—That it is not averred in, or shewn by, the plea, that the said H. J. Shepherd, when he the said H. J. Shepherd, as in the plea alleged, privately examined into the truth of the several matters alleged in the said petition, did examine the defendant upon oath, and any creditor concurring in his petition, and any witness then produced by the defendant; and that it is quite consistent with the plea, that the said H. J. Shepherd, when he privately examined into the truth of the matters alleged in the said petition, did not examine, either upon oath, or at all, the said defendant, or any creditor concurring in his said petition, or any witness then produced by the defendant:—That it is not averred in, or shewn by, the plea, that **[354]** the resolution or agreement therein mentioned contained any terms for the compromise or future payment of the said debt due from the defendant to the plaintiff, or that the same could not be carried into effect, according to the tenor of the same, without in fact satisfying the said debt due from the defendant to the plaintiff:—That it is not averred or shewn in or by the plea, that the plaintiff, before or at the time when the resolution or agreement in the plea mentioned was carried into effect, or at any time by reason of the said resolution or agreement being or having been carried into effect, received any payment or satisfaction, either wholly or in part, of his said debt, and it is perfectly consistent with the plea, that the said resolution or agreement was carried into effect, and that the creditors of the defendant were satisfied, according to the tenor of the same, without any satisfaction or payment of the said debt due from the defendant to the plaintiff, either wholly or in part, being or having been made:—That it does not appear in or by the plea, that H. J. Shepherd, in the plea mentioned, had jurisdiction to give to the defendant a certificate, according to the provisions of the 13th section of the said act of parliament; because it does not appear thereby, neither is it shewn therein, that any meeting of the creditors of the defendant was held in pursuance of the directions in the plea alleged to have been given by the said H. J. Shepherd:—That it does not appear by the said plea, that the defendant is entitled to plead the certificate in the plea last mentioned, in bar of this action, or in discharge of the debt for the recovery of which this action is brought, because it is not shewn or averred in or by the said plea, that the said court of bankruptcy did, in writing under hand and seal, certify to the court of review, or to such one of the vice-chancellors of the high court of Chancery as the lord chancellor had then **[355]** been pleased to appoint to exercise all the jurisdictions, powers, authorities, and privileges of the said court of review in bankruptcy, that the defendant had made a full discovery of his estate and effects, and at all times conformed himself to the laws in force at the time of presenting his said petition to the court of bankruptcy, and that there did not appear to be any reason for doubting the truth and fulness of such discovery; and because it is not averred or shewn in or by the said last plea, that the defendant hath made oath in writing that the said certificate in the said plea last mentioned, was obtained fairly and without fraud; and because it is not averred in, or shewn by, the said plea, that the said certificate in the said plea last mentioned, was, after oath made in writing by the defendant that the said certificate in the said plea last mentioned, was obtained fairly and without fraud, confirmed by the court of review, or such one of the vice-chancellors of the high court of Chancery as the lord chancellor had been pleased to appoint to exercise all the jurisdictions, powers, authorities, and privileges of the said court of review in bankruptcy:—That the defendant, by his said plea, seeks to make the certificate therein last mentioned, operate more fully than a certificate of conformity under the statutes relating to bankrupts:—And that it does not appear by the said plea, that the defendant is entitled to plead a certificate under the provisions of the 13th section of the said act of parliament, in bar of this action, or of the debt for the recovery of which this action is brought, because it is not averred or shewn in or by the said plea, that the debt for the recovery of which this action is brought, is not a debt in the said act of parliament excepted from the operation of the said act of parliament.

Joinder in demurrer.

[356] Keane, in support of the demurrer. The preamble of the statute 7 & 8 Vict. c. 70, recites that "it is expedient that trust deeds and other amicable modes of arrangement between debtors and their creditors should be facilitated, and that better means should be provided for carrying the same into effect:" the 1st section then proceeds to enact, "that it shall be lawful for any debtor who is unable to meet his engagements with his creditors,—such debtor not being a trader within the meaning of the statutes now in force relating to bankrupts,—with the concurrence of one third in number and value of his creditors (testified by their signing his petition), to present a petition to the court of bankruptcy, setting forth a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him; and also setting forth that he is unable to meet his engagements with his creditors, and the true cause of such inability; and also setting forth such proposal as he is able to make for the future payment, or the compromise, of such debts or engagements; and that one third in number and value of his creditors have assented to such proposal; and praying that such proposal (or such modification thereof as by the majority of his creditors should be determined) should be carried into effect under the superintendence and control of the said court; and that he, the said petitioning-debtor, should in the mean time be protected from arrest by order of the said court." The petition set out in this plea does not comply with that section, inasmuch as it does not set forth such proposal as the defendant was able to make for the future payment or the compromise of his debts or engagements. The 2nd section enacts, "that **[357]** upon the presentation of such petition, one of the commissioners of the said court, in such rotation as by order of the said court shall be appointed, shall privately examine into the matter of the said petition, and for that purpose shall have power to examine upon oath such petitioning-debtor, and any creditor concurring in his petition, and any witness produced by such petitioning-debtor; and, if such commissioner shall be satisfied of the truth of the several matters alleged in such petition, and that the debts of such petitioning-debtor have not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat in bankruptcy, or malicious trespass, and that such petitioning debtor has made a full disclosure of his debts and credits, estate and effects, and is desirous of making a bonâ fide arrangement with all his creditors, and that his proposal to that effect is reasonable and proper to be executed under the direction of the said court,—it shall be lawful for such commissioner to direct that a meeting of all the creditors of such petitioning-debtor should be convened at such time and place as the said commissioner shall appoint; notice of which meeting shall be given in writing to every such creditor not less than seven or more than twenty-eight days before the same is held." The 15th section,—the interpretation clause,—provides that the act shall be construed "beneficially to creditors;" that is, that a party availing himself of the benefit of the act, shall proceed with a due regard for the interests of his creditors; and this requirement is not complied with, unless the proposal made is the best the debtor can **[358]** make. Under this act, the creditors have not necessarily the security of the examination of the debtor, or any witness, upon oath, as they have under the 5 & 6 Vict. c. 122. The 4th section of the 7 & 8 Vict. c. 70, enacts, "that, if at such meeting of creditors the major part in number and value, or nine tenths in value, or nine tenths in number whose debts exceed 20l., shall assent to the proposal of such petitioning-debtor, or to any modification thereof, the president (*a*)1 of such meeting shall appoint another meeting of the creditors of such petitioning-debtor, to be held not earlier than seven or later than twenty-eight days from such first meeting,—of which second meeting, and of the purpose thereof, notice in writing shall be personally served on every creditor who was not present, by himself or his appointed agent, at such first meeting, three clear days at least before the day appointed for such second meeting." The 5th section enacts, "that, if, at such second meeting of creditors, three fifths in number and value of all the creditors present, or nine tenths in value, or nine tenths in number whose debts exceed 20l., shall agree to accept such arrangement or composition as was assented to at the said first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to such confirmation as is hereinafter enacted) shall thenceforth be binding and of full force, as well against the petitioning-debtor as against all persons who were creditors of the said petitioning-debtor at the date of his said petition, and who had notice of the said several meetings of creditors: provided, however, that such resolution or agreement shall not be valid, unless one full third in number and value of all the creditors of such petitioning-debtor were present at such second meeting, either in person or by an authorised agent." **[359]** Sections 6 and 7 provide for the interim protection of the petitioner; and the former enacts that no such protection shall be valid in favour of any petitioning-debtor who shall be proved to have been about to abscond beyond the jurisdiction of the court of bankruptcy, or who has concealed, or is concealing, any part of his estate or effects, nor against any creditor whose debt is not truly specified in the said petition, nor against any creditor whose debt has been contracted by reason of any manner of fraud or breach of trust. The 8th section vests the estate and effects of the petitioner in the trustee, from the filing of the resolution and agreement. The 10th section enacts, "that, if it shall at any time appear to the said commissioner, on the representation of such trustee as aforesaid, or of any two creditors as aforesaid, that such petitioning-debtor has not made a true discovery of his estate and effects, or has not duly accounted for any subsequently-acquired property (if required, by the true intent and meaning of the said resolution or agreement), or has wilfully made any false return of creditors, it shall be lawful for the said commissioner to summon such petitioning-debtor to be examined before him upon oath touching such matters; and such summons and examination shall be enforced in such manner as is now practised in the summoning and examination of bankrupts." The 13th section,—upon which the right to plead the plea now in question is founded,—enacts, "that, at such last-mentioned meeting (*a*)2, the said commissioner shall give to the said petitioning-debtor a certificate, under the hand and seal of the said commissioner, of the filing of the said petition, and of the resolution or agreement of the creditors of the said petitioning-debtor, and that the said resolution or agreement has been fully carried into effect; **[360]** and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under the statutes relating to bankrupts, excepting only that no debt herein excepted from the operation of this act shall be barred by the said certificate." The certificate relied on in this plea is not the certificate mentioned in that section: it does not certify the filing of the petition, which is to be the foundation of the whole proceeding: neither does it shew, as it is submitted it ought to do, that the certificate was obtained fairly and without fraud, or that it has been confirmed. If thesetwo latter requirements are held unnecessary, the certificate will operate more fully than a certificate of conformity under the bankrupt acts,—which is contrary to the declared intention of the legislature. In *Wells* v. *Iggulden* (3 B. & C. 186, 5 D. & R. 13), a declaration on the 55 G. 3, c. 137, s. 6 (*b*) stated that the defendant

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(*a*)1 Whose appointment is provided for by s. 3.

(*a*)2 A meeting held for the purpose mentioned in s. 12.

(*b*) Which enacts, "that no churchwarden or overseer of the poor, or other person or persons in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control, or direction of the poor of any parish, &c., shall or may be placed jointly with, or independent of, such churchwardens and overseers, or any of them, under or by virtue of any act or acts of parliament, shall, either in his own name, or in the name of any other person or persons, provide, furnish, or supply, for his or their own profit, any goods, materials, or provisions for the use of any workhouse or workhouses, or otherwise, for the support and maintenance

[361] being an overseer of the poor of the parish of A., supplied for his own profit provisions for the support of the poor of the said parish, "whereby, and by force of the statute in such case made and provided, he forfeited for his said offence 100l., and thereby, and by force of the statute, an action had accrued," &c.: upon motion in arrest of judgment, on the ground, amongst others, that the declaration did not negative the exceptions contained in the 6th section of the act, it was contended, for the plaintiff, that the exception, coming by way of proviso, and being incorporated with that part of the act which created the offence, the plaintiff was not bound to take notice of it in his declaration. On the other hand, it was insisted that the declaration should have negatived the exceptions, they being contained in the same section which creates the offence. But Holroyd, J., said (3 B. & C. 188): "The exception is totally separate from the enactment; it was not, therefore, necessary for the plaintiff to negative it. Had it formed a qualification of that which went before, and been incorporated with it, then it would have been necessary, according to the rule laid down in *Stowel* v. *Lord Zouch* (Plowd. Comm. 376 (per Dyer, C. J.), and *Newis* v. *Lark*" (Plowd. Comm. 410). And Bayley, J., added: "Upon that point I have no doubt: statutes are not divided into [362] sections upon the rolls of parliament, and therefore the mere placing the proviso in the same section of the printed act, does not make it necessary to notice it in pleading; unless it is also incorporated in the enacting sentence." Here, the onus of shewing that he is entitled to the protection of the certificate, is by the whole scope of the act thrown upon the defendant: the creditor can have no means of knowing whether his debtor has contracted debts fraudulently or not; it is therefore expedient that the party who alone possesses the knowledge, should be bound to aver and to prove it.

The 37th section of the 5 & 6 Vict. c. 122, enacts "that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter mentioned." By section 38, the bankrupt is declared not entitled to a certificate, if he has lost certain amounts by gaming or stock-jobbing, or concealed or destroyed books, &c., or made false entries, or concealed any property, or permitted fictitious debts to be proved. And the 39th section provides "that no certificate shall be such discharge, unless the court (of bankruptcy) shall, in writing under hand and seal, certify to the court of review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be [363] confirmed by the court of review." The omission of all this is objected against this plea. And the omission is most important; for, should the objection prevail, the commissioner must necessarily take a very different view of

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of the poor in any parish, &c., for which he or they shall be appointed as such, during the time which he or they shall retain such appointment, nor shall be concerned, directly or indirectly, in furnishing or supplying the same, or in any contract or contracts relating thereto," under the penalty of 100l. "Provided nevertheless, that, if it shall happen in any parish, &c., that a person or persons competent and willing to undertake the supply of any of the articles or things required for such workhouse or workhouses, or for the use of the poor there, cannot be found, within a convenient distance therefrom, other than and except some or one of the churchwardens and overseers of the poor, or other person or persons having the ordering, managing, control, or direction of the poor in such parish, &c., then and in every such case, it shall and may be lawful to and for any two or more neighbouring justices of the peace (proof thereof having been first duly made before them upon oath, &c.), by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens and overseers, or other such person or persons as aforesaid, to contract and agree for the furnishing and supplying of any articles or things which may be required for such workhouse or workhouses, or otherwise for the use of the poor of such parish, &c., during the time which he or they may retain such appointment; any thing therein contained to the contrary, notwithstanding."

his duty under the 2nd section of the 7 & 8 Vict. c. 70. [Cresswell, J. You contend, as I understand, that, after the certificate is given under this act, the same steps must be taken to obtain its confirmation, as in the case of a certificate of conformity under the bankrupt acts?] Precisely so. [Wilde, C. J. In short, that it is no certificate at all until confirmation?] It may before confirmation operate a limited protection of the debtor, in the way pointed out in the 42nd section of the 5 & 6 Vict. c. 122. But, under the 37th section of that act, the confirmation must be pleaded, as well as the allowance of the certificate. And, by the interpretation clause of the act now in question, s. 15, it is enacted, that, "if any doubts should arise in the construction thereof, it shall be construed by analogy to the laws now in force relating to bankrupts, and the practice thereof."

Bernard, contrà. [Wilde, C. J. Have you addressed your attention to the fact of the certificate stated in the plea, being merely a certificate that a certain resolution or agreement was duly assented to at the meeting of the creditors, which the commissioner thought reasonable, and that the commissioner had caused the same to be filed and entered of record,—instead of a certificate, as required by s. 13, of the filing of the petition, and of the resolution or agreement? Had you not better amend your plea?] The plea certainly does seem to be defective in that respect. [Maule J. If you elect to amend, you may probably think it worth your while to amend also with respect to the omission to negative **[364]** the debts being of one of the excepted classes. That seems to me to be doubtful.]

Bernard elected to amend, on the usual terms.

Rule accordingly (*a*).

KIDGILL *v.* MOOR, Clerk. Feb. 11, 1850.

[S. C. 19 L. J. C. P. 177; 14 Jur. 790. Referred to, *Mayfair Property Company* v. *Johnston*, [1894] 1 Ch. 519.]

A declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant; and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way; and that, by means of the premises, the plaintiff was injured in his reversionary estate:—Held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given.

This was an action upon the case, by a reversioner, for an obstruction of an alleged right of way.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereinafter mentioned, the plaintiff was, and continually from thence hitherto had been, and still remained, seised in his demesne as of fee of and in one undivided seventh part, the whole into seven equal parts to be divided, of a certain close and premises, with the appurtenances, situate in the parish of Bradfield, in the county of Berks, as tenant in common thereof with William Kidgill, &c., the said William Kidgill, &c., **[365]** then being possessed of the other six undivided parts of the said close and premises, with the appurtenances; that the said undivided seventh part of the said close and premises, with the appurtenances, during all the time aforesaid, was, and still remained, in the possession and occupation of Joseph Kidgill, as tenant thereof to the plaintiff, the reversion thereof, expectant on the determination of the said tenancy, then and still belonging to the plaintiff; and that the plaintiff, during all the time aforesaid, of right ought to have had, and yet of

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(*a*) The plea was afterwards amended, the amendment consisting of the substitution for the words in italics, ante, p. 352, of the following,—"the filing of the said petition of the defendant, and of the said resolution or agreement of the creditors of the defendant, and that the said resolution or agreement had been fully carried into effect."

The amended plea was demurred to: but the matter was ultimately arranged.

right ought to have, for his tenants, occupiers of the said undivided seventh part of the said close, &c., a certain way from and out of the said close, unto, into, through, and over a certain other close of the defendant, in the parish aforesaid, from and out of the same, unto and into a certain common and public highway in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close of the defendant, unto and into the said first-mentioned close and premises, to go, pass, and re-pass, on foot, with horses, waggons, and carriages, every year, and at all times of the year, at their free will and pleasure: yet that the defendant, well knowing the premises, but wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, whilst the said undivided seventh part of the said close was so in the possession and occupation of the said Joseph Kidgill as tenant thereof to the plaintiff, and whilst he, the plaintiff, was so interested in the said undivided seventh part of the same, as aforesaid, to wit, on the 1st of May, 1849, and on divers days and times between that day and the commencement of this suit, wrongfully and unjustly locked, chained, shut, and fastened a certain gate stand-**[366]**-ing in and across the said way, and wrongfully and injuriously kept and continued the said gate so locked, chained, shut, and fastened, in and upon the said way, for a long space of time, to wit, from thence until the commencement of this suit, and thereby during all that time wrongfully and injuriously obstructed the said way,—by means of which said several premises the plaintiff had been and was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, so in the possession of the said Joseph Kidgill as tenant thereof to the plaintiff; and also by means of the committing of the said grievances by the defendant as aforesaid, one J. G. Lewis, who, before the committing of the said grievances by the defendant, had contracted and agreed with the plaintiff for the purchase by him from the plaintiff of the said reversionary estate and interest of the plaintiff, for a large sum of money, to wit, the sum of 300l., and who would otherwise have completed the said purchase, and have paid to the plaintiff the said sum of money, was deterred and prevented from completing the said purchase, and from paying the said sum of money to the plaintiff, and from thence continually had wholly declined to complete the said purchase, or to pay the said sum of money, or any part thereof, to the plaintiff; and thereby the plaintiff had been, and still was, hindered and prevented from completing the sale of his said reversionary estate and interest to the said J. G. Lewis, and had thereby not only lost and been deprived of the advantage and emoluments which he would have derived and acquired from the completion of the sale of his said reversionary estate and interest to the said J. G. Lewis, but had been forced and obliged to pay, lay out, and expend divers large sums of money, to wit, the sum of 100l., **[367]** in and about the said contract for the sale of his said reversionary estate and interest, and expenses incidental thereto,—to the damage of the plaintiff of 200l., &c.

The defendant pleaded,—first, not guilty,—secondly, a plea traversing the seisin of the plaintiff as alleged in the declaration,—thirdly, a traverse of the alleged right of way: whereupon issue was joined.

The cause was tried before Rolfe, B., at the summer assises for the county of Berks, in 1849, when a verdict was found for the plaintiff upon all the issues, damages 40s.

Whateley, in Michaelmas term last, obtained a rule nisi to arrest the judgment (*a*), on the ground that the declaration disclosed no cause of action,—the alleged obstruction of the right of way not being shewn to be an injury of a permanent nature, so as to affect the reversion. He cited *Jesser* v. *Gifford* (4 Burr. 2141), *Jackson* v. *Pesked* (1 M. & Selw. 234), *Baxter* v. *Taylor* (4 B. & Ad. 72, 1 N. & M. 11), *Bright* v. *Walker* (1 C. M. & R. 211, 4 Tyrwh. 509), and *Tucker* v. *Newman* (11 Ad. & E. 40).

Keating and Matthews now shewed cause. The complaint here is, that the defendant wrongfully fastened a gate erected across a way leading over the defendant's close; whereby the plaintiff's reversionary estate was injured: and the question will be, whether such an obstruction could, under any circumstances, be any injury to the reversion. One of the earliest authorities upon this subject is, the case of *Jesser* v.

(*a*) He also moved for a new trial, on the ground that the verdict was against the weight of evidence; but the rule as for a new trial was refused.

Gifford (4 Burr. 2141). That was an action for erecting a wall, whereby the plaintiff's **[368]** lights were obstructed. A motion was made in arrest of judgment, on the ground that the action would not lie by a reversioner, being only an injury to the person in possession. But Aston, J., afterwards said "he had looked into it, and had found a case S. P. with the present; and accordingly cited *Tomlinson* v. *Brown* (E. T. 1755, MS.): it was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. Mr. Norton, in arrest of judgment, objected that a temporary nuisance cannot be an injury to the inheritance; it may be abated before the estate comes into possession: and he cited *Some* v. *Barwish* (Cro. Jac. 231); and observed, that, if this would hold, the defendant would be liable to a double action,—one, by the possessor of the estate,—the other, by the reversioner. Mr. Crowle shewed cause on behalf of the plaintiff, and insisted that it was a damage done to the inheritance: if the reversioner wanted to sell the reversion, this would certainly lessen the value of it. The court were of opinion that an action might be brought by one in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it." And Lord Mansfield added: "That is decisive;" and the rule for arresting the judgment was discharged. Can there be any doubt that the erection and fastening of a gate across a way may be as permanent an obstruction to the right, and consequently as great an injury to the reversion, as the building of a wall? This is not like the case of an attempt to gain a right on the plaintiff's land. [Maule, J. In the case of an obstruction of lights, the house is permanently the worse for it: but, in the case of an obstruction of a right of way, the plaintiff is only injured if he is obstructed at a time **[369]** when he wants to exercise his right. It is like a profit à prender: the commoner must shew that he wanted to use the common, before he can complain of an obstruction to his right. Cresswell, J. Would the mere putting a lock upon the gate, no one appearing ever to have been prevented from passing through, enable the reversioner to bring an action?] Whether the act done amounted to an obstruction or not, would be for the jury. [Maule, J. The tenant clearly could not maintain an action, unless he has been actually obstructed. Could the landlord bring an action alleging an injury to the reversion, where there has been no actual obstruction of the tenant?] It is submitted that he may. [Maule, J. Suppose the plaintiff were tenant in fee in possession, he could maintain no action except in respect of some actual obstruction of his right. Could he in such case acquire a right of action by simply parting with the right of possession?] After verdict, the court will assume here an obstruction as permanent as the terms used will admit of. In 1 Wms. Saund. 346 a. (notes to *Mellor* v. *Spateman*), the learned editors, treating of the action by a commoner for the disturbance of his right, say: "The consumption of the grass by the other cattle, is of itself a diminution of the right and profit of the commoner, and considered as sufficient proof of the damage alleged in the declaration; for, if the other cattle had not been there, the commoner's cattle might have eaten every blade of grass which was consumed by the other. Therefore, it seems sufficient for the plaintiff to prove his right to the common, and that the defendant put upon it cattle, or (if he be another commoner) more cattle than he ought to do. Besides, the law considers that the right of the commoner is injured by such an act, and therefore allows **[370]** him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of incroachment: *Wells* v. *Watling* (2 W. Blac. 1233); *Hobson* v. *Todd* (4 T. R. 71); *Pindar* v. *Wadsworth* (2 East, 154). For, wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury: and this seems to be a governing principle in cases of this kind. As in the case of *Patrick* v. *Greenway* (tried before Lawrence, J., Oxford Spring Assises, 1796), which was an action of trespass for fishing in the plaintiff's several fishery: it appeared in evidence that the defendant fished there, but did not take any fish; neither was it alleged in the declaration that the defendant caught any fish: the plaintiff obtained a verdict, which in the following term (Easter, 1796) the defendant moved to set aside: but the court of Common Pleas refused even a rule to shew cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act were overlooked." In *Young* v. *Spencer* (10 B. & C. 145, 5 M. & R. 47), in case by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises,—upon a plea of not guilty, the jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it; and the judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case: and it was held, on argument, that the plaintiff was not, at all events, entitled to **[371]** a verdict; but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the court ordered a new trial. [Maule, J. That was waste.] In *Shadwell* v. *Hutchinson* (*a*)[1], it was ruled by Lord Tenterden, that a reversioner may maintain an action for a nuisance, which produces no injury to his reversion beyond that to the right, and which may be removed before the reversion comes into possession. If the continuance of the sky-light in that case would injuriously affect the plaintiff's right, surely the same result would follow here from the fastening of the gate. [Cresswell, J. The putting a lock on the gate, was not necessarily an obstruction of the tenant's free passage.]

After verdict, it must be assumed that the tenant was obstructed. In *Tucker* v. *Newman* (11 Ad. & E. 40, 3 P. & D. 14), the building of a roof with eaves,—and, in *Fay* v. *Prentice* (ante, vol. i. p. 828), the erection of a projecting cornice,—whereby the rain was discharged on to adjoining premises, was held to be a nuisance from which the law would infer injury to the reversioner of such adjoining premises. Such an obstruction as this, acquiesced in by the reversioner, would afford an answer to a claim of right of way resting upon a twenty years' user. He, therefore, clearly must have a right of action, to vindicate his title. [Cresswell, J. Could the reversioner maintain an action, where the gate was locked with the permission of his tenant?] The act of the tenant, in the absence of knowledge by the reversioner, would not be allowed to prejudice him: *Daniel* v. *North* (1 East, 372). Bayley, J., in that **[372]** case, says: "The tenant cannot bind the inheritance in this case, either by his own positive act, or by his neglect. If, indeed, the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him." [Williams, J. That remark would equally apply to a man assenting to a right of way, or to an obstruction of a right of way.] No doubt it would. [Williams, J. In *Baxter* v. *Taylor* (4 B. & Ad. 72, 1 N. & M. 11), it was held that a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way,—such an act, during the tenancy, not being necessarily injurious to the reversion.] The ground upon which the decision in that case proceeded was, that the acts complained of, would not be evidence against the reversioner in support of a claim of right by the trespasser. The question now before the court, is of a totally different character. [Williams, J. In the report of that case in 1 Nev. & Man. 11, Parke, B., is made to say,—"My notion is, that there must be some destruction of the land, to enable the reversioner to maintain this action. No case has ever gone so far as to constitute a simple trespass, like this, an injury to the reversion." Maule, J. My brother Parke does not say that it would not be evidence, if the party claimed a right of way, and meant to assert it.] In *Dobson* v. *Blackmore* (9 Q. B. 991), there was no permanent injury to the reversion; and the jury negatived actual damage. [Maule, J. To entitle the reversioner to maintain this action, must not the two things concur, viz. an injury of such a nature as will be presumed to be permanent, and the fact of its being evidence against him on a **[373]** claim of right? Will the circumstance of its being evidence against him alone suffice? It is clear that no action by the reversioner can be founded upon an act done, during the continuance of the lease, by the permission of the tenant (*a*)[2]. Here, the declaration avers the obstruction to be of such a nature as to be an injury to the reversion. That is clearly the only way in which it can be sustained.] In no case has the right to maintain the action been put upon the ground that something had been been done to the land itself. In *Shadwell* v. *Hutchinson*, Lord Tenterden puts it

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(*a*)[1] M. & M. 350, 4 C. & P. 333. In that case, a second action was brought, and damages recovered for a continuance of the nuisance. *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97.

(*a*)[2] Quære, where the tenant of a house is passive while a stranger pulls it down.

on the ground of loss of evidence of the right. In *Hopwood* v. *Schofield* (2 M. & Rob. 34), Patteson, J.,—who was one of the judges who concurred in the decision of *Baxter* v. *Taylor*,—says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case: but *Jackson* v. *Pesked* (1 M. & Selw. 234), and all the authorities, shew that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent, which, it is in evidence, can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different." Here, the declaration contains both the allegations, one or other of which was held in *Jackson* v. *Pesked* to be necessary to make the declaration good: it avers that the obstruction is of a permanent nature, and that the plaintiff is injured by the consequent diminution of value of his reversionary estate. In *Alston* v. *Scales* (9 Bingh. 3, 2 M. & Scott, 5), a surveyor of highways was held liable in case at the suit of a reversioner, for subtraction of a portion of his bank by the road side, **[374]** although the occupying tenant, who was called as a witness, stated that the property was improved by what the surveyor had done.

Whateley and Piggott, in support of the rule. To entitle the plaintiff to maintain this action, he must shew that his reversion has been injured, and that the injury is of a permanent character. It is not alleged here that the gate was erected by the defendant; but merely, that, being there, he locked it. It is perfectly consistent with that statement, that the defendant locked the gate with the assent of the tenant, and that each had a key. [Cresswell, J. There is an averment here that the obstruction was permanent, and an injury to the reversion: it must be assumed that the judge would have told the jury that such a declaration would not be proved by the state of facts you suggest.] The court will intend nothing which is not stated. "Nothing can be supplied beyond that of which proof is necessarily involved in the proof of what is alleged:" per Lord Denman, in *Davis* v. *Black* (1 Q. B. 900, 911). The distinction which will be found to pervade all the cases is, whether the obstruction is in its nature permanent or not. [Williams, J. What do you mean by permanent?] The erection of a wall, as in *Jesser* v. *Gifford*, would be a permanent obstruction: or the building a house across the way. In *Baxter* v. *Taylor*, Taunton, J., said: "The action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action for an injury to the reversion against a stranger. *Jackson* v. *Pesked* shews, that, if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must **[375]** state an injury of such a permanent nature as to be necessarily prejudicial thereto." In the same case, Patteson, J., says: "To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right: but then, for such an injury, the action must be brought in the name of the tenant, who is the person in the actual possession of the land" (*a*). And Parke, J., adds: "To entitle the plaintiff to maintain this action, it was necessary for him to allege, and prove, that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate: and what Lord Tenterden said in *Young* v. *Spencer* must be construed with reference to the subject-matter then under consideration,—an action on the case in the nature of waste, by a reversioner against his tenant." The ruling of the same learned judge in *Hopwood* v. *Schofield* was to the same effect. *Dobson* v. *Blackmore* is precisely in point: there, a count stating the plaintiff to be reversioner of premises, occupied by his tenants and abutting on a public navigable river, and that the plaintiff and all the liege subjects of the Queen were accustomed of right to have free navigation and passage on the river, for boats, &c., and that the plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to **[376]** approach the same, and pass to the premises from the

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(*a*) Quære, as to redress for an injury to reversioner's title, being wholly dependant on will of tenant.

river, and unload the boats on the premises, without obstruction, but that the defendant fixed barges, planks, &c., in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises from the river, and hindred the unloading of boats on the premises, and by means thereof the plaintiff was injured in his reversionary interest,—was held bad, in arrest of judgment, as not shewing a damage to the reversionary interest (*a*). Lord Denman, in giving the judgment of the court, there says: "The objection to the six counts was, that the unlawful act charged does not, per se, import any damage to the plaintiff's reversionary interest. The tenant in possession is abridged of his rights by the stoppage of a public road, and may suffer damage from it. But the landlord, who is out of possession, is in nowise dammified by his tenant's being prevented from enjoying his house in so ample a manner as he might otherwise have done. Each of the counts in question would be established by evidence proving that the defendant had, on two different days, placed a bar across the road for five minutes only. In *Baxter* v. *Taylor*, a greater obstruction was held to give a reversioner no cause of action. Even a more permanent nuisance may not continue till the end of the lease, when the plaintiff's right of possession would accrue, but might in the meantime be abated by one of the public, or by the sheriff, on indictment." [Williams, J. In the case of *The Provost and Scholars of Queen's College, Oxford*, v. *Hallett* (14 East, 489), it was held that an action on the case for an injury to the inheritance, lies by the reversioner, pending the term, against the tenant, for inclosing and cultivating waste land included **[377]** in the demise, and for continuing the grievance. And Grose, J. said: "Acts of this kind have been held over and over again to be a present injury to the estate of the reversioner."] There is a marked distinction between the case which Lord Ellenborough there puts, of the building of a wall,—*Jesser* v. *Gifford*,—and the present case. So, in *Tucker* v. *Newman*, that which the defendant did was, in itself, as Patteson, J., observes, something lasting. That is the distinction which runs through all the cases. [Maule, J. You must shew that that which is charged here, could not possibly be an injury to the reversion. It must be taken that the Court of Queen's Bench decided, in *Dobson* v. *Blackmore*, that proving the declaration in any way would shew no cause of action. The action there was, for obstructing a public way. It was necessary, therefore, to shew some particular injury. For anything that appears, there could have been no particular injury.] It has been said that the continuance of this gate for twenty years might conclude the plaintiff. That, however, is not so; for, there could be no enjoyment "as of right," as against the reversioner, so long as the land was in the hands of the tenant: *Bright* v. *Walker* (1 C. M. & R. 211, 219). Parke, B., in delivering the judgment in that case, says: "In order to establish a right of way, and to bring the case within this section (2 & 3 W. 4, c. 71, s. 2), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for, that is the form in which by section 5, such a claim must be pleaded: and the like evidence would have been required before the statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in **[378]** the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done,—if he shall have occasionally asked the permission of the occupier of the land,—no title could be acquired, because it was not enjoyed 'as of right.'"

Maule, J. I think the declaration in this case,—which is objected to after trial and a verdict for the plaintiff, and which alleges that the defendant wrongfully and unjustly locked, chained, and fastened a certain gate in and across a certain way, and wrongfully and injuriously kept and continued the same so locked, chained, and fastened, and so obstructed the way, whereby the plaintiff was injured in his reversionary right and interest,—states a cause of action which entitles the plaintiff to damages; and that we cannot arrest the judgment. It may have been that no evidence was given at the trial, of any such obstruction as could be a permanent injury to the plaintiff's reversion. That might have been ground for a nonsuit, or a verdict for the defendant: but it was not so put at the trial. The only question, therefore, for our consideration is, whether the plaintiff's reversionary interest might be injured by the acts alleged in this declaration to have been done by the defendant. It appears

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(*a*) And see *Rose* v. *Groves*, 5 M. & G. 613, 6 Scott, N. R. 645.

to me that it might. It is not denied that the erection of a wall across the way,—assuming, of course, that there was no contract as between the tenant of the land and the defendant,—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land: and I cannot doubt that there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall. The meaning of the allegation, that, by means of the premises, the plaintiff **[379]** was greatly injured in his reversionary estate and interest, is not that the injury follows as a consequence of law from what is previously stated,—like an allegation that J. S. was seised in fee, and that he died so seised, whereby J. T., his son and heir-at-law, became entitled: but it is an allegation of a matter of fact, as was lately held in this court, in the case of *Brown* v. *Mallett* (ante, vol. v. p. 599), which is for the jury to find, or not, according to the evidence. I therefore think, upon the whole, that the declaration is sufficient.

Cresswell, J. I have entertained a good deal of doubt during the progress of the argument: but I concur in the judgment which has been pronounced by my brother Maule. *Jackson* v. *Pesked* decides that a declaration of this sort is insufficient unless it contain an averment that the acts charged injured the plaintiff's reversionary interest. That case, however, impliedly recognises the validity of a declaration which contains such an averment, and states facts which may or may not amount to such injury of the reversion. Here, the declaration alleges certain things to have been done by the defendant, so as to occasion injury to the plaintiff's reversionary interest. I agree with my brother Maule that that is an allegation of fact, and that we must take it to have been proved, if the facts stated could so operate. It is impossible to say that a gate may not be so fastened as to enure as an injury to the reversion.

Williams, J. I am of the same opinion. If in point of fact the obstruction complained of took place under such circumstances as not to occasion any permanent injury to the plaintiff's reversion, the judge ought to have directed the jury to find for the defendant. The learned judge, however, did not so direct the jury: and no complaint is made on that score. We must, **[380]** therefore assume such a state of facts to have been proved as might exist consistently with what is charged in this declaration as being an injury to the plaintiff's reversion. There is clearly no ground for arresting the judgment.

Rule discharged.

Barnewall, one of the Registered Public Officers of the Commercial Bank of London, v. Sutherland, Connell, Mitchell, and Duff. Feb. 25, 1850.

[S. C. 1 L. M. & P. 159; 19 L. J. C. P. 290; 14 Jur. 720. Referred to, *Pell* v. *Linnell*, 1868, L. R. 3 C. P. 443.]

A., who sued as public officer of a banking company under the statutes 7 G. 4, c. 46, and 7 & 8 Vict. c. 113, died after issue joined. The nisi prius record was made up from the plea-roll, as though A. was alive. The venire had been awarded accordingly as between A. and the defendants, and no entry was made on the plea-roll, of the death of A., or of the appointment of another public officer. After the nisi prius record was so made up, a memorandum was entered upon it, stating the fact of the death of A., and that B., another public officer of the co-partnership, had been appointed to continue the proceedings; but this was not stated by way of suggestion to the court, nor was it followed by any statement of confession by the defendants, or a nient dedire: and, after such entry had been made, the cause was entered for trial as "B. v. (the Defendants)," and was tried by the jury returned on the venire in the cause of "A. v. (the Defendants)." Three of the defendants appeared at the trial, under protest; the fourth had suffered judgment by default: and a verdict was found for the plaintiff:—Held, that the entry so made upon the nisi prius record, was irregular, and did not authorise the trial in the name of B. as plaintiff.—Quære, whether a formal suggestion of the death of A. would have been traversable?

This action was commenced on the 12th of December, 1848, in the name of John Taylor, one of the registered public officers of the Commercial Bank of London. Judgment by default was signed against the defendant Duff. The other defendants, Sutherland, Connell, and Mitchell, having pleaded several pleas, issues were joined thereon on the 9th of July, 1849, and notice of trial, and of the assessment of damages against Duff, was given for the then next Surrey [381] assises. On the 18th of July, Taylor died. The commission day of the Surrey assises was Monday, the 6th of August. On the evening of that day, the following notice was served at the office of the defendant's attorney:—

"In the Common Pleas.—Between John Taylor, one of the registered public officers of the Commercial Bank of London, and John William Sutherland, John Connell, John Mitchell, and Adam Duff.

"We do hereby give you notice that the above-named plaintiff, John Taylor, has died since the issues were joined in this cause, and that the said action will be continued in the name of Thomas Barnewall, another of the registered public officers of the said Commercial Bank of London, pursuant to the statute in that case made and provided; and that the said cause will be taken down to trial, and entered accordingly. Dated, &c. "AMORY & Co., Plaintiff's attorneys."

The defendants' attorney had, before the receipt of the above notice, sent his managing clerk to Croydon to watch the entry of the cause, and to attend the trial; and, on receiving the notice, he proceeded to Croydon, where he arrived between 12 and 1 o'clock on the 7th of August, when he was informed by his clerk that the cause had been entered for trial in the name of Thomas Barnewall, and that a suggestion to the following effect had been entered on the nisi prius record:—

"Before which last-mentioned day, and after the said 10th of July, to wit, on the 18th of July, 1849, the said John Taylor departed this life, being until and at the time of his death such registered public officer [382] as aforesaid; whereupon, according to the first-mentioned act of parliament (7 G. 4, c. 46), as the same hath been extended by the act of parliament secondly above mentioned (7 & 8 Vict. c. 113), as in the declaration in this cause mentioned, one Thomas Barnewall, then being, and thenceforth hitherto and still being, one of the registered public officers of the said Commercial Bank of London, was and is duly appointed in the room and place of the said John Taylor, deceased, further to continue, prosecute, and carry on the said action; and thereupon and thereby, and according to the law in that behalf, the said suit so commenced by the said John Taylor as aforesaid is further continued, prosecuted, and carried on by the said Thomas Barnewall for and on behalf of the said co-partnership. Therefore," &c.

The defendants' attorney, having obtained a copy of this suggestion, caused the same to be laid before the counsel retained on the part of the defendants Sutherland, Connell, and Mitchell, to advise them as to pleading thereto. Counsel advised that the suggestion should be pleaded to; but, inasmuch as the eight days allowed, by the practice of the court, to the defendants to plead, would expire after the 10th of August, they recommended the defendants to appear at the trial under protest, and to apply to have the trial postponed, in order that the defendants might have the opportunity of pleading to the said suggestion.

The cause came on for trial before Pollock, C. J., and a common jury summoned in a cause wherein the said John Taylor was the plaintiff, and the above-named Sutherland, Connell, Mitchell, and Duff were defendants, on the 18th of August, 1849.

Before the jury were sworn, the defendants Sutherland, Connell, and Mitchell, by their counsel, appeared [383] and objected to the trial of the cause, by reason of the abatement in consequence of the death of Taylor, and that the defendants had no opportunity of pleading to the suggestion so entered on the nisi prius record as aforesaid; and also that the jury summoned to try the cause had no authority to try a cause wherein Thomas Barnewall was the plaintiff. After hearing counsel on the part of the plaintiff, in reply to the said objections, the lord chief baron said that the better course would be to try the cause, and for the defendants to appear under protest; and he ordered the jury to be sworn; and the jury were sworn accordingly; and a verdict was found for the plaintiff, subject to an application to the court.

Upon an affidavit of the above facts, and also stating, that, according to the practice of this court, jury-process could not be issued until a few days before the commission-day, and that the deponent believed that the jury-process in this cause was issued after the death of Taylor,

Russell Gurney, in Michaelmas term last, moved to enter a verdict for the defendants, or for a new trial. The defendants were clearly entitled to an opportunity of traversing the suggestion: it might be a matter of importance to them in respect of costs. In *Brocas* v. *The City of London* (1 Stra. 235), it is said by the court,—"It was settled in *Sir Peter Delme's case*, and has always been the course of the court, that, when either party will suggest any special matter about awarding the venire out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a nient dedire." Here, the whole proceeding would be a nullity **[384]** without a suggestion; and an indictment for perjury could not be sustained for any false evidence given on the trial: *The King* v. *Cohen* (1 Stark. N. P. C. 511). In *Bartlett* v. *Pentland* (1 B. & Ad. 704), it is laid down as a general rule, that, wherever by the provision of an act of parliament, a person not a party to the record, is to be affected by a judgment, or where the judgment is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is, to enter a suggestion on the roll; so that the party to be affected may demur if the plaintiff do not set forth facts to bring the case within the act of parliament, or that he may traverse those facts if untrue. The case of *Watson* v. *Quilter* (1 M. & W. 760, 1 D. & L. 244) clearly establishes that such a suggestion may be traversed; notwithstanding the doubt suggested by Maule, J., in *Bartholomew* v. *Carter* (5 Scott, N. R. 501; S. C. 4 M. & G. 612), where that learned judge observes that "no instance can be found in the whole history of the law, of a suggestion being traversed. [Maule, J. It certainly is somewhat singular that no instance of a trial of a traverse of a suggestion is to be met with, although it has so repeatedly been said that it is traversable.]

The 9th section of the 7 G. 4, c. 47, the act for the regulation of banking co-partnerships, enacts that all actions and suits, &c., and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such co-partnership against any person or persons, shall be commenced, instituted, and prosecuted in the name of one of the public officers for the time being of such co-partnership as the nominal plaintiff for and on behalf of the co-partnership; and that the death, resignation, removal, or any act of such **[385]** public officer, shall not abate or prejudice any such action, suit, or other proceeding commenced against or by and on behalf of such co-partnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such co-partnership for the time being. By a subsequent act, 7 & 8 Vict. c. 113, s. 1, it is provided that no joint-stock bank established after the 6th of May, 1844, shall carry on business, unless by letters-patent under that act. And the 47th section enacts, "that, after the passing of this act, every company of more than six persons established on the said 6th of May, for the purpose of carrying on the said trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of this act, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff, petitioner, or defendant, on behalf of such co-partnership." There is no provision in that section that actions shall not abate by the death of the public officer. [Maule, J. They would not have all the power of suing, unless they could carry on the proceeding in the name of a surviving public officer. The two acts are to be construed as being in pari materiâ.]

The declaration states that the plaintiff sues as public officer according to the 7 G. 4, c. 46, as extended by the 7 & 8 Vict. c. 113; and that is traversed. The question is, whether the plaintiff is not suing under the latter act only: and, if he is, the declaration is bad, for not shewing that the co-partnership was an existing co-partnership on the day named in the act, the 6th of May, 1844. The former act applies only to companies carrying on the business of bankers more than sixty-five miles from London. [Maule, J. Can there be a **[386]** doubt that the company are suing under the latter act? There is nothing in that point.]

A rule nisi having been granted upon the first point,

Channell, Serjt., and Peacock, in the last term, shewed cause. Assuming that the last day for pleading was the 10th of August, the defendants had still three days during which they might have traversed the suggestion, if traversable. But the defendants are under a misimpression with respect to the 2 W. 4, c. 39, s. 11, which only applies to pleadings before issue joined,—otherwise pleas puis darrein continuance would be precluded: the defendants, therefore, had ample time before the day of trial, to tender a traverse.

But it is submitted that the fact here suggested was not traversable at all. It was not necessary to suggest Taylor's death until the judgment-roll was made up: Tidd's Practice, 9th edit., p. 1119; *Denn d. Lawson* v. *Farr* (Barnes, 469; *Farr* v. *Denn*, 1 Burr. 363). There, "after issue joined, and before the day of nisi prius, one of the defendants died: the plaintiff sued out a venire facias between himself and the surviving defendant, and made the jurata at the foot of the record of nisi prius, agreeable thereto. Verdict for plaintiff. Objected at the trial, that the death of the deceased defendant ought to have been suggested on the nisi prius record, and thereupon an award of a venire facias between the plaintiff and the surviving defendant. Point reserved was now argued; and thereupon the plaintiff produced the roll in court, whereon the suggestion and award of the venire facias, as above, were entered; which the court held to be sufficient." The question arose in *Webb* v. *Taylor* (1 D. & L. 676), where a defendant gave a cognovit actionem in a suit by a public officer **[387]** under the 7 G. 4, c. 46, and, before judgment was entered, the nominal plaintiff was removed from his office, but the name of the plaintiff on the record was not altered, and judgment was signed in the name of such plaintiff, and the defendant having been arrested on a ca. sa. issued upon the judgment, the court allowed the record and writ to be amended, upon the application of the banking company, who were the real plaintiffs, by the insertion of the name of the new public officer, nunc pro tunc, and refused to set aside the judgment on the ground of the irregularity. It never was intended that a matter of mere form like this should be traversed. It is very different from the matters suggested in *Bartlett* v. *Pentland* and the cases which followed it, and *Watson* v. *Quilter*: those were matters of substance. [Maule, J. You cannot introduce new parties upon the record without a suggestion.] That may be; but there is no case to shew that the fact need not be suggested upon the nisi prius record. Suppose a suggestion were entered, that the plaintiff had been created a baronet after the commencement of the action, would that have been traversable?

Gurney and Ogle, in support of the rule. The jury were summoned to try a cause of *Taylor* v. *Sutherland*, and the cause tried was *Barnewall* v. *Sutherland*. This was a clear irregularity, and one by which the defendants might be prejudiced in respect of costs. There are numerous cases to shew, that, wherever it becomes necessary to shew upon the record an excuse for deviating from the customary course of proceedings, it must be done by some act of the court, or by a suggestion, which the other side must have an opportunity of traversing or demurring to. In *Pennoir* v. *Brace* (1 Salk. 312, 319, 1 Lord Raym. 244), **[388]** judgment was obtained in trespass against four, who brought error, and afterwards one of them died: it was held that the plaintiff could not sue out execution without suggesting the death upon the record. [Williams, J. There, the writ did not agree with the judgment. In *Rex* v. *Cohen* (1 Stark. N. P. C. 511), it was held, that, if a co-plaintiff die, the suit will be abated, unless the death be suggested according to the statute 8 & 9 W. 3, c. 11, s. 6: and therefore, if a co-plaintiff die after issue joined, a trial without such suggestion on the record would be extra-judicial, and consequently no perjury could be assigned upon any false evidence given thereon. [Maule, J., referred to the form of suggestion given in Chitty's Statutes, p. 2, n. (*e*).] In such a case as this, the jury could not be attainted, or fined for non-attendance. [Wilde, C. J. The venire should certainly follow the record.] In *Plomer* v. *Ross* (5 Taunt. 381-391), Heath, J., says that a suggestion may be pleaded to, and that common justice requires it. [Williams, J. That was a suggestion of breaches.] All the authorities are fully considered in *Watson* v. *Quilter*, where the question is very elaborately discussed by Lord Abinger; and the result is, that a suggestion of this kind must be so entered as to give the opposite party an opportunity of traversing or demurring to it. [Williams, J. What do you say that the company should have done here?] They should have served the defendants with the suggestion, and demanded a plea. [Williams, J. Suppose the death of Taylor had taken place on the day before the trial,—what would have been their course then?] That might occasion inconvenience: but it is enough to say it is not this case. Here was a fourth defendant, Duff, who was not represented at the trial, he having **[389]** suffered judgment by default before Taylor's death: suppose execution were to issue against him upon this assessment of damages at the suit of Barnewall, —would he not be justified in resisting and even shooting the officer? [Cresswell, J. I think he would be very rash. He would probably have the wisdom to take advice.]

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

In this case a rule has been obtained, on the part of the defendant, to shew cause why the verdict which has been found for the plaintiff, should not be set aside, and a new trial had.

The facts were, that the plaintiff, who sued as public officer of a banking company, under the statute 7 G. 4, c. 46, died after issue joined, and that the nisi prius record was made up from the plea-roll, as though the party were alive; that the venire had been awarded accordingly as between Taylor as plaintiff and the defendants; and that no entry was made upon the plea-roll, of the death, or of the appointment of the new public officer.

It appears, further, that, after the nisi prius record was passed so made up, a memorandum was entered upon it, stating the fact of the death, and that Barnewall had been appointed public officer,—but which was not stated by way of suggestion to the court, nor followed by any statement of a confession by the defendant, or a 'nient dedire;' and that, after such entry had been made, the cause was entered for trial as a cause of *Barnawall* v. *Sutherland;* and that cause was tried by the jury returned upon the venire in a cause at the suit of Taylor.

Upon the part of the plaintiff, notice had been given **[390]** of the death of Taylor, and that such an entry would be made, and that the cause would be tried. Some of the defendants appeared to protest against the trial, and others did not appear.

A verdict was found for the plaintiff, and the present rule was afterwards obtained to set aside that verdict, on the ground that the entry made upon the record, of the death of Taylor, and that Barnewall had been appointed public officer, was irregular; as was also the proceeding to trial in a cause in which Barnewall was the plaintiff, by a jury returned under a venire in a cause in which Taylor was the plaintiff.

Upon shewing cause against this rule, the plaintiff insisted that his proceedings had been regular, being authorised by the statute of 7 G. 4, c. 46. By the 9th section of that statute, the companies mentioned therein, are authorised to sue in the name of a public officer; and it is enacted "that the death, resignation, or removal, or any act of such public officer, shall not abate or prejudice any such action, but the same may be continued and carried on in the name of any other public officer of the co-partnership for the time being." And in section 12, it is enacted "that any judgment recovered against any public officer of the co-partnership shall have the like effect and operation against the property of the partnership, and the property of every member thereof, as if such judgment had been recovered or obtained against the co-partnership."

The plaintiff contends, that, under these words, no suggestion, or entry upon the plea-roll, was necessary; and that a mere memorandum upon the nisi prius record, stating the fact of the death of Taylor, and that Barnewell had been appointed public officer, was all that was required; and also that the cause was properly tried in the name of such new public officer as plaintiff, and that no new venire was requisite.

[391] Upon the part of the defendant, it was contended that the enactment that the action shall not abate by the death of the public officer, the plaintiff,—as would have been the case by the course of the common law,—and that the action may be carried on in the name of the new public officer, does not dispense with the necessity of the fact of the death, and the appointment of the new public officer, being suggested upon the record, nor the issuing of a venire in the name of the new or substituted plaintiff. And the defendants insist,—except where there is an express statutable provision dispensing with it,—that, in all cases where there is a change of parties during the progress of the cause, before trial, that change is required to appear upon the record, by way of suggestion to the court; and, where such facts are not traversable, they should be followed by a confession, or nient dedire.

In this case, the defendants had traversed by plea the appointment of Taylor as a public officer of the company; and a verdict for the defendants upon the issue on that plea would have been a full defence: and for a good reason; for, the company would not be bound by the judgment in the cause, unless the plaintiff Taylor was a public officer of the company; nor would the property of the members of the company have been bound by any such judgment. And the fact whether Barnewall was a public officer of the company when he was substituted as plaintiff, is equally important to the defendant as was the character of Taylor when he stood upon the record as plaintiff. And, if the court, upon application, would have allowed a suggestion that

Barnewall was a public officer, to have been entered, with a confession or a nient dedire, some satisfactory evidence must have been offered to the court of the fact. But, in this case, the memorandum was entered upon the record, stating the fact, without any authority **[392]** from the court; and in a very informal manner,—without any opportunity to the defendants to traverse the facts stated, and without the statement of any matter excluding the right to do so, such as follows a suggestion which the opposite party is not allowed to traverse.

Without entering into the question, whether, if the suggestion were properly entered upon the plea-roll, the facts alleged would be traversable or not, it is clear that the entry which was made on the nisi prius record in this case was irregular, and did not authorise the trial of the cause in the name of Barnewall as the substituted plaintiff; and therefore the rule for setting aside the verdict which has been obtained for the plaintiff, and for a new trial, must be made absolute.

Rule absolute.

BARNES, Administrator of Jane Barnes, Deceased, *v.* WARD. Feb. 25, 1850.

[S. C. 19 L. J. C. P. 195; 14 Jur. 334: at Nisi Prius, 2 Car. & K. 661. Approved, *Hardcastle* v. *South Yorkshire Railway Company*, 1859, 4 H. & N. 73. Distinguished, *Hounsell* v. *Smyth*, 1860, 7 C. B. (N. S.) 742. See *Fisher* v. *Prowse*, 1862, 2 B. & S. 779. *Robbins* v. *Jones*, 1863, 15 C. B. (N. S.) 240. Referred to, *Hadley* v. *Taylor*, 1865, L. R. 1 C. P. 55; *Orr Ewing* v. *Colquhoun*, 1877, 2 App. Cas. 864; *Pearson* v. *Cox*, 1877, 2 C. P. D. 371; *Wright* v. *Midland Railway Company*, 1884, 51 L. T. 541. Applied, *Silverton* v. *Marriott*, 1888, 59 L. T. 62. Referred to, *Ponting* v. *Noakes*, [1894] 2 Q. B. 286.]

A. being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area, and was killed:—Held, that A. was liable, under the 9 & 10 Vict. c. 93, to an action by the husband, as administrator, for the benefit of himself and B.'s infant children.—The declaration alleged that the defendant was possessed of a messuage, with the appurtenances, near to a common and public footway, and that, in front of and before the said messuage, and parcel of the appurtenances thereof, and close to, and by the side of, the said footway, and abutting upon, and opening into, the same, there then was a large hole, vault, or area, which hole, vault, or area, the defendant, by reason of the possession of the said messuage, *with the appurtenances*, before and at the time when, &c., ought to have so sufficiently guarded and fenced as to prevent injury to persons lawfully passing in and along the said footway:—Held, that the duty of the defendant to fence the area, was properly alleged:—Held also, that the judge at the trial was justified in amending the declaration, by adding the words in italics.—In such a case, the declaration need not negative the existence of any relations entitled to compensation, other than those on whose behalf the action purports to be brought.

This was an action upon the case brought by the plaintiff as administrator of Jane Barnes, deceased, under Lord Campbell's act, 9 & 10 Vict. c. 93, **[393]** intituled "An Act for compensating the families of persons killed by accident," to recover damages from the defendant, the owner of land adjoining a public footway, for negligence in leaving unfenced an excavation on his land, and thereby causing the death of the intestate.

The declaration alleged that the defendant, before and at the time, &c., was possessed of a messuage, with the appurtenances, near to a common and public footway, in front of and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said footway, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which said hole, vault, pit, or area, the defendant, by reason of the possession of the said messuage [with the appurtenances (*a*)], before and at the said time when, &c., ought to have so

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(*a*) These words were added on amendment at nisi prius.

sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in and along the said footway: yet that the defendant, whilst he was so possessed of the said messuage, and the said hole, vault, pit, or area, and premises, with the appurtenances, and whilst there was such hole, vault, pit, or area, on, &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, vault, pit, or area to be and continue, and the same was then, so wholly unguarded, and not fenced off or railed in, that, by **[394]** means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said footway, slipped and fell into the said hole, vault, pit, or area, and was thereby killed: To the damage, &c.: And thereupon the plaintiff, as such administrator as aforesaid, for the benefit of himself, the husband of the said Jane Barnes, and of Jane Barnes, her infant daughter, of the age of ten years, and of Elizabeth Barnes, her infant daughter, of the age of eight years, and of Robert Barnes, her infant son, of the age of six years, according to the form of the statute in such case made and provided brought his suit, &c.—Profert of letters of administration.

The defendant pleaded,—first, not guilty,—secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.,—thirdly, that he ought not, by reason of his possession of the said messuage, with the appurtenances, to have guarded, fenced off, and railed in the said hole, vault, pit, or area, in manner and form, &c.

On these pleas, the plaintiff joined issue.

The cause was tried before Coltman, J., at the sittings at Westminster after Easter term, 1847. The facts were as follows:—The deceased, Jane Barnes, between eight and nine o'clock in the evening of the 26th of October, was proceeding, in company with her sister and a child, along an unfinished pathway near a row of houses then in the course of erection by the defendant, a builder, called Victoria Grove Terrace, in the Uxbridge Road. It being dark, and no light near, the deceased accidentally fell down the area in front of one of the houses, and died shortly afterwards, from the injuries she thus sustained. It appeared that the deceased was sober at the time of the accident, and that there was no fence to guard the area, but merely a low stone coping **[395]** for the reception of iron railings. It further appeared that there had always been a thoroughfare; but the evidence as to the particular part of the newly formed road which had constituted the antient pathway, was somewhat confused. The land belonged to the Bishop of London, by whom it had been leased for terms of years to various persons, under one of whom the defendant held the premises in question.

On the part of the defendant, it was contended,—first, that there was no sufficient evidence that the footpath was a public way,—secondly, that a man has a right to excavate his own land to its extremity, and there is no common law obligation upon him to fence or guard such excavation, even though it abut upon a highway,—thirdly, that the third issue was not, in its terms, sustained by the evidence.

The learned judge told the jury, that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced,—or, if there was a public way so near that it would produce danger to the public, unless fenced,—the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area; and they returned a verdict for the plaintiff, damages 300l.,—being, 100l. to the husband of the deceased, 75l. each to her two infant daughters, and 50l. to her son.

Byles, Serjt., in Trinity term, 1847, pursuant to leave reserved to him at the trial, moved for a rule to shew cause why this verdict should not be set aside, and a verdict entered for the defendant; or why there should not be a new trial, on the ground of misdirection, and that the verdict was against evidence; or why the judgment should not be arrested,

[396] No such duty is cast by the common law upon the owner of land adjoining a public way, under the circumstances disclosed, as is sought to be enforced by this action. The various provisions of the local acts for the districts surrounding London, and also the 70th section of the general highway act, 5 & 6 W. 4, c. 50 (*a*), shew

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(*a*) Which enacts, "that, from and after the commencement of this act, it shall that the interference of the legislature was necessary for the protection of the public in these cases. In *Trower* v. *Chadwick* (6 N. C. 1, 8 Scott, 1), it was held that the mere circumstance of juxta-position, does not render it necessary for a person who pulls down his wall, to give notice of his intention to the owner of an adjoining wall: nor, if he be ignorant of the existence of the adjoining wall,—as, where it is under ground,—is he bound to use extraordinary caution in pulling down his own. [Maule, J., referred to *Jarvis* v. *Dean* (11 J. B. Moore, 351, 3 Bingh. 447). There, in an action on the case [397] for an injury resulting to the plaintiff from falling down an unprotected area, the declaration stated that the defendant was possessed of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them: but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved: but the inhabitants had paid the highway and paving rates. And it was held that this was sufficient evidence to go to a jury, of a possession in the defendant, and of a dedication of the street to the public.]

The statute (9 & 10 Vict. c. 93) gives this remedy only if the circumstances are such as would have enabled the deceased person to bring an action, in case death had not ensued. The 1st section recites that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him:" and it then enacts, "that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the [398] death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The declaration should have alleged, that, if death had not ensued, the deceased would have been entitled to damages, or it should have stated circumstances whence the court might have seen that that was so. For any thing that appears, although the defendant may have been guilty of a breach of duty, which may have rendered him liable to a penalty, no action could have been brought by the deceased or her husband. [Maule, J. A neglect of a public duty, from which a private injury results, gives a good cause of action. This is in truth the same point as the first.]

This action is brought for the benefit of the husband and the three children of the deceased. The 2nd section of the act enacts "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or adminis-

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not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards, from any part of any carriage-way or cart-way, unless such pit or shaft, or steam-engine, gin, or other like engine, or machinery, shall be within some house or other building, or behind some wall or fence sufficient to conceal or screen the same from the said carriage-way, or cart-way, so that the same may not be dangerous to passengers, horses, or cattle; nor shall it be lawful for any person to make, or cause to be made, any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of cokes, within the distance of fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building, or behind some wall or fence, sufficient to screen the same from the same carriage-way or cart-way as aforesaid; and, in case any person shall offend in any of the cases aforesaid, every such person so offending shall forfeit and pay any sum not exceeding 5l. for each and every day such pit, shaft, windmill, steam-engine, gin, machine, or fire, shall be permitted to continue, contrary to the provisions of this act."

trator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury, by their verdict, shall find and direct." The declaration should have negatived the existence of any parent, or other relative of the deceased, than those named. [Maule, J. Did it appear that there was any other person entitled?] No. [Maule, J. Then, I do not see how the defendant can be injured by the supposed omission (*a*)[1].]

[399] There was no evidence to go to the jury of the existence of a public footway abutting upon the area in question. This was a new road. There was no evidence of its dedication to the public. There could be no dedication by the termors: *Bright* v. *Walker* (1 C. M. & R. 211, 4 Tyrwh. 509). And it may be doubtful whether the Bishop of London, who was a mere tenant for life, could dedicate a way to the public. [Coltman, J. The bishop was tenant in fee, and not for life.]

The duty is alleged to have arisen "by reason of the possession of the said messuage," not by reason of the possession of the area. Upon this objection being taken at the trial, the learned judge allowed the declaration to be amended, by the addition of the words "with the appurtenances,"—subject to an application to the court. [Maule, J. Is not that rather an allegation of fact, that there were such circumstances attending the defendant's possession of the premises, as to render it his duty to guard the area? Does not "messuage" comprehend the area?] Not in this declaration, which describes the area as being "parcel of the appurtenances of the messuage." The amendment entirely changes the duty.

If this verdict stands, a difficulty will arise as to the appropriation of that portion of the money which is awarded to the children.

Wilde, C. J. We all think the amendment was properly allowed. The 3 & 4 W. 4, c. 42, s. 23, provides for the case of an amendment that may prejudice the opposite party in his defence, by allowing him to ask for a postponement of the trial. None was asked for here. And, in truth, the question tried seems to be the very question the parties came prepared to try. As to defendant's duty to fence the area, and also as to the **[400]** evidence of the existence of the footway, we think the rule may go. With regard to the distribution of the damages, we think we have no authority to interfere. The statute seems to have been somewhat imperfectly framed in that respect: but the shares of the children will of course be subject to equities, which may be enforced in the proper place.

Montagu Chambers and Hugh Hill shewed cause (*a*)[2]. It is the duty of every man who makes an excavation on his own land, near to a public way, so to fence and guard it as to prevent injury to persons passing in the exercise of a public right. One of the earliest authorities upon this subject, is, *Blithe* v. *Topham* (*b*), which will probably be relied on by the other side. It is there said, that, if A., being seised of a waste adjoining a highway, digs a pit in the waste, within thirty-six feet of the way, and the mare of B. escapes into the waste, and falls into the pit, and is killed, yet B. shall not have an action against A.; because the making of the pit in the waste, and not in the highway, was no wrong to B., but it was by the default of B. himself that his mare escaped into the waste. There, as is observed by Gibbs, C. J., in *Deane* v. *Clayton* (7 Taunt. 532), "the defendant was held not to be answerable for the damage done to the plaintiff's mare, because the mare had no right to be on the land where the pit, into which she fell, was dug:" and it is to be observed also that the pit was at the distance of thirty-six feet from the highway. "The difference," as is said by Dallas, J., in the same case (*Dean* v. *Clayton*, 7 Taunt. 522), "is, between absolute and relative rights, **[401]** between that which is mine, exclusive of any right in others, present and future, and that which is of a spreading, shifting possession, as, air, water, &c., in which I have but a qualified possession, a possession subservient to the future

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(*a*)[1] The 3rd section of the act provides "that not more than one action shall lie for and in respect of the same subject-matter of complaint."

(*a*)[2] On the 11th of November, 1848, the judges present being, Coltman, J., Maule, J., and Williams, J.: Wilde, C. J., being absent on account of indisposition.

(*b*) 1 Roll. Abr. Action sur Case (N.) (translated, 1 Vin. Abr. 554, pl. 4); S. C. Cro. Jac. 158.

use by others. If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public, or individuals, having a right over it, an action will lie, because there is a right in others to pass along without interruption: but, if there be no right of way, I may, with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained." In *Coupland* v. *Hardingham* (3 Camph. 398), which was an action upon the case for negligence in not railing in or guarding an area before the defendant's house in Wood Street, Westminster, whereby the plaintiff fell down into the area, and was severely hurt,—it appeared, that, before the defendant's house, there was an area which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house; that there was no railing or fence to guard the area from the street; and that the plaintiff, passing by on a dark night, fell into it, and broke his arm. The defence set up was, that the premises had been in exactly the same situation as far back as could be remembered, and many years before the defendant was in possession of them. But Lord Ellenborough held, that, however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed; and that he was liable for **[402]** the consequence of having neglected to do so, in the same manner as if he himself had originated the nuisance. And his lordship added,—"The area belongs to the house; and it is a duty which the law casts upon the occupier of the house, to render it secure." *Jarvis* v. *Dean* (11 J. B. Moore, 354, 3 Bingh. 447) is also a distinct authority to the same effect. In *Sarch* v. *Blackburn* (4 Car. & P. 297, M. & M. 505), which was an action for an injury sustained by the plaintiff from the bite of a dog placed in the defendant's yard for the protection of his premises, Tindal, C. J., in leaving the case to the jury, said: "If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a court of justice of that which was brought upon him by his own act. The difficulty is in saying whether, in the particular place, the means adopted by the defendant were sufficient. We must see, first, whether the plaintiff had a justifiable and reasonable cause for being on the spot; whether he was there without any notice, having such cause as would justify him if he had an action brought against him as a trespasser, for being on the defendant's premises. It seems that there are three different entrances to the premises; one of them more public than the rest, having a spring gate; another, called the middle entrance, across a field; the third, an entrance across the cow-yard, and through a private gate, and another yard, to the house. The plaintiff must have gone through one of the last two. Undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose, may be injured by it. I think he has no right **[403]** to place a dog so near to the door of his house, that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one; a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it. As to the notice (*a*), it does not appear to me that a painted notice is sufficient, unless the party is in such a situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient, so as to bar the action, if the plaintiff had any right at all to be on the spot; for, it seems that he was not able to read. Then, was there any thing in the appearance of the dog which would lead the plaintiff to suppose that the dog would bite him? It seems that the injury happened in the middle of the day, in the month of July; and that the plaintiff was a person employed as a watchman in the neighbourhood: and, as no suspicion has been thrown upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety) for your consideration is, to leave it to you to say on which side was the negligence upon this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself: but, if there was no negligence on his part, and there was negligence on the part of the defendant, then

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(*a*) A board, on which was painted in letters three inches in length,—"Beware of the dog."

the plaintiff will be entitled to your verdict." The jury found for the plaintiff. The defendant afterwards obtained a rule nisi for a new trial; but the matter was ultimately **[404]** compromised. In *Brock* v. *Copeland* (1 Esp. N. P. C. 203), the defendant, a carpenter, kept a dog for the protection of his yard: the dog was kept tied up all day, and was at that time quiet and gentle, but was let loose at night: the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out, and was severely bitten by him. Lord Kenyon, upon this evidence, ruled that the action would not lie. He said "that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action was calculated to redress, was, where an animal, known to be mischievous, was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." And his lordship added, "that, in a former case, where, in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that, the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie: but that, it appearing also in evidence that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the court of King's Bench had concurred in opinion with him, that, the plaintiff having gone into the field, supposing that he **[405]** had a right to go there, and the defendant having permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close; but that the action was maintainable." In *Townsend* v. *Wathen* (9 East, 277), it was held to be actionable, to bait traps on a man's own premises, so that his neighbour's dogs were lured to them and injured. [Cresswell, J. There was no bait, no temptation, held out here; therefore that case has no application.] The case of *Dixon* v. *Bell* (5 M. & Selw. 198) places the duty, in cases of this sort, in a very strong light. It was there held, that the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: therefore, where the defendant, being possessed of a loaded gun, sent a young girl (of the age of thirteen or fourteen) to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off,—it was held that the defendant was liable. Wherever a neighbour has acquired a right of easement, the owner of the adjoining property cannot so use his land as in any way to prejudice or affect that right: *Cooper* v. *Barber* (3 Taunt. 99): and that applies as well to public rights as to private easements.

The declaration is perfectly good in point of form,—and would have been so, even if the action had been brought by Jane Barnes herself. The duty is well alleged, as also the breach. In *Firmstone* v. *Wheeley* (*d*), the declaration stated that the plaintiffs and defendants **[406]** were owners of adjacent mines; that the defendants had trespassed on the plaintiff's mine, and had carried away a quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the defendants, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiff's mine; yet that the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: and it was held, on general demurrer, that this was a good count in case.

Byles, Serjt., and Ogle, in support of the rule. Three propositions will be sought to be established in this case, on the part of the defendant,—first, that there is no common law duty upon an owner of land adjoining a highway, to guard or fence a ditch or area upon his own land,—secondly, that, if there be any such common law duty, it is not properly alleged in this declaration,—thirdly, that the learned judge who tried the cause ought to have told the jury that there was no evidence that the place in question was a public way.

(*d*) 2 D. & L. 203. See *Smith* v. *Kenrick*, ante, vol. vii. p. 515.

1. There are many instances of roads passing along the sides of ditches or excavations; but it has never been suggested that the owner of the land on which the ditch or excavation is situate, was bound to fence it; nor is there any instance to be found of an indictment for not doing so. In *Rex* v. *Whitney* (7 C. & P. 208), it was sought to impose such a liability upon the parish; but without success. The language of the 5 & 6 W. 4, c. 70, s. 50, shews that the interposition of the legislature was found necessary, to prevent inconveniences of that sort. The onus of shewing the liability to fence, rests upon the **[407]** plaintiff: and no authority has been cited that bears very much in his favour. The cases which approach the nearest to this, are, *Coupland* v. *Hardingham* and *Jarris* v. *Dean*: but, in both, the area was constructed in or under the public way,—which materially distinguishes those cases from the present. *Blyth* v. *Topham* is an authority for the defendant. [Williams, J., referred to *Sybray* v. *White* (1 M. & W. 435).] There, the mine into the shaft of which the plaintiff's horse fell, was in the possession of the defendant,—the plaintiff being possessed of the surface. In *Jordin* v. *Crump* (8 M. & W. 782), a declaration in case alleged that the defendant wrongfully and unlawfully set and concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen, as to their dogs happening to run upon the same, among the bushes near a public footway running through a close of the defendant's; and that, by means thereof, a dog of the plaintiff's, with which he was going on foot along the said footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of and unavoidably by the plaintiff, begun to pursue, and was in pursuit of, the said rabbit, ran upon the dog-spear, and was wounded, &c. The defendant pleaded, that the defendant set and concealed the said engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, whereof the plaintiff had notice. And it was held, on general demurrer, that the plea was a good answer to the action; and that it would have been so even without the allegation of notice. Alderson, B., in delivering the judgment of the court, in that case, says, "Although it is admitted by these pleadings that the **[408]** instrument in question was one calculated to do grievous bodily harm to human beings, still it does not appear to have been set in the wood with that intention; and there is, therefore, nothing in the case to shew that the setting of it by the defendant was an illegal act. It is true that the law, in certain cases, makes an exception to the right of setting instruments capable of causing deadly injuries to human life, where such injuries will be a probable consequence of setting them (see 7 & 8 G. 4, c. 18): but, with the exception of those cases, a man has a right to do what he pleases with his own land. Now, in the present case, the injurious act was done by the dog to the land of the defendant: and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against the danger. If he chose to walk with his dog along a footpath through ground on which the dog might commit a trespass, he knew the risk he was running; and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case, the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in the adjacent field, the case would be very different, for, the falling into it would then be the act of the injured party himself." That is precisely in point, and, if it be law, which it is submitted it unquestionably is, is decisive of the present case. [Williams, J., referred to *Bird* v. *Holbrook* (4 Bingh. 628, 1 M. & P. 607).] That case has not been universally approved (*c*). [Maule, J. The distinction between those cases and the present, is this,—the nature and office of a dog-spear or a spring-gun, is, **[409]** to kill or maim; whereas, an area is a necessary convenience to a house (*a*).

2. The declaration does not, upon the face of it, disclose a cause of action. It does not allege that the action would have lain, if death had not ensued. The plaintiff was bound to make the allegation, to bring himself within the statute, so as to enable the defendant to traverse it. [Maule, J. To entitle the administrator to sue under this statute, it must appear, either by direct allegation, or by necessary inference, that the husband of the deceased could have maintained an action for any injury she had

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(*c*) See the remark of Alderson, B., in *Jordin* v. *Crump*, 8 M. & W. 789.

(*a*) See also *Daniels* v. *Potter*, 4 C. & P. 262, *Proctor* v. *Harris*, 4 C. & P. 337.

sustained which did not terminate in her death.] This declaration does not shew that. Further, the declaration should have alleged the duty to have arisen by reason of the defendant's possession of the area, and not by reason of his possession of the messuage; and the objection is not cured by the addition of the words, "with the appurtenances."

3. There was no evidence to go to the jury, that the way in question was a public way. It appeared to have been used by the public for about twenty-five years; but beyond that there was no evidence. [Williams, J. Was there no evidence of the origin of the road?] None whatever. And the circumstance of the land having been during all the time held under leases from the Bishop of London, rebuts the ordinary presumption. [Maule, J. Might not the bishop grant a way?] Not since the 13 Eliz. c. 20. [Maule, J. There clearly was evidence to go to the jury here, of an user of this way for a thousand years.] A dedication of a highway is not to be presumed against a reversioner: *Baxter* v. *Taylor* (1 Nev. & M. 13, S. C. 4 B. & Ad. 72).

[410] The court took time to consider, and ultimately directed a second argument, which accordingly took place in Easter term, 1849, before Wilde, C. J., Coltman, J., Cresswell, J., and Williams, J.

Montagu Chambers, for the plaintiff, urged and cited the following additional arguments and authorities. In Bacon's Abridgment, Highways (D.), it is laid down, that "it is clearly agreed to be a nuisance to dig a ditch, or make a hedge over-thwart the highway, or to erect a new gate, or to lay logs of timber on it, or, generally, to do any other act which will render it less commodious." The right of an individual to enjoy his own land according to his own free will, is more limited in the case of a public than in that of a private right: *Taylor* v. *Whitehead* (2 Dougl. 745). Keeping gunpowder, or using powder-mills near a highway, is an indictable offence: Russell on Crimes (2nd edit. vol. ii. p. 297, n.); *Rex* v. *Taylor* (2 Stra. 1167). So, suffering a house on the highway to be so out of repair as to be in danger of falling: *The Queen* v. *Watts, or Watson* (*d*). So, a person may be indicted for carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the King's subjects: *The King* v. *Vantandillo* (4 M. & Selw. 73). In *Firmstone* v. *Wheeley* (2 D. & L. 208), Pollock, C. B., in the course of the argument, suggests this very case. "Suppose," he says, "a person digs so near a highway as to render it dangerous, unless fenced by day and lighted by night, that might be a trespass to the soil, for which the lord of the manor, or owner of the land, could maintain trespass: but there being also a duty to guard the public, **[411]** a person injured would have a right to sue in case." In *Lynch* v. *Nurdin* (1 Q. B. 29, 4 P. & D. 672), the defendant negligently left his horse and cart, unattended, in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: it was held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act. Lord Denman there says: "If I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and, if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In the present case, the duty for the breach of which it is sought to charge the defendant, results from the dangerous position of the pit or area in reference to the highway.

Byles, Serjt., contrà. [Coltman, J., intimated that the court were fully agreed that the way in question was a public way.] There is no common law duty on the owner of land to fence a ditch or area adjoining a highway. Many instances will readily present themselves, of public walks and highways adjoining cliffs and precipices; among these may be instanced, the ways between Margate and Ramsgate, and from Folkstone to Sandgate. So, in the fens, the common fence of the country is a deep ditch, of a date in most cases subsequent to the formation of the roads. [Wilde, C. J., mentioned the path along the side of the New River, at Islington.] Where an individual has acquired, **[412]** by prescription, or otherwise, a right to the support of my land, I cannot so use my land as to deprive my neighbour of that support: but, when he has no such right, I may dig to the extreme verge of my own land, without

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(*d*) 1 Salk. 357, 2 Lord Raym. 856: and see the indictment, 3 Ld. Raym. 18.

giving him notice. [Cresswell, J. So that you do not let his land in.] In Gale on Easements (2nd edit. p. 216) it is said: "Although there is no direct decision in support of this doctrine, yet the leaning of the courts appears to have been in its favour from a very early period: thus, in Rolle's Abridgment (title Trespass, Justification (T.), pl. 1, *Wilde* v. *Minsterly*), it is laid down, 'It seems that a man who has land closely adjoining my land, cannot dig so near mine that mine would fall into his pit; and an action brought for such an act would lie.' 'It may be true,' said Lord Tenterden, in delivering the judgment of the court of King's Bench, in *Wyatt* v. *Harrison* (3 B. & Ad. 871), 'that, if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action.' By the civil law, this right of support from the neighbouring soil, was recognised in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support,—'If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom'" (l. 13, ff. fin. reg.). [Williams, J. Suppose there be a public right of way across a field, and the owner of the land excavates the soil so as to form a precipice on either side, leaving the pathway untouched,—would he be guilty of a nuisance?] That would, in effect, render the way impassable. The only authority that materially **[413]** presses the defendant, is *Coupland* v. *Hardingham*: and there the area is alleged to have been in the highway. [Coltman, J. We have procured the record in that case; it appears that there were two counts in the declaration, the one charging that the cellar was adjoining, the other that it was on the highway. Williams, J. If it was on the highway, the defendant could not fence it without being guilty of an indictable nuisance. Wilde, C. J. The presumption would be, that the excavation of the areas in Wood Street was coeval with the dedication of the way to the public.] So, in *Jarvis* v. *Dean*, it does not clearly appear that the area was not in the highway: besides, the point was not discussed there. [Cresswell, J. Here is an antient road, with a modern excavation. May not the public acquire a right something analogous to the servitude of the old Roman law, viz. that the land adjoining shall be left in such a state as to protect the public in the use of the highway?] No trace of any such distinction is to be found in the books.

If liable at all, the defendant can only be so in respect of his possession of the area. [Cresswell, J. Is it not part of the appurtenances?] Clearly not. The declaration in substance is, that the defendant, by reason of his possession of Blackacre and Whiteacre, is bound to fence. That, however, is not so; the liability, if any, arises only by reason of the possession of Whiteacre, the excavated place. In *Ricketts* v. *Salwey* (2 B. & Ald. 360), in an action for disturbance of the plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, &c.: and it was held that this allegation was divisible, and that proof that the plaintiff was possessed **[414]** of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages pro tanto. [Wilde, C. J. In *Rooth* v. *Wilson* (1 B. & Ald. 59), A. sent his horse, for the night, to B., who turned it out, after dark, into his pasture-field, adjoining to and separated from a field of C. by a fence, which C. was bound to repair: the horse, in consequence of the bad state of the fence, fell from the one field into the other, and was killed: and it was held, that B., although a gratuitous bailee, might maintain an action against C., and recover the value of the horse.] There is clearly a variance here between the duty alleged, and the duty proved: *Yarly* v. *Turnock* (Palmer, 269).

Cur. adv. vult.

Maule, J., now delivered the judgment of the court.

This was an action on the case founded on the statute 9 & 10 Vict. c. 93, "An act for compensating the families of persons killed by accident," and brought by the administrator of Jane Barnes.

The declaration (as amended during the trial) alleged that the defendant, before and at the time when, &c., was possessed of a messuage, with the appurtenances, near to a common and public foot-way, in front and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said foot-way, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which hole, &c., the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time when, &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in or along the said foot-way; yet that the defendant, while **[415]** he was so possessed of the said messuage, and the said hole, &c., and premises, with the appurtenances, and whilst there was such hole, &c., on, &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, &c., to be and continue, and the same was then, so wholly unguarded and not fenced off or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said foot-way, slipped and fell into the said hole, &c., and was thereby killed.

The defendant pleaded,—first, not guilty:—secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.;—thirdly, that he ought not, by reason of his possession of the said messuage, &c., with the appurtenances, to have guarded, fenced off, and railed in the said hole, &c., in manner and form, &c.: on which pleas issues were respectively joined.

At the trial, before Coltman, J., at the sittings in Middlesex, after Easter term, 1847, it appeared that Jane Barnes was passing, between eight and nine o'clock at night, on the 26th of October, 1849, along a road which had on the one side of it a dead wall, and on the other a row of houses, some of which were finished and some unfinished. It being dark, and no light near, she accidentally fell from a path which was on the road by the side of the houses, into the open area of one of the unfinished ones, which was shewn to have been at that time in the possession of the defendant, and was killed by the fall. The area was separated from the path by a kerb-stone which was intended for the reception of upright iron rails.

On the part of the defendant, it was contended,—first, that there was no sufficient evidence that the foot-path was a public way,—secondly, that a man has a **[416]** right to make a hole in his own ground, and is not bound to fence an adjoining highway against such a hole,—thirdly, that the third issue was not sustained, in its terms, by the evidence.

The learned judge told the jury, that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area, and gave a verdict for the plaintiff, with 300l. damages.

The learned judge having given leave to the counsel for the defendant to move the court, on the points suggested by him, a rule was obtained accordingly, to shew cause why a nonsuit should not be entered; and, further, why the judgment should not be arrested, on the ground that the declaration disclosed no good cause of action.

On the argument of this rule, before my brothers Coltman, and Williams, and myself, it was contended, on behalf of the defendant,—first, that the evidence on the part of the plaintiff furnished no case for the consideration of the jury, as to the existence of an immemorial public foot-way,—secondly, that the obligation of the defendant to fence off the area, was not properly described in the declaration,—thirdly, that no such obligation existed as that alleged: for, that the owner of land is not bound to fence off an excavation in it by the side of a public road.

As to the first point, the court was clearly of opinion that there was sufficient evidence to go to the jury, as to the existence of a public foot-way from time immemorial.

[417] As to the second point, the objection was, that the liability of the defendant was alleged to exist in respect of the house and the appurtenances; whereas, on the evidence, it appeared to exist, if at all, by reason of the possession of the appurtenances alone, i.e. of the area. But the court was of opinion that the declaration might be regarded as truly describing the origin of the liability of the defendant, viz. that he was in the possession of a house, to which an area appertained, abutting on a public foot-way.

On the third point, however, the court felt so much doubt and difficulty, that a second argument was directed, which took place in Easter term last, before Wilde C. J., Coltman, J., Cresswell, J., and V. Williams, J.

The arguments for the plaintiff were, that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that, if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put, of the proprietor of land over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which, it was argued, would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland* v. *Hardingham* (3 Campb. 398) and *Jarvis* v. *Dean* (3 Bingh. 447, 11 J. B. Moore, 354) were cited.

Coupland v. *Hardingham* was an action on the case for negligence, in not railing in or guarding an area before a house in Westminster, whereby the plaintiff fell down into the area, and was severely hurt. The defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord **[418]** Ellenborough held, that, however long the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had before been exposed; and that he was liable for the consequences of having neglected so to do, in the same manner as if he himself had originated the nuisance: and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house, to render it secure.

Jarvis v. *Dean* was also an action on the case to recover damages for an injury occasioned to the plaintiff by his falling at night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open at a house he possessed, in the parish of Islington, and in, near, and adjoining a certain street there, which was a common highway. The only point of law decided in the cause was, as to whether the evidence sufficiently proved a dedication of the road to the public. And the case is only an authority on the present subject, to this extent, viz. that it appears to have been assumed as a matter beyond dispute, that the action was well founded, supposing the road was shewn to have been a public one.

On the part of the defendant, it was argued, that no use which a man chooses to make of his own property, can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though **[419]** not fenced, could be in any degree detrimental or dangerous.

In support of this view of the subject, reliance was placed on the case of *Blythe* v. *Topham* (1 Roll. Abr. 88, Cro. Jac. 158. Supra, 421 (*b*)), where it was held, that, if A., seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of Alderson, B., in *Jordin* v. *Crump* (8 M. & W. 782), where the case is put of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. "In such a case," says the learned judge (ib. 788), "the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for, the falling into it would be the act of the injured party himself." And, as to the case of *Coupland* v. *Hardingham*, it was not only denied to be law, by the counsel for the defendant, but it was further argued, that, in that case,—as appeared by the original nisi prius record, procured by Coltman, J.,—as also in *Jarvis* v. *Dean*,—the area was in one count alleged to be in the highway.

But it seems clear to us, that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public **[420]** from it, in a manner quite inconsistent with the notion of its being itself a part of the highway. And, with respect to the case of *Blythe* v. *Topham*, and the passage cited from the judgment in *Jordin* v. *Crump*, it must be observed, that, in these instances, the existence of the pit in the waste or field adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

The result is,—considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for, the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained,—it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird* v. *Holbrook* (4 Bingh. 628, 1 M. & P. 607), the plaintiff was a trespasser,—and, indeed **[421]** a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred, if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch* v. *Nurdin* (1 Q. B. 37, 4 P. & D. 677), and also in the case of *Jordin* v. *Crump*, in which the court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed, that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action.

For these reasons, we are of opinion that the declaration in this case discloses a good cause of action; and also that the third issue was properly found for the plaintiff.

The rule, therefore, must be discharged.

Rule discharged (*b*).

[422] IN THE MATTER OF JOHN FOSTER, a Bankrupt. Feb. 13, 1850.

[S. C. 19 L. J. C. P. 274; 14 Jur. 814.]

By a settlement made on the 13th of July, 1841, in contemplation of a marriage between A. and B., C. covenanted to pay to the trustees, so long as A. and B., or either of them, or any issue of the said intended marriage, should be living, an annuity of such an amount, as would, either alone,—in the mean time and until any real or personal estate should devolve upon or vest in A. and B., in B's right, or any issue of the marriage, under the settlement of her father and mother, or otherwise,—or together with the annual produce to arise from any such real or personal estate, after any such devolution or vesting should take place, make up an annuity of 150l., payable half-yearly. The marriage took place. No real or personal estate had devolved upon or become vested in A. and B. in right of the latter, or in any issue of them. On the 24th of October, 1842, a fiat issued against C., under which he was declared bankrupt, and under which he obtained his certificate on the 6th of March, 1843. The trustees proved against C.'s estate, on the 25th of March, 1843, for 105l., being partly for arrears due at the time of the bankruptcy, and partly for a proportionate part of the current half-year, up to the time of tendering the proof. They at the same time tendered a proof for the value of the annuity as a contingent debt, but such proof was rejected, on the ground that the contingencies were such that the value of the annuity could not be ascertained. The instalments of the annuity accruing after the date of the said proof, down to the 21st of September, 1848, amounted to 823l. 16s. 8d.; on account of which, C. had, since his bankruptcy, made payments amounting to 120l. In February, 1849, the trustees petitioned, praying to be admitted as creditors for the

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(*b*) As to the rule cited from the Digest, supra (which purports to be a translation of a law of Solon), see note C. at the end of this volume.

remaining 703l. 16s. 8d., and to receive dividends thereon, not disturbing former dividends:—Held, that the trustees were not entitled to prove against the estate of C. in respect of such subsequent instalments.

The following case was sent by Vice-Chancellor Knight Bruce for the opinion of this court:—

By indenture bearing date the 13th of July, 1841, and made between William Aggas of the first part, John Foster, the bankrupt, of the second part, Maria Foster, daughter of the said John Foster, of the third part, and Rowland Evans, Thomas Foster, and Charles Crompton, of the fourth part,—after reciting that the said Maria Foster, by virtue of the settlement executed on the marriage of the said John Foster with her mother, and of the will of Thomas Oldham, deceased, her late grand-father, was, or might become, entitled, expectant on the respective deceases of her said father and **[423]** mother, to certain moneys and other estate and property, and the said Maria Foster might also, by other means, become entitled to other real and personal property; and reciting that a marriage had been agreed upon, &c., between the said William Aggas and Maria Foster, and, upon the treaty for the marriage, it was agreed that the said John Foster should, by his covenant, secure the payment, during so long as the said William Aggas and Maria Foster, or either of them, or any issue of the said intended marriage immediately entitled under the provisions thereinafter contained, should be living, of an annuity or yearly sum of such an amount, but no more, as, either alone, or together with the yearly income to arise or be payable from any real or personal estate, or both conjointly, which should at any time or times, or from time to time, devolve upon or vest in the said William Aggas and Maria Foster, in her right, or any issue of the said intended marriage, would, after any such devolution or vesting as aforesaid, make up the yearly income or sum of 150l. for the time being, to the intent that 150l. a year should be always enjoyed by means of the said covenant and real and personal estate so to devolve or vest as aforesaid, or either of them respectively,—it was witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said John Foster did thereby, for himself, his heirs, executors and administrators, covenant, promise, and agree with and to Evans, Foster, and Crompton, their executors, administrators, and assigns, that, in case the said intended marriage should be solemnized, he, the said John Foster, his heirs, &c. should and would pay, or cause to be paid, to Evans, Foster, and Crompton, their executors, &c., during such time and so long as the said William Aggas and Maria Foster, or either of them, or any **[424]** issue of the said intended marriage immediately entitled under the provisions thereinafter contained, should be living, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex between the hours of twelve at noon and two in the afternoon, an annuity or yearly sum of such an amount as, either alone in the mean time and until any real or personal estate should devolve upon or vest in the said William Aggas and Maria Foster, in her right, or any issue of the said intended marriage, under the said settlement of her said father and mother, and the said thereinbefore-mentioned will, or either of them, or otherwise howsoever, or together with the clear annual produce to arise or be payable from any such real or personal estate, as the case might be, after any such devolution or vesting as aforesaid should take place for the time being, would, from time to time, make up one full annuity or yearly sum of 150l. of lawful money of Great Britain, and should and would pay the same by two equal half-yearly payments, on the 13th of January and the 13th of July in every year, without any deduction or abatement whatsoever out of the same or any part thereof, for or on account of any present or future taxes, charges, and impositions.

[A copy of the deed accompanied, and was to be taken as part of, the case.]

The said marriage between William Aggas and Maria Foster was duly solemnized shortly after the date of the said indenture, and before the bankruptcy hereinafter mentioned; and there has been issue born, one child only, who is now living, and is of the age of six years, or thereabouts.

The said William Aggas, and Maria, his wife, are both living.

No real or personal estate has yet devolved upon, or become vested in, the said William Aggas, and Maria, **[425]** his wife, in her right, or any issue of them, or the said Rowland Evans, Thomas Foster, and Charles Crompton, as such trustees under the said indenture, under or by virtue of the said settlement executed on the marriage of the said John Foster, the bankrupt, or the will of the said Thomas Oldham, or otherwise howsoever.

On the 24th of October, 1842, a fiat in bankruptcy was duly issued against the said John Foster, together with the said Rowland Evans and the said Thomas Foster, under which the said John Foster, Rowland Evans, and Thomas Foster, were declared bankrupts: and, on the 8th of November, 1842, George Rowe (since deceased), Thomas Moore, and Robert Minter, were chosen creditors' assignees, and Thomas Massa Alsager (since deceased,) was appointed official assignee, under the said fiat.

On the 25th of March, 1843, the said Rowland Evans, Thomas Foster, and Charles Crompton, as such trustees as aforesaid, tendered a proof under the said fiat, against the separate estate of the said John Foster, for the value of the said annuity, as a contingent debt: but such proof was rejected, on the ground that the contingencies on which the said annuity depended, were such that the value of the said annuity could not be ascertained.

At the date and issuing of the said fiat, the sum of 42l. 8s. 4d. was due and owing to the said Rowland Evans, Thomas Foster, and Charles Crompton, as such trustees as aforesaid, for arrears of the said annuity; and on the said 25th of March, 1843, there was due and owing to the said Rowland Evans, Thomas Foster, and Charles Crompton, for and in respect of the said annuity, the sum of 105l., including the amount of such arrears, and a proportional part of the current half-year, up to the time of tendering the said proof.

The said Rowland Evans, Thomas Foster, and Charles **[426]** Crompton, were, on the said 23rd of March, 1843, allowed to prove, and were admited as creditors, against the separate estate of the said John Foster, for such sum of 105l.

Under the joint-estate, dividends, amounting in the whole to 6s. 1d. in the pound have been paid to the joint-creditors. The creditors upon the separate estate of the said John Foster, including the said Rowland Evans, Thomas Foster, and Charles Crompton, in respect of their said claim for 105l., were paid in full; and a surplus from his separate estate was carried over to the credit of the joint-estate.

On the 6th of March, 1843, the said John Foster obtained his certificate.

In and during the year 1848, and after such distribution as aforesaid, a further sum of 1211l. 4s. 6d. was received by Herbert Harris Cannan, as the official assignee under the said fiat, as part of the separate estate of the said John Foster, to which he became entitled in right of his wife.

The whole of the said annuity of 150l. per annum hath continued to be, and still is, payable under and by virtue of the said indenture. The instalments of the said annuity which accrued after the date of the hereinbefore-mentioned proof, down to the 21st of September, 1848, amount to 823l. 16s. 8d.

The said John Foster has, since his bankruptcy, paid to the said William Aggas four several sums of 30l. each on account of such last-mentioned instalments, leaving a balance of 703l. 16s. 8d. due in respect of the said annuity.

On the 5th of February last, the said Rowland Evans, Thomas Foster, and Charles Crompton presented their petition to Vice-Chancellor Knight Bruce, alleging, that under the circumstances hereinbefore stated and appearing, the contingencies upon which the said an-**[427]**-nuity or debt was payable, had happened, as to the successive payments thereof which had accrued due and become payable since the said bankruptcy; and praying that they might be admitted as creditors for the said sum of 703l. 16s. 8d., and might receive dividends thereon (not disturbing former dividends): and, by the order of His Honour, made, upon the hearing of the said petition, on the 14th of February last, it was ordered that a case should be stated for the opinion of the justices of Her Majesty's court of Common Pleas, upon the following question,—

Whether the said Rowland Evans, Thomas Foster, and Charles Crompton, are entitled to prove against the separate estate of John Foster, the bankrupt, in respect to the said annuity, for the instalments thereof accrued since the 25th of March, 1843, the date of the first-mentioned proof, or any or either of them, and receive dividends with the other creditors, not disturbing any former dividends.

Channell, Serjt. (with whom was Hardy), in support of the claim of the trustees to prove under the fiat. The annuity in question was, before and at the date of the fiat against Foster, "a debt payable upon a contingency," within the first branch of the 6 G. 4, c. 16, s. 56 (*a*)[1], which is in substance re-enacted in the 12 **[428]** & 13 Vict. c. 106, s. 177 (*a*)[2]. The authorities are distinct. Thus, in *Ex parte Tindall, In re Gibbins* (Mont. & M'A. 415), S., by his marriage-settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80l. for himself for life, then to his wife for life, and, after her death, to any issue of the marriage; and that his heirs, executors, or administrators, should, within twelve calendar months after his death, pay to the petitioners the sum of 4000l. on various trusts. S. became bankrupt: and it was held that the petitioners were entitled to prove the value of the 4000l. as a contingent debt against his separate estate. So, in *Willes, In re* (4 Exch. 530), it was held, that, under the 6 G. 4, c. 16, s. 56, a claim on a guarantee for a sum certain, when due, is provable as a debt, and, before it is due, is provable as a debt due on a contingency. Where the contingency happens after the date of the fiat, but before the whole estate has been distributed, the amount is provable under the second branch of the clause, although its value could not be ascertained at the date of the fiat. In *Ex parte Grundy, In re Russell* (Mont. & M'A. 293), A., in February, 1772, covenanted by his marriage-settlement for the payment of 2000l., in case his intended wife, or any issue of the marriage, should survive him: in 1803, a commission of bankruptcy issued against A., under which he obtained his certificate: in February, 1825, A. died, leaving issue of the marriage: in May, 1828, there **[429]** being funds remaining for distribution amongst the creditors of A., a renewed commission was issued, and a final dividend advertised: it was held, that the 6 G. 4, c. 16, s. 56, was retrospective in its operation, and that, although the event upon which the debt was contingent, had happened after the commission issued, and before that statute came into operation, the sum of 2000l. was a debt provable under the commission. In *Ex parte Lewis, In re Charman* (Mont. & M'A. 426), where A. advanced 2000l. to B., to be repaid on a day certain, and secured by the bond of C., conditioned that, if B. made default in payment on the day named, C. should pay within one week: C. became bankrupt, and B. afterwards made default: and it was held that the debt was provable under the commission against C. So, in *Ex parte Myers, In re Sudell* (Mont. & Bligh, 229), a debt on a guarantee which did not become absolute before the bankruptcy, was held to be provable as a contingent debt. Here, as the events had continued, during the existence of which the annuity was to be payable, the contingency had happened as to each and every of the sums which became due since the bankruptcy; and the trustees are consequently entitled to prove against the separate estate of the bankrupt, for all the payments which had accrued since the 25th of March, 1843.

Willes (with whom was Maxwell), contrà. Foster's liability to pay the annuity in question does not constitute a debt provable within the 6 G. 4, c. 16, s. 56, by reason of the uncertainty of the amount to be paid in futuro, and the impracticability of calculating its value. In *Thompson* v. *Thompson* (2 N. C. 168, 2 Scott, 266), it was distinctly held, that the instalments of an annuity for the payment **[430]** of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, provable under a fiat against the surety. In *Bennett* v. *Burton* (12 Ad. & E. 657, 4 P. & D. 313), by deed of mortgage for a debt of 1000l., the mortgagor covenanted, as a further security, to insure his life for the mortgagee's benefit, deliver the policy to him, and keep the

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(*a*)[1] That section enacted, that, "if any bankrupt shall, before the issuing of the *commission* [*fiat*, or the filing of a petition for adjudication of bankruptcy], have contracted any debt payable upon a contingency which shall not have happened before the issuing of such *commission* [*fiat*, or the filing of such petition], the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt, and the *commissioners are* [court is] hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(*a*)[2] This section is substantially the same as the former, the only difference being the substitution of the words within brackets for those in italics.

premiums paid till the debt was discharged; and that, if in the mean time the premiums should be in arrear, the mortgagor might pay them, and recover the amount from the mortgagee. The mortgagor afterwards took the benefit of the insolvent debtors' act, 7 G. 4, c. 57, and included the 1000l. debt in his schedule, stating also that the creditor held a policy of insurance on his life, with the joint security of A. B. for payment of the premiums. And it was held that the mortgagor was not protected, by his discharge and s. 51, from an action of covenant at the suit of the mortgagee, for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default. And in *Toppin* v. *Field* (4 Q. B. 386, 3 G. & D. 340), the defendant, being indebted to the plaintiff, assigned to him a policy of assurance on the defendant's life, and covenanted to pay the annual premiums, and, if he did not, and the plaintiff paid them, to repay the plaintiff. The defendant afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by the defendant, and the plaintiff having paid it, and not been repaid,—it was held, that the defendant was not discharged from liability for these breaches of covenant, by ss. 56 and 121 of the 6 G. 4, c. 16. In the present case, the annuity not falling within any express provision of the bank-**[431]**-rupt act, the arrears accruing due since the fiat are not provable as an absolute debt.

Channell, Serjt., was heard in reply.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that Rowland Evans, Thomas Foster, and Charles Crompton, are not entitled to prove against the separate estate for the instalments mentioned in this question.

"W. H. MAULE. E. V. WILLIAMS.
"C. CRESSWELL. T. N. TALFOURD."

HEYHOE *v.* BURGE. Feb. 14, 1850.

[S. C. 19 L. J. C. P. 243.]

One who stipulates for a share of the clear profits of a particular adventure is, quoad third persons, a partner.—A. and B., by a memorandum in writing, agreed, "for services performed," to allow C. a fourth share of the clear profits arising from a contract for the construction of a line of railway; and there was evidence to shew that C. had acted upon the agreement (though not formally a party to it), and that he had to some extent interfered in the work:—Held, sufficient to shew that C. was a partner in the transaction, quoad third persons.

Debt, for work and labour and materials, and for money found due upon an account stated.

Plea, nunquam indebitatus.

The cause was tried before Pollock, C. B., at the Norfolk spring assises, 1847. The facts were as follows:—

The plaintiff was a mason and bricklayer at Swaffham, in the county of Norfolk. The defendant had formerly been a contractor for railways and other **[432]** public works, but, at the date of the transactions out of which this action arises, had retired from active business, and resided at Herne Bay, in the county of Kent.

In the month of July, 1846, two persons, named William Fry and Daniel Frost, who had formerly been in the employ of the defendant, entered into a contract with the chairman of a company then called "The Lynn and Dereham Railway Company," but since amalgamated with other lines of railway, now known by the name of "The East Anglian Railway Company," to construct the portion of the railway between Narborough and Swaffham, for the sum of 41,029l.; and a short agreement between the parties was signed, as the foundation of a more formal contract. The directors requiring two sureties for the due performance of the contract, Fly and Frost applied to the defendant to become one of such sureties; to which he consented, and thereupon the following agreement was executed:—

"Memorandum of an agreement made this 5th day of August, 1846, between Messrs. Frost, Fly, and Matheson: the aforesaid Frost, Fly, and Matheson hereby

agree, for services performed, to give unto Mr. George Burge, of Herne Bay, one fourth part of the clear profits arising from a contract made with the Lynn and Dereham Railway Company, for five and a half miles of rail-road between Narborough and Swaffham, and they further appoint him to be their arbitrator in any dispute that may arise between themselves." (Signed) "WILLIAM FLY.
"DANIEL FROST.
"DONALD O. MATHESON."

On the 8th of August, a second agreement was entered into by Fly and Frost, of which the following is a copy:—

[433] "Memorandum, 8th August, 1846. We, the undersigned, hereby agree to pay Mr. George Burge, of Herne Bay, any moneys he may advance for us, and interest at the rate of 10l. per cent. until repaid; and, further, give an order jointly upon the Lynn and Dereham Railway Company to receive any moneys that may become due under the contract with them, for the performance of five and a half miles of rail-road upon the Lynn and Dereham line, or any other moneys that may be due to us, the said William Fly, Daniel Frost, and Donald O. Matheson."
(Signed) "WILLIAM FRY.
"Witness, D. O. Matheson. "DANIEL FROST."

In pursuance of the last-mentioned agreement, Fly and Frost signed an order, in favour of the defendant, upon the company, as follows:—

"London, 8th August, 1846,
"The Lynn and Dereham Railway Company.

"Gentlemen,—Have the goodness to pay unto Mr. George Burge, of Herne Bay, any amount due to us for work performed under our contract with you for the execution of a part of the rail-road between Narborough and Swaffham; and his receipt will be our discharge for the same." (Signed) "W. FLY.
"D. FROST."

On the 15th of August, a contract under seal was entered into by Fly and Frost, as contractors, with the company, for the formation of the portion of the line above referred to: by this deed it was provided, amongst other things, that Fly and Frost should not make any sub-contract without the leave of the directors, except as to labour,—and that only with the consent in writing **[434]** of the company's engineer. Bonds for the due performance of the contract by Fly and Frost, were at the same time executed by the contractors, and also by the defendant and Matheson respectively as their sureties.

During the progress of the work, several letters were addressed by the defendant to Matheson. These letters shewed that the defendant took considerable interest in the work. In one of them,—which bore date the 6th of December, 1846,—he says: —"I am glad you have got over your difficulties. If you had been a little positive with Mr. Hall (the company's engineer), I consider you could have got a certificate. Look out in time always. Write me to Bull and Mouth. Mr. Fisher has received the bill of particulars from Mr. Cox; and it is necessary, the first opportunity, that we see him together. If you have anything particular to come up for, besides this, you can meet me after Wednesday at Bull and Mouth: but leave as seldom as possible; you have all had running about enough." In another of these letters, the defendant desired Matheson "to keep down all expenses:" and, in another, he sends notice to a person named Reynolds, to detain all stone which had been ordered by Fly and Frost. And, in a letter addressed by him to Messrs. Hall & Co., the engineers, the defendant desires them not to let any materials leave the line.

The plaintiff then put in the examination of the defendant under a fiat in bankruptcy, issued on the 10th of November, 1847, against Fly, Frost, and Matheson. The material parts of this examination were as follows:—"I know the bankrupts, Fly, Frost, and Matheson. Matheson is my brother-in-law. Frost has worked for me nearly twenty years, at different places; and Fly, also, I have employed from time to time to do work for me as a contractor. I have paid them as sub-contractors;

and I have lent them money to carry on **[435]** contracts. They had good credit, and good character: but I should think not much capital. I knew of their tendering for a contract with the Lynn and Dereham Railway Company. I first heard of it after they had agreed for it,—about August, 1846. In the first instance, they tendered for the contract, and were not successful. But, the directors having for some reason refused to take the party they had previously agreed with, they applied again to Fly and Frost to take the contract; and they then applied to me for assistance. I believe this is the way they got the contract. They advised with me originally as to the quantities, and the prices to be charged for the work. I mean to state that I knew of their tendering for the contract originally. The original contract price was, I think, 45,000l., or thereabouts. I was proposed as, and am, one of the sureties. I agreed to advance money to carry on the work. No sum was named. The agreement under which the advances were to be made, was in writing. I produce the agreement, dated the 5th of August, 1846. [The agreement was set out.] There was another agreement, of the 8th of August, 1846, which I also produce. [This agreement also was set out.] That is the agreement I acted upon."

This examination was put in for the purpose of proving the agreement of the 5th of August, 1846,—as a statement, under the hand of the defendant, that there was such an agreement, and that he had acted under it, and therefore within the principle laid down in *Slatterie* v. *Pooley* (6 M. & W. 664).

The lord chief baron, after consulting Coltman, J., refused to receive the examination as evidence of the agreement.

The original was then called for, and produced, but was objected to on the part of the defendant, as being **[436]** unstamped, and also on the ground that the defendant was no party to it.

To the first objection, it was answered that there was no evidence that the profits, a division of which the agreement stipulated for, amounted to 20l., and therefore no stamp was requisite. And, in answer to the second objection, the plaintiff's counsel put in a further agreement, also dated the 5th of August, 1846, and purporting to be made between Fly, Frost, and Matheson (but executed by Fly and Frost only), and witnessed by the defendant, in whose handwriting it was, as follows:—

"Memorandum of agreement, made this 5th of August, 1846, between William Fly, Daniel Frost, and Donald O. Matheson: the said William Fly and Daniel Frost hereby agree to give unto the said Donald O. Matheson one fourth part of the net profits arising from a contract made with the Lynn and Dereham Railway Company; and they further appoint him to pay and receive all moneys that may be necessary to pay or receive during the performance of the work: and, should any dispute arise between the aforesaid parties, the same is to be decided by Mr. G. Burge, of Herne Bay." (Signed) "WILLIAM FLY.
"DANIEL FROST.

"Witness, George Burge."

The learned judge thereupon ruled that the two agreements were admissible in evidence: and, in leaving the case to the jury, he told them, that, if they believed those documents to be the documents which they purported by the examination to be, they ought to find that the defendant was interested in the profits, and consequently a partner.

The jury accordingly returned a verdict for the plaintiff, damages 361l.,—leave being reserved to the defendant to move to enter a nonsuit.

[437] O'Malley, in Easter term, 1848, accordingly obtained a rule nisi to enter a nonsuit, and also for a new trial, on the ground that the verdict was against evidence. He submitted that there was no evidence that the defendant had ever assented to the agreement of the 5th of August, 1846; and that, even if there was, the agreement did not constitute him a partner with Fly and Frost, nor did he, not being a party thereto, acquire any legal right under it; and that the agreement was without consideration.

Byles, Serjt., and Bramwell, shewed cause against that rule, in Trinity term, 1848. They submitted that the stipulation to receive a share of profits constituted Burge a partner with Fly and Frost,—citing Vinnius (Vinn. Comm. in Inst. book iii. tit. xxvi. De Societate), *Gilpin* v. *Enderby* (5 B. & Ald. 954), *Bond* v. *Pittard* (3 M. & W.

357), Smith's Mercantile Law (3rd edit. p. 21, 4th edit. p. 19), and Story on Partnership (ch. iv. §§ 54, 60, 75).

Channell, Serjt., and O'Malley, in support of the rule, insisted that the agreement of the 5th of August, 1846, was a mere inchoate agreement for a participation in profits, which was never carried into effect, and therefore did not constitute a partnership; and they referred to *Pott* v. *Eyton* (ante, vol. iii. p. 32), and the authorities there cited.

Coltman, J. It appears to the court(*h*) that there was in this case a question of fact which ought to have been submitted to the jury, viz. whether the defendant had assented to the agreement of the 5th of August, **[438]** 1846. We think that the omission to present that to the jury, and dealing with the whole as a question of law, was a miscarriage, and, consequently, that the rule should be made absolute for a new trial.

Rule absolute, accordingly.

Upon the second trial, before Parke, B., at the summer assises for Norfolk, in 1848, the same evidence was again given; and it was further proved, that the work in respect of which the plaintiff sought to recover, was work done by him under a subcontract, for which there was no leave of the directors, or consent of the engineer, as required by the original contract of the 15th of August, 1846.

On the part of the defendant, the objections which were taken on the former trial, were again urged; and it was further insisted, that there was no evidence that Burge had acted upon the agreement of the 5th of August, 1846; that the subsequent agreement of the 8th of August was inconsistent with, and evidently intended to be substituted for, the former; that the interference of the defendant, as evidenced by his letters, arose from an anxiety, which as a surety he would naturally entertain, that the contractors should so proceed with the work as to save him from personal responsibility; and that, assuming that the defendant was bound by the agreement of the 5th of August, 1846, or that there was evidence that he had acted upon and taken an interest under it, it did not bind him quoad contracts, like the present, entered into by Fly and Frost without the scope and authority of the deed of the 15th of August, 1846.

For the plaintiff, it was insisted that the agreement of the 5th of August, 1846, if not per se a contract binding the defendant, it must be assumed, from the circumstance of his having it in his possession, and from **[439]** his subsequent conduct, that he meant to act, and did act, upon it.

The learned baron, in presenting the case to the jury, told them that the first question for them to consider, was, whether there was a partnership between the defendant and Fly and Frost,—whether he entered into a contract with them to share in the profit and loss of the particular adventure; that, if the defendant did actually agree, by a binding contract, to take a share of the profits of the adventure, in point of law he was a partner, and authorised every thing that was necessary for the purpose of carrying the contract into effect, and constituted Fly and Frost his agents for the purpose of entering into any sub-contracts which might be necessary for that purpose. His lordship then proceeded to comment upon the examination of the defendant under the fiat, as to which he said that "he could not help observing that the examination was conducted in a somewhat artful manner; for, that the examiner had never ventured to put to the defendant, as he ought in fairness to have done, the precise question, whether he had agreed beforehand, and upon what consideration, and upon what terms, with Fly and Frost, to become a partner in the adventure, but had contented himself with resting the plaintiff's case upon inferences arising from answers which the defendant had given to other questions, and from the production of the documents by him." And, when he came to that part of the examination in which the defendant said—"I agreed to advance money to carry on the work: no sum was named: the agreement under which the advances were to be made, was in writing,"—the learned judge said,—"Then the examiner just interposes this agreement of the 5th of August which is said to constitute a partnership, not being at all the agreement for the advance of the money: and then **[440]** there is put in and read by the officer the agreement that is produced by the defendant. It is dated the 5th of August. Then the officer gives you an account of the contents of

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(*h*) Coltman, J., Maule, J., Cresswell, J., and Williams, J.

the instrument in the examination. It is, 'Memorandum of agreement made the 5th of August, 1846, between Messrs. Fly and Frost and Matheson,' those three persons being apparently then the partners in the contract. You will observe there is another agreement of the same date entered into between Fly and Frost and Matheson, to give Matheson another fourth share of the profits; and on the same day there is an agreement made, not purporting to be between Fly and Frost and the defendant, but in the defendant's possession,—produced by him,—an agreement by Fly and Frost to give him a fourth of the profits, for services performed. Now, the learned counsel objected to this agreement, and said it could not be a binding agreement, because the instrument did not purport, upon the face of it, to be an agreement between Fly and Frost and the defendant. I think there is nothing in that objection, inasmuch as it is quite clear that the object of the agreement was, to give the defendant a share of the profits, and inasmuch as the instrument may be presumed to have been intended for the defendant, who upon his examination produced it; and therefore, if he received an instrument in these terms, although it did not mention his name as a contracting party, yet, if they agreed to give him a share of profits, and handed over the document to him, it is ample evidence that he was a party to it. The objection that it is not an agreement with the defendant nominatim, is, I think, invalid. This agreement purports to give the defendant a fourth part of the clear profits, not the gross profits, of the contract. A person who shares gross profits is not a partner; but a person who shares net profits is primâ facie to be considered as a partner." **[441]** His lordship then read the agreement; and, after adverting to the agreement of the same date, to give another fourth of the profits to Matheson, he proceeded, —"If you take the literal words that are used by the defendant in his examination, this contract is not a binding contract; because, in the first place, it is only an offer of a remuneration for services already performed, which could not be enforced by action. In the next place, it does not appear from the examination, that this agreement was acceded to, or acted upon, by the defendant; for, he goes on to say,—'There was another agreement, of the 8th of August, 1846, which I also produce.' [His lordship read that agreement.] 'That,' he says, 'is the agreement I acted upon.' Then, they do not ask him whether he acted upon the first agreement, by which he was to share in the profits, and what the consideration for that agreement was. And, this matter having been before the court of Common Pleas, it appears one of the questions which they thought ought to be left to the jury was, whether the agreement was assented to, and whether it had been acted upon by the defendant: because, if he never assented to it, he could not be made a partner. According to the literal terms of the examination, all that the defendant does is, to produce the instrument from his possession; and he says no more about it. The plaintiff's counsel argue, that, inasmuch as the defendant chose to take possession of the agreement, it must be assumed that he meant to act upon it. I can only repeat, that it would have been much more fair and honest to have asked the defendant whether he had assented to it. One question which appears to have been dwelt upon in the court of Common Pleas, was, whether the agreement of the 8th of August, under which the defendant was to advance money at 10l. per cent., was not substituted for the former agreement. **[442]** And it certainly does seem rather a strong thing to say that the defendant was to have 10 per cent. upon his advances, and also a fourth share of the net profits. If this really was the case,—that the agreement of the 8th was substituted for that of the 5th of August, then the defendant was not a partner." "Particular reliance is placed by the plaintiff's counsel upon the examination. They say, that, although perhaps, if literally construed, it would not afford evidence of an admission by the defendant that he was a partner, yet, coupling it with the contemporaneous agreement of the 5th of August, there is evidence of an agreement between these four persons,—Fly, Frost, Matheson, and the defendant, that they were to share in the profit and loss of the adventure: and, further, that the agreement of the 8th of August was not in substitution of the former agreement, but was additional,—that the defendant was to have, besides one fourth of the profits, 10 per cent. upon the money he advanced. If it was so, it was a very good bargain. The defendant's counsel, on the other hand, say that that is not the fair inference to be drawn from the defendant's examination. It is for you to judge how that is. And, in order to arrive at a proper conclusion, you must take into your consideration the other evidence which has been given on the part of the plaintiff." The learned judge then proceeded to comment upon the defendant's letters, saying,—"You will have to judge of the effect of these letters. They certainly are quite consistent with the supposition that the defendant was a partner, because they shew that he takes an interest about the partnership concern: he writes to Matheson, objecting to his being absent, urging the necessity of economy, the making of all their contracts as cheaply as possible; in short, taking an interest in every thing they do, as one who expected to profit by it. You will have to say whether these **[443]** letters, taken in conjunction with the defendant's examination, satisfy you that he was a partner. The defendant says that these letters are consistent with the supposition that he was not a partner; that he took an interest in the concern, as an old friend; that he was interested, because he was a surety, and, if the contractors failed in the undertaking, he would be responsible to the company for their breach of contract: and, besides, he had advanced the contractors large sums of money, and the hope of being repaid was another inducement for the interest he took. You will say which of these suppositions these letters, in your judgment, accord with. If you think they warrant the inference that the arrangement was, that the defendant was a partner, and intended to share the profits, you must be satisfied that he adopted the first agreement; and you are to form your judgment upon the effect of these letters, to assist you in arriving at a conclusion. Upon the whole of the facts, taken together, the question will be, whether you are satisfied that this was a binding agreement,—not a mere promise, but a binding agreement,—that the defendant should have a share of the net profits of carrying into effect this particular contract. If you are not satisfied of that, there is an end of the plaintiff's case, because the whole rests upon the inference to be drawn, of the defendant's being a partner in the profit and loss of the contract. If he is not a partner in the profit and loss, then the defendant is entitled to your verdict. But, if you are satisfied that he was a partner in the contract, then the defendant is, I think, responsible for all the acts done by Fly and Frost, which were necessary for the purpose of carrying the contract into effect." In answer to a remark of the defendant's counsel, that there cannot be a partnership constituted by persons agreeing to share the profits of an individual transaction, the learned baron said: "I am of opinion that **[444]** the rule of law as to sharing net profits, is not confined to general dealings of that nature; but is also applicable to particular transactions,—that, if a person agrees to share with another, by a binding agreement, the profits of a particular adventure, they are partners in that particular adventure. Sometimes cases arise in which a person, although he is taking a share of the profits, is not a partner for some purposes; such, for instance, is the case in the whale-fisheries: it is well known by persons conversant with that trade, that the master, the mates, and the seamen, all take a share in the ultimate profits of the voyage, proportioned to their rate of wages; but that does not constitute them partners, so as to render them liable for articles supplied in the equipment of the vessel; it is only a mode of remunerating them for their services. But, where a person stipulates for a share in the net profits of a concern, and has a right to an account of the net profits as a partner, he is liable, although the partnership is limited to a single transaction or adventure."

The learned baron then proceeded to the second point, saying,—"If you are satisfied that there was this contract between Fly and Frost and the defendant, then comes the question whether Fly and Frost were authorised to enter into a contract for the work in respect of which it is now sought to charge the defendant as a partner. Now, it is material to look at the contract between Fly and Frost and the railway company, to see whether that authorised such a transaction as this; for, if the contract expressly prohibited the employment of any person in the situation of the plaintiff to do any part of the work, then it could not be said to have been done with his authority: by becoming a partner in the contract, he only authorises the doing of that which was necessary for carrying the contract into effect. The contract contains this clause, **[445]**—'And, further, that they, the said William Fly and Daniel Frost, or either of them, or their or his executors or administrators, shall not nor will, unless with the previous consent of the said company, signified in writing under the hands of three directors thereof, make any sub-contract or sub-contracts for the several works hereby contracted to be executed, or any of them, except as to labour only, and then only with the consent of the principal engineer for the time being of the said company; and shall not nor will, unless with such consent as aforesaid, signified as aforesaid, assign or underlet this contract, or any part thereof.' If the work in respect of which this action is brought, had been done by the plaintiff under a sub-contract with Fly and Frost, there would have been very great weight in the objection; and I think the defendant could not be made responsible in respect of such sub-contract, unless there were some other evidence than the mere fact of his being a partner, of his having sanctioned the work. But it appears to me that this is not a sub-contract within the meaning of this clause of the deed; the work was to be charged for at measure and value. I will, however, ask your opinion whether, independently of the construction which I put upon the contract, the defendant has by his conduct sanctioned this particular work. If it is not prohibited by the contract, there is considerable evidence which would tend to satisfy you that the defendant must have contemplated that Fly and Frost could not have done the work by themselves or their own servants, but must have had recourse to others to complete the undertaking,—carpenters, masons, bricklayers, slaters, &c.; and therefore you may reasonably conclude that the defendant, if a partner, would concur in that mode of carrying the contract into effect."

And, in conclusion, his lordship said,—"The ques-**[446]**-tion for you to decide in the first place is, are you of opinion that there was a binding contract between the defendant and Fly and Frost, that the former should share in the profits of the adventure? And, secondly, if there was, are you of opinion that the work in question was necessarily done in carrying the original contract into effect? And, further, do you think that this particular work was sanctioned by the defendant? If you are of opinion in the affirmative upon those points, the plaintiff will be entitled to your verdict. If you are not satisfied that the defendant was a partner in the profit and loss of the adventure, and that the execution of the contract necessarily required the employment of the plaintiff in order to carry it completely into effect, your verdict will be for the defendant."

The jury returned a verdict for the plaintiff, damages 354l.

O'Malley, in Michaelmas term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence.

Byles, Serjt., Willes, and Couch, in Trinity term last, shewed cause. The main objection to the agreement of the 5th of August, 1846, was, that, the defendant was no party to it, and therefore there was no mutuality. But there is no rule of law, that one who is not expressly named as a party cannot avail himself of a contract, if he has assented to and acted under it: *Goldshede* v. *Swann* (1 Exch. 154). It is true, the agreement was not executed by the defendant: but there was ample evidence that he had assented to it; and it came out of his possession when he was examined under the fiat against Fly and Frost and Matheson. It is clear, that, under that agree-**[447]**-ment, he would have a remedy in equity against Fly and Frost for an account of profits. There was, therefore, abundant evidence to warrant the verdict. Then, as to the alleged misdirection,—it is quite clear, upon the authorities, that a stipulation for a participation in the net profits of a particular adventure constitutes a partnership, just the same as an agreement to share in the profits of trade in general. In *Grace* v. *Smith* (2 Sir W. Blac. 998), De Grey, C. J., says: "If any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment." [Cresswell, J. That reasoning does not apply to an isolated transaction.] The rule is applied to a single adventure, in the subsequent case of *Hesketh* v. *Blanchard* (4 East, 144). In *Waugh* v. *Carver* (2 H. Blac. 235), Eyre, C. J., said, that, "upon the authority of *Grace* v. *Smith*, he who takes a moiety of all the profits indefinitely, shall by operation of law be made liable to losses, if losses arise, upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace* v. *Smith*: and I think it stands upon the fair ground of reason." And in *Smith* v. *Watson* (2 B. & C. 401, 407, 3 D. & R. 751), Bayley, J., says: "A right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself which is the subject-matter of the adventure." In *Pott* v. *Eyton* (ante, vol. iii. p. 32), this court held, in conformity with the rule laid down in *Grace* v. *Smith*, **[448]** that one who takes a share of the profits, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which the creditors have a right to rely for payment. In *Bond* v.

Pittard (3 M. & W. 357), A. & B. carried on business together as solicitors, in partnership, and held themselves out as such, and the defendant employed them in that capacity. By the agreement under which A. and B. entered into business together, B. was to receive annually out of the profits the sum of 300l., but he was not to be in any manner liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner. It was held that A. and B. were properly joined as plaintiffs in an action for work and labour, as the money when recovered would be the joint property of both, until the accounts were ascertained, and the division took place. Parke, B., there says: "In *Gilpin* v. *Enderby* (5 B. & Ald. 954, 1 D. & R. 570. And see *Enderby* v. *Gilpin*, 5 J. B. Moore, 571), a person who, by a partnership deed, was exempted from all possibility of loss, was held to be a partner, though of an unusual kind, and so considered by the court in giving judgment." In *Ex parte Rowlandson* (1 Rose, 89), Lord Eldon says it is settled, "that, if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it." *Ex parte Gellar* (1 Rose, 297) is an authority to the same effect. In *Gouthwaite* v. *Duckworth* (12 East, 421), A. and B., general partners in trade, being indebted to C. for advances paid by him on the joint account of the three in **[449]** the purchase of tobacco which had been sent out on a special joint adventure to Spain,—with a view to liquidate that balance, C. agreed with A. and B. to join with them in another adventure to Lisbon, of which he was to have one moiety; and it was agreed that A. and B. should purchase goods for the adventure, to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns, the amount of his advances previously made to A. and B.: it was held, that this agreement constituted a partnership between the three in the adventure, at and from the time of the purchase of the goods for the adventure by A. and B., although C. did not go with them to make the purchase, or authorise them to purchase on the joint account, but A. and B. alone in fact made the purchase; and although C. also purchased in his own name, and paid for, goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three. And Grose, J., said: "I think this is a strong case of partnership, within the description given of it by Lord Chief Justice De Grey in the case cited"—*Grace* v. *Smith*. In *Cheap* v. *Cramond* (4 B. & Ald. 663), a merchant in London recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house should be equally divided, without allowing any deduction for the expenses: and it was held that this was a participation in profit, and constituted a partnership between the parties quoad hoc. **[450]** This clearly was a partnership, according to the principles laid down by all the text-writers. In Vinnius's Commentary on the Institutes (book iii. tit. xxvi.), it is said,—"De damno nihil adjeci, quia lucrum tantum sperant spectantque socii, damnum præter votum eorum accidit. Sed nec damni communio ad substantiam societatis pertinet: quippe quæ etiam ita constitui potest, ut unus e sociis damni sit expers." So, in Smith's Mercantile Law (3rd edit. p. 21; 4th edit. p. 19), it is said: "There may be a partnership in one transaction, as well as in a continuing business, and between persons out of trade, as well as in trade, since, in either case, there may be a combination of property or labour, in order to a common undertaking and a common profit (*c*). This community of profit is the criterion whereby to ascertain whether a contract is really one of partnership; for, one partner may stipulate to be free from loss, and the stipulation will hold good as between himself and his companions (*d*), though it will not diminish his liability to strangers" (*e*).

(*c*) *Ex parte Gellar*, 1 Rose, 297; *Salomons* v. *Nissen*, 2 T. R. 674.

(*d*) *Ferday* v. *Hornderne*, Jacob, 144; *Gilpin* v. *Enderby*, 5 B. & Ald. 954; *Bond* v. *Pittard*, 3 M. & W. 357. See 18 Ves. 300: unless, indeed, such stipulation be inserted as a mask to disguise usury; *Jestons* v. *Brooke*, Cowp. 793; *Morse* v. *Wilson*, 4 T. R. 363.

(*e*) *Waugh* v. *Carver*, 2 H. Blac. 235, 1 Smith's Leading Cases, 491; Jacob, 147, per Lord Eldon.

So, Story, in his Treatise on Partnership, lays the rule down thus (ch. iv. § 54), "The cases in which the liability as partners as to third persons exists, may be distributed into the following classes,—first, where, although there is no community of interest in the capital stock, yet the parties agree to have a community of interest, or participation, in the profit and loss of the business or adventure, as principals, either indefinitely, or in fixed proportions,—se-**[451]**-condly, where there is, strictly speaking, no capital stock, but labour, skill, and industry, are to be contributed by each in the business, as principals, and the profit and loss thereof are to be shared in like manner,—thirdly, where the profit is to be shared between the parties as principals, in like manner, but the loss, if any arises beyond the profit, is to be borne exclusively by one party only,—fourthly, where the parties are not in reality partners, but hold themselves out, or at least are held out by the party sought to be charged, as partners, to third persons, who gave them credit accordingly,—fifthly, where one of the parties is to receive an annuity out of the profits, or as a part thereof." It is to the third class that the present case more immediately belongs. The learned author proceeds, in § 60,—"In the next place, as to the class of cases where the parties are to share the profits between them, if any, as principals, but the losses are to be borne exclusively by one party. It is here that the pressure of the general doctrine, that a participation in the profits, as profits, creates a partnership between them, is most severely felt, and is most difficult to maintain, upon general reasoning. In all this class of cases, it is the intention of the parties that no partnership shall exist between themselves; and the common law, in this respect, gives full force and effect to that intention. But, in regard to third persons, the common law holds that the mere right to participate in the profits creates a partnership between the parties, notwithstanding there is no participation in the losses, ultra the profits, and it is not their intention to be partners. The doctrine here seems to be founded in part upon the consideration, that, even in such a case, there is incidentally, and to a limited extent, a participation in the losses, as well as in the profits; for, before it can be ascertained that there are any profits, the losses must first be deducted, and the **[452]** residue only shared as profits. But the main reason is, that which has been already adverted to as the first foundation of the doctrine, to wit, that every man who has a share of the profits of a trade or business, ought also to bear his share of the loss; for, if one takes part of the profit, he takes a part of the fund on which the creditor of the trader relies for his payment." He then proceeds, in § 75, to treat of partnerships in a single transaction or adventure. "Special partnerships, in the sense of the common law, are those which are formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. They are more commonly called limited partnerships, when they extend to a single transaction or adventure only; such as, the purchase and sale on joint account of a particular parcel of goods, or the undertaking of a voyage or adventure to foreign parts upon joint account. But the appellation may be applied indifferently, and without discrimination, to both classes of cases. They, therefore, fall within the denomination of the Roman law. Societas sive negotiationis alicujus, sive vectigales, sive etiam rei unius." *Barry* v. *Nesham* (ante, vol. iii. p. 641) is also a distinct authority to shew that this was a partnership quoad third persons.

Channell, Serjt., O'Malley, and Worlledge, in support of the rule. So far as direct decision is concerned, the question presented to the court in this case is a new one; and the dicta which are to be found scattered through the cases upon the subject, have not met with the approval of jurists in any other commercial country. And this doubtful law is sought to be supported and enforced upon evidence most questionable,—consisting mainly of an examination under a fiat in bankruptcy, **[453]** conducted with consummate craft, and evidently with a view to this action. Taking the whole of the evidence together, the fair result is, that the defendant never intended to become a partner; and that, in truth, the agreement of the 5th of August was never acted upon, but that of the 8th was substituted for it. The former constituted no binding contract; the defendant was no party to it, and could not have enforced it. It is not like a proposal, which may be evidence of an agreement, where it appears only to be a part of the contract. But, where the instrument on the face of it purports to be, not evidence of a contract, but to be an agreement between other parties, it cannot be eked out by parol evidence. Besides, there is no sufficient consideration to support it. Assuming that the memorandum of the 5th of August, was a binding contract, and that it conferred upon the defendant a legal right to participate in the profits of the adventure, the question is, whether a right to share in the profits of a single undertaking or adventure constitutes a partnership, where there has been no actual participation in profits, and where the party sought to be charged as a partner has not been dealt with as such, or been in any way held out as a partner. None of the cases cited tend to establish that proposition. In *Elgie* v. *Watson* (5 M. & W. 518), by an agreement in writing, W. agreed with E. to advance him a sum of money, for the purpose of manufacturing certain inventions; and it was agreed, that, if the inventions should become of public or private use, W. should be entitled to one third of the profits of the inventions. The agreement contained an express promise on the part of E. to repay the sums of money advanced by W.: and it was held, in an action brought by W. to recover the money thus advanced, that this **[454]** agreement did not constitute a partnership between the parties with respect to that sum. And in *Wilson* v. *Whitehead* (10 M. & W. 503), A., B., and C. verbally agreed that they should bring out, and be jointly interested in, a periodical publication: A. was to be the publisher, and to make and receive general payments, B. to be the editor, and C. the printer; and, after payment of all expenses, they were to share the profits of the work equally: C. was to furnish the paper, and charge it to the account, at cost prices: no profits were ever made, nor any accounts settled: the plaintiff furnished paper to C., for the purpose of being used by him in printing the periodical; and it was held that A. and B. were not jointly liable with C. for the price of it. Consistently with that case, it is impossible to hold the defendant liable as a partner in this case.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This was an action of debt brought by the plaintiff against Burge, to recover the price of certain work done upon a railway, which was formerly called "The Lynn and Dereham Railway," but which is now consolidated with other lines of railway, called "The East Anglian Railway."

At the trial before Parke, B., at the Norfolk summer assises, 1848, it appeared that two persons named Fly and Frost had entered into a contract with the Lynn and Dereham Railway Company, for certain work to be done on that railway, and that part of the work had been executed by the plaintiff, who claimed payment for the same from the defendant, alleging him to be a partner with Fly and Frost, who had become bankrupt.

[455] The plaintiff put in the examination of the defendant, taken under a fiat in bankruptcy against Fly and Frost. From that examination, it appeared that a certain agreement had been entered into between the defendant and Fly and Frost, and one Matheson. Evidence was also given of a contract made by Fly and Frost with the Lynn and Dereham Railway Company, under seal, dated the 15th of August, 1846, for the construction of five miles and a half of railway, from Swaffham to Narborough,—Fly and Frost not to make a sub-contract without the leave of three of the directors, except as to labour, and that only with the consent in writing of the engineer. Three bonds were also put in; one, from Fly and Frost, to the company; the others, by the defendant and Matheson, respectively, as sureties for them. Three agreements, which appeared in the examination of the defendant under the fiat, were also read. The first, which was dated the 5th of August, 1846, was in these terms:—

"Memorandum of an agreement made the 5th day of August, 1846, between Messrs. Fly, Frost, and Matheson;—the aforesaid Frost, Fly, and Matheson, hereby agree, for services performed, to give unto Mr. George Burge, of Herne Bay, one fourth part of the clear profits arising from a contract made with the Lynn and Dereham Company, for five miles and a half of rail-road, between Naboro' and Swaffham; and they further appoint him to be their arbitrator in any dispute that may arise between themselves." (Signed) "William Fly.
"Daniel Frost.
"Donald O. Matheson."

The second agreement, of the 8th of August, 1846, was in these terms:—

"We, the undersigned, hereby agree to pay Mr. George Burge, of Herne Bay, any moneys he may ad-**[456]**-vance for us, and interest at the rate of 10l. per cent. until

repaid; and, further, give an order jointly upon the Lynn and Dereham Railway Company, to receive any moneys that may become due under the contract with them, for the performance of five miles and a half of rail-road upon the Lynn and Dereham line, or any other moneys that may be due to us, the said William Fly, Daniel Frost, and Donald O. Matheson." (Signed) "WILLIAM FLY.
"DANIEL FROST.

"Witness, D. O. Matheson."

There was a third agreement, by which Fly, Frost, and Matheson agreed jointly to give an order to Burge on the Lynn and Dereham Railway Company, to receive any sums of money due to them. There were also letters given in evidence, written by the defendant, Burge, during the progress of the work for which this action was brought. From these letters, the defendant appeared to take great interest in what was going on, and in one, of December, 1846, addressed to Matheson, the defendant says,—"I am glad you have got over your difficulties. If you had been a little positive with Mr. Hall (the engineer), I consider you could have got a certificate. Look out in time always. Write me to Bull and Mouth. Mr. Fisher has received the bill of particulars from Mr. Cox; and it is necessary, the first opportunity, that we see him together. If you have any thing particular to come up for besides this, you can meet me after Wednesday at Bull and Mouth: but, leave as seldom as possible: you have all had running about enough." In another letter, he desires Matheson to keep down all expenses; in a third, he sends notice to a person named Reynolds, to detain all stone which had been ordered by Fly and Frost; and in another, addressed to Messrs. Hall & Co., he desires them not to let any materials leave the line.

[457] Upon this evidence, the learned baron left it to the jury to say whether, upon the whole, they were satisfied that a binding agreement had been made between the defendant and Fly and Frost, that the defendant should have a share of the profits of carrying on the contract with the company, and whether that agreement was acted on, when the contract with the plaintiff for the work executed by him was made; telling them, that, if there was such binding contract, that would make him a partner with Fly and Frost, and communicate to them an authority to make all contracts necessary to carry into effect the objects of the partnership, as usual in similar businesses.

It had been contended, on the part of the defendant, that, even if such partnership existed, it must be governed by the terms of the deed entered into between Fly and Frost and the company,—which did not authorise the making of a sub-contract, except for labour. This, it was said, was a sub-contract, and was not for labour; therefore, no such implied authority was given to Fly and Frost by the defendant.

The learned baron also asked the jury, whether, independently of the deed, the plaintiff was in the employ of the defendant.

The jury found both questions for the plaintiff.

A rule nisi for a new trial was granted, on the ground of an alleged misdirection by the learned baron, and also on the ground that the verdict was against evidence.

The argument as to misdirection was, that, the agreement between the parties being at the utmost for the share of the profits of one single transaction, it did not constitute a partnership; and, secondly, that a written instrument whereby Fly and Frost promised to give Burge a share of the profits, was unilateral only, that there was no consideration given for it, and that Burge was no party to it, and consequently there was no binding agreement for a share of the profits.

[458] As to the first point, it has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction, constitutes a partnership (*a*), and authorises them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken.

With regard to the second point, the argument proceeded on a misapprehension as to the direction of the learned judge. He did not tell the jury that the written contract alone made a binding contract: but he left it to them to say whether they were satisfied of the existence of such a contract, from the whole of the evidence. To this direction it was impossible to object; for, unquestionably, there was evidence of the existence of a contract for their consideration.

(*a*) I.e. a quasi partnership: vide *Barry* v. *Nesham*, ante, vol. iii. pp. 641, 650.

The argument turned so much on the question, whether that instrument alone was sufficient to constitute a partnership, that we thought there must be some misapprehension as to the meaning of the learned baron's report. We have, therefore, referred to him; and find that he intended to report that which he apparently reported, viz. that he had left the question to the jury on the whole of the evidence,—not leaving it that that instrument constituted a partnership: on the contrary, he said it would not.

As to the verdict being against evidence,—it is not by any means apparent, on reading the report; and, on referring to the learned baron, he states that he considered the question to be one upon which the jury might fairly find either way; and he is not at all dissatisfied with the conclusion at which they arrived.

Both grounds for a new trial, therefore, fail, and the rule must be discharged.

Rule discharged.

[459] PHILLIPS AND ANOTHER *v.* PICKFORD. Feb. 25, 1850.

A plea framed in accordance with the 10th section of the 5 & 6 Vict. c. 116, is no bar to an action brought against an insolvent in respect of a debt contracted before the date of filing his petition under the 7 & 8 Vict. c. 96: to constitute a bar, the plea must not only shew that the debt was contracted before the filing of the petition, but also that it was inserted in the schedule.

This was an action of debt. The first count was upon a bill of exchange for 22l. 4s. 6d., dated the 20th of September, 1845, and payable three months after date.

The defendant pleaded, that, after the accruing of the said several debts and causes of action, and before the commencement of the suit, to wit, on the 27th of December, 1845, a petition for the protection of the defendant from process was duly, and according to the form of the statutes in such case made and provided, presented by the defendant to the Liverpool district court of bankruptcy; and that thereupon, afterwards, and before the commencement of this suit, to wit, on the 27th of January, 1846, a final order for protection and distribution was made, in the matter of the said petition, by Charles Phillips, Esq., then being a commissioner of the court of bankruptcy, duly authorised in that behalf, to wit, then being one of the commissioners of the court of bankruptcy authorised to act in the Liverpool district; and that the said several debts and causes of action, and every of them, and every part thereof, were contracted before the date of the filing of the said petition in the said district court of bankruptcy,—verification.

To this plea the plaintiffs replied, that the said petition for the protection of the defendant from process in the said first plea mentioned, was presented, and the said final order therein also mentioned, was made, after, and not before, the passing of an act of parliament made and passed in a session of parliament held in the **[460]** seventh and eighth years of the reign of Her present Majesty, intituled "An Act to amend the law of insolvency, bankruptcy, and execution,"—verification.

General demurrer, and joinder.

Hugh Hill, in support of the demurrer. The question is, whether a plea in the form here pleaded is, since the passing of the 7 & 8 Vict. c. 96, available as a defence. This court, in *Toomer* v. *Gingell* (ante, vol. iii. p. 322), intimated an opinion that it was not: but the court of Exchequer, in a subsequent case of *Platel* v. *Bevill* (2 Exch. 511, 517), after time taken to consider, held that it was. By the 1st section of the 5 & 6 Vict. c. 116, it is provided that any person not being a trader, or, being a trader, owing less than 300l., on giving certain notices, may present a petition to the court of bankruptcy, stating the debts owing by and to him; and that thereupon the judge or commissioner of the court of bankruptcy, may grant him a protection from process against his person and property; and that, upon the presentation of such petition, all the estate and effects of the petitioner shall vest in the official assignee. The 4th section provides for the examination of the petitioner by the commissioner; and enacts, that, if the commissioner is satisfied with the allegations in the petition and schedule, and that the debts were not contracted by fraud, &c., he may make a final order "for the protection of the person of the petitioner from all process, and for the vesting of his estate in an official assignee," &c. The 7th section enacts, that, from and after the passing of the final order, the whole estate, present and future, as well real as personal, &c., of the petitioner, shall become absolutely vested in the official assignee and assignee chosen by the creditors, without any deed or [461] conveyance, and that the assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his fiat. The 9th section enacts, that the assignees shall be entitled to claim and demand from the petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and that all such estate and effects, of what kind soever, and wheresoever situate, shall be absolutely vested in such assignees, upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition; and that they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order thereinbefore provided: provided always that no assignee of any insolvent shall be authorised by virtue of that act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of after the making of the final order therein mentioned, except under the authority of an order of the said commissioner, or of the court of review in bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order. Then, the 10th section, which gives the form of plea, enacts, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorised,—whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." Then comes the 7 & 8 Vict. c. 96, the 1st section of which, reciting the expediency of amending the former act, enacts "that a petition for [462] protection from process under the said act, may be presented to any court or district court of bankruptcy within the district of which the petitioner shall have resided twelve calendar months, without any notice whatever being given to any creditor, or in the *London Gazette*, or any newspaper." The 2nd section gives the form of the petition. The 3rd provides for the notices to be given to creditors, the examination of the petitioner, and the choice of assignees. The 4th section enacts that "the property of the petitioner shall, for the purposes of the said recited act and of this act, vest in the assignee or assignees for the time being, by virtue of the appointment of such assignee or assignees." For the meaning of the word "property," reference must be had to the 73rd section, which enacts, "that, in construing this act, the word 'property' shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel, and such other articles, of the value in that behalf aforesaid, as may by this act be excepted from the operation of the said recited act and this act), and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained the final order, and all debts due or to be due to such petitioner before he shall have obtained such final order." The 5th section provides, that, upon the petition being filed, the commissioner shall have the like power for seizure of the property of the petitioner, and examination of him and of other persons, as in cases of bankruptcy. Further provisions for the mode of dealing with the property of the petitioner, are contained in the 9th and 10th sections. Then comes the 22nd section, which enacts, "that the [463] final order to be made under the provisions of the said act, as amended by this act, shall protect the person of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same, respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons, not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule," &c. [Maule, J. In terms, that is confined to the protection of the person of the petitioner.] The question is, whether the 10th section of the former act does not remain in force. The 74th section of the later act expressly enacts "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with or at variance with the provisions of this act." Reading the two acts as one, there is nothing in the second act which is inconsistent with the 10th section of the first act. [Maule, J. If the future property vests by the petition in the assignee, it seems to be a reason why the final order should be a bar.] Some light is thrown upon the subject by the 28th section of the 7 & Vict. c. 96, which enacts, "that, if, for any of the causes in that behalf aforesaid, no day be named for making the final order, or if the consideration of such final order be adjourned sine die, or such final order be refused, the commissioner shall **[464]** have the power, after the expiration of such time subsequent to the filing of the petition, as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor before and after his insolvency, the commissioner shall think just, and after hearing the petitioner, or any of his creditors, or his or their counsel or attorneys, to make an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition, from the said petitioner, to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same, respectively, or for which such persons should have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making such order, who may be indorsers (sic) or holders of any negotiable security set forth in his said schedule: provided, always, that no debtor shall be imprisoned on any process for more than twelve calendar months, for any debt contracted before filing his petition, in case the final order shall be refused, or shall not be made, or in case the protecting order shall not be renewed."

To constitute a good plea, the form given by the 10th section of the 5 & 6 Vict. c. 116, must be strictly pursued, or the plea must go on to allege that all the steps required by the 4th section have been duly taken: *Nicholls* v. *Payne* (7 M. & G. 927, 8 Scott, N. R. 732); *Gillon* v. *Deare* (ante, vol. ii. p. 309); *Wright* v. *Hutchison* (ante, vol. iv. p. 569); *Laurie* v. *Bendall* (12 Q. B. 634). The case of *Toomer* v *Gingell* (ante, vol. iii. p. 322) has been supposed to be at vari-**[465]**-ance with the decision of the court of Exchequer in *Jacobs* v. *Hyde* and *Platel* v. *Berill* (2 Exch. 508, 517). But, in *Toomer* v. *Gingell*, the plea was clearly a bad plea: it contained no statement that any assignee had been appointed, or that the creditors had any means whereby to obtain the future property of the insolvent; nor was the general form given by s. 10 followed. In *Miles* v. *Pope* (ante, vol. v. p. 294), a plea alleging that the defendant had obtained a final order for protection and distribution, under the 7 & 8 Vict. c. 96, was holden not to be proved by the production of a mere order for personal protection, under s. 28. Rolfe, B., in delivering the judgment of the court in *Platel* v. *Berill*, says: "On a careful consideration of the clauses of both acts, we think the intention of the legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second, from that given under the first act, as to the discharge of the insolvent. In both, we are of opinion that it constitutes an absolute bar to the actions in respect of which it is a protection." And, after a minute criticism of the various clauses of the two acts, the learned baron concludes: "Considering the two acts together as one system, we see no reason to suppose that the legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act, all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts. We think that the legal effect of the discharge is the same in both acts, and that the effect inartificially described in the 10th section belongs just as much to an order under the second, as under the first act. This view of the two acts differs from that which my Brother Maule is reported to have taken in the case of *Toomer* **[466]** v. *Gingell*. The question in that case was not fully argued, the learned counsel for the defendant having, after taking time, acted upon the impression, as to the meaning of the second act, which its language is, at first sight, so likely to create, and abandoned the argument. Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts." The point was again argued in this court, in *Nash* v. *Brown* (ante, vol. vi. p. 584); but the court gave no opinion upon it, the judgment ultimately proceeding upon the ground that it sufficiently appeared that the petition and order were under the 5 & 6 Vict. c. 116. [Maule, J. Under the first act, the order in terms ordered the protection of the person of the petitioner, and the distribution of his estate. Under the second act, we thought,—though we do not seem to have been properly understood,—that the vesting, if assumed to take place, will entitle the party to his discharge. I do not gather from the case of *Platel* v. *Berill*, that the court of Exchequer intimate an opinion that an order of discharge under the 7 & 8 Vict. c. 96, without an allegation of the appointment of an assignee, would be a bar.] No. [Maule, J. This court thought it necessary that the property should vest: the court of Exchequer think so too. In *Toomer* v. *Gingell*, the property did *not* vest: in *Platel* v. *Berill* it *did*. The court of Exchequer treat that as a difference of opinion.]

Cowling, contrà. The 10th section of the 5 & 6 Vict. c. 116, is impliedly repealed by the subsequent inconsistent provisions of the 7 & 8 Vict. c. 96,—to such an extent, at all events, as to make this a bad plea. The **[467]** 5 & 6 Vict. 116, was passed at a time when imprisonment for debt was thought to have been carried too far: this sufficiently appears from the recital, which declares it to be "expedient to protect from all process against the person, such persons as have become indebted without any fraud or gross or culpable negligence, so as, nevertheless, their estates may be duly distributed among their creditors." Under the former acts, 7 G. 4, c. 57, and 1 & 2 Vict. c. 110, it was necessary that the party availing himself of the benefit of those acts, should, at the time of petitioning, be in actual custody. In dispensing with that condition, the legislature seems to have intended to confine the boon to those petitioners whose conduct had been honest and bonâ fide. The petition must have annexed to it a full and true disclosure of the petitioner's debts and property; and, upon the filing of the petition, all the estate and effects of the petitioner forthwith become vested in the official assignee. By section 4 the commissioner is to examine the petitioner upon oath; and, if satisfied that the allegations in the petition, and the matters in the schedule, are true, and that the debts have not been contracted by fraud or breach of trust, &c., he is to make an order,—"which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee," &c. Section 7 enacts that, from and after the final order, the whole estate, present and future, shall become absolutely vested in the official assignee and creditors' assignee. Then the 10th section enacts, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly **[468]** authorised, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." There the final order is called an order for protection and distribution. So that the final order is for three purposes,—first, for protecting the person of the petitioner from all process,—secondly, for vesting his estate in the assignees,—thirdly, for distribution of his estate among his creditors. Without the 7th and 10th sections, the estate would not have vested, and the petitioner would have had no protection. There was no provision in the act for distribution: the act, therefore, became a dead letter: "its effect was, to take the property out of the hands of the debtor, and place it in the insolvent court, where it remained without any power on the part of the creditors to take it out" (*a*). The 7th section shews how the estate is to vest: it enacts, "that, from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies as in the united kingdom, all the effects, and all the credits of the petitioner, shall become absolutely vested in the official assignee and the assignee chosen by the creditors, without any deed or conveyance; which assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his fiat," &c. [Maule, J. Does not that make the assignees trustees for the creditors?] Possibly it might, in equity. But for the 10th section, the final

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(*a*) Per Lord Cottenham, in Dom. Proc. See Hansard's Debates, vol. 76, p. 1394.

order would give no protection. The consequence of the present and future property of the petitioner vesting in the assignees, by s. 7, was, that the party was reduced to a state of pauperism. The legislature, therefore, went further than they intended, by exposing him to imprisonment for life,—which was [469] evidently contrary to the spirit in which the earlier provisions of the statute were conceived. The 10th section is not confined to creditors whose debts are scheduled, but applies to all who were creditors before the date of filing the petition. Under the former acts, 7 G. 4, c. 57, ss. 46, 61, and 1 & 2 Vict. c. 110, ss. 75, 91,—the insolvent could only plead his discharge in bar against scheduled creditors. [Cresswell, J. The commissioner has power, under s. 4, to determine whether or not the condition of filing a faithful schedule, has been fulfilled. Maule, J. The 12th section seems to have been designed to remedy the inconvenience to which you allude.] It does so, but in a very imperfect manner, by enabling the commissioner,—if he sees reason to believe that the petitioner had not, before the making of the order sought to be rescinded, made a full disclosure of his estate, effects, and debts, or had, since the making of such order, not given notice to the assignees, of any property after acquired by him,—to rescind the final order, so far as it relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of suits and actions. [Williams, J. If all the protection the petitioner gets is derived from the 10th section, though it enables him to plead in bar the final order, he could not reply it to a plea of set-off.] That is an additional difficulty.

The 7 & 8 Vict. c. 96, was passed to remedy these defects in the former act. It had the same objects in view, and has carried them out more correctly. The 1st section dispenses with notice. The 2nd section provides the form of petition, and requires the petition and schedule to be verified by affidavit. By s. 4 the property of the petitioner is vested in the assignees. The final order, under s. 22, is an order for the protection of the person only, "from all process in respect [470] of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons, not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule." [Maule, J. This you say altogether puts an end to s. 10 of the 5 & 6 Vict. c. 116?] Yes: and it limits the protection to creditors whose debts are mentioned in the schedule. [Maule, J. May not the 22nd section of the 7 & 8 Vict. c. 96, consistently stand with ss. 7 and 10 of the 5 & 6 Vict. c. 116? Section 22 contains no negative words.] It is laid down by Eyres, J.(*a*), in *Harcourt* v. *Fox* (*b*), that "statutes introductive of a new law, penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative." After the passing of the second act, there can no longer be a final order for protection and distribution; and the protection is limited to such creditors as are named in the schedule, and to the person of the petitioner. The 73rd section of the 7 & 8 Vict. c. 96, shews what "property" of the petitioner vests under s. 4 in the assignees: it enacts, that, "in construing this act, the word 'property' shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel, and such other articles of the value in that behalf aforesaid as may by this act be excepted [471] from the operation of the said recited act and this act), and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained the final order, and all debts due or to be due to such petitioner before he shall have obtained such final order." [Maule, J. There is no doubt that the 7 & 8 Vict. c. 96, applies to a limited futurity.] *Nicholls* v. *Payne*, *Gillon* v. *Deare* and *Wright* v. *Hutchison* proceeded upon the 5 & 6 Vict. c. 116. *Miles* v. *Pope* has no bearing whatever on the question. And, with respect to *Toomer* v. *Gingell*, the point for argument there was,

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(*a*) Samuel Eyres, Just. of K. B.

(*b*) 1 Show. 506, 520. And see *Townsend's case*, Plowd. 113; Jenk. Cent. 89; *Wethwen* v. *Baldwin*, 1 Siderf. 55; post, 478 (*b*).

—"that the plea afforded no answer to the action, the order therein set forth only protecting the person of the defendant from arrest or detention for the debts therein specified, and being no bar to an action for the recovery of them." The plea shewed an order in the form given by the 7 & 8 Vict. c. 96, but not an order for distribution. The case was not decided,—as is suggested,—on the point of pleading. [Maule, J. The court in that case intimate an opinion that the construction you are now contending for is the true one.] Yes. In the argument in *Jacobs* v. *Hyde* (2 Exch. 510), it is suggested that "the 22nd section of the 7 & 8 Vict. c. 96, is substituted for the 4th section of the 5 & 6 Vict. c. 116, leaving the 10th section of the previous act unaffected by its provisions." The 22nd section of the later act, however, it is submitted, is substituted for the 10th section of the former act,—or, rather, for both the 4th and the 10th sections. [Maule, J. If the protection given by s. 4 is taken away, and something is substituted for it, [472] and s. 10 gives a defence in the one case and not in the other, s. 10 of course falls: for, when a thing cannot be done, the mode of doing it is not material.] There is nothing in the judgment of the court of Exchequer in *Flatt* v. *Bell* that necessarily shews this plea to be a good one.

Hugh Hill, in reply. The question is whether the 10th section of the 5 & 6 Vict. c. 116, is impliedly repealed by the 7 & 8 Vict. c. 96. By s. 4 of the former act, the final order is declared to be "for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in the assignee:" and s. 7 enacts that, from and after the passing of the final order, the whole estate, present and future, shall become absolutely vested in the official assignee, without any deed or conveyance. Under this section, the property which passes to the assignees, must be property which is capable of vesting,—such an interest as could be conveyed by deed, and which would presently vest: it must be something actually or potentially in the possession of the petitioner at the time: *Lowe* v. *Thornton* (ante, vol. i. p. 379). The 9th section shews that this is the meaning of s. 7: it enacts "that the said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and all such estate and effects, of what kind soever, and wheresoever situate, shall be absolutely vested in such assignees, upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner [473] as they held the estate and effects of the petitioner transferred by force of the final order, as hereinbefore provided:" and then follows a provision as to the mode in which the assignees are to obtain possession of such property. Under the first act, the property did not vest until the final order,—s. 4. Under the corresponding section of the second act, it vests in the assignees, by virtue of their appointment, before the final order. The provisions in the first act as to after-acquired property, are left untouched by the second act. [Cresswell, J. The 7th section of the 5 & 6 Vict. c. 116, had effect upon the same property as the vesting clause (s. 4) of the 7 & 8 Vict. c. 96, has, and is not altered by it. If so, and the 9th section remains unaltered, what necessity was there for making any new provision?] The legal effect is the same, though the 7th section is altered as to its machinery. It is a mistake to say that, under the former act, the discharge was only given by s. 10. *Gibbs* v. *Dean* (ante, vol. ii. p. 309, 3 D. & L. 417) and *Wright* v. *Hutchinson* (ante, vol. iv. p. 560), shew that a discharge may be pleaded under s. 4. In s. 4 of the 5 & 6 Vict. c. 116, the order is called a final order for protection and for vesting: in s. 10 it is called a final order for protection and distribution. Under the 22nd section of the 7 & 8 Vict. c. 96, the final order is for protection only,—nothing being said about vesting or distribution. [Maule, J. Under both acts, it is the final order that enables the assignees to distribute.] In truth, the provisoes of the two statutes are substantially the same: the only difference is, in the mode in which they are to be worked out. [Maule, J. Suppose, instead of availing himself of s. 10, a defendant, in pleading,—or a plaintiff, in replying to a plea of set-off,—were to set out the proceedings and the order, must he not aver [474] that the debt was scheduled?] Yes. [Maule, J. But you say that that does not apply, where the party avails himself of the form given by the 10th section?] Precisely so. If the debt is not in the schedule that omission should come by way of replication.

Cur. adv. vult.

Cresswell, J., now delivered the judgment of the court.

This demurrer was argued before us, with much ingenuity, during the last term. In support of the demurrer, it was contended, that, although the alleged order for protection and distribution mentioned in the plea, was made after the passing of the 7 & 8 Vict. c. 96, that plea is still a good and sufficient plea in bar, by virtue of the 10th section of the former act, the 5 & 6 Vict. c. 116.

By the 1st section of that act, certain persons were enabled to present a petition to the court of bankruptcy, for protection from process, and the court, or any commissioner to whom any such petition was referred, might give an interim order for protection against all process whatever, either against the person or property of the petitioner. By section 4 the commissioner was authorised, on being satisfied of certain matters, to grant an order, "which shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an assignee to be named by such commissioner, together with an assignee to be chosen by the creditors,"—as therein mentioned. By the 5th section, the commissioner was impowered to renew the interim order, from time to time, until "the final order for protection and distribution." This plainly refers to the final order mentioned in the preceding section, and therefore gives to the order for protecting **[475]** the person of the petitioner, and for vesting his estate in assignees, the designation of "an order for protection and distribution." Section 7 provided, that, from and after the passing of the final order, all the present and future estate of the petitioner should become absolutely vested in the assignees: and the 9th section gave the assignees a right to demand of the petitioner all property acquired by him after the final order, and enacted, that, upon certain steps being taken, it should become absolutely vested in the assignees. This section gave rise to some discussion as to the meaning of the word *future* in section 7: but it is not necessary to deal with it, in deciding this case. Then came section 10, by which it was enacted, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorised; whereof the production of the order, signed by the commissioner, with proof of his hand-writing, shall be sufficient evidence."

The plea in the present case is framed in accordance with that section. It alleges, that, after the accruing of the debts in the introductory part of the plea mentioned, a petition for the protection of the defendant from process, was duly presented, that a final order for protection and distribution was made, and that the said debts were contracted before the filing of the petition. If that section remains unaltered by any subsequent enactment, we think that the plea in this form must be held to be a good plea in bar: and so it was considered by counsel on the argument of the case, which turned upon the effect to be given to the subsequent statute of the 7 & 8 Vict. c. 96, the 1st section of which recites that it is expedient to amend the 5 & 6 Vict. c. 116: **[476]** but the 74th section enacts "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with, or at variance with, the provisions of this act."

Now, the 10th section of the former act is not expressly repealed; and the question is, whether it is inconsistent with, or at variance with, the provisions of this latter act. In order to determine this, we must inquire what was the nature of the order made under the former statute, and which the 10th section allowed to be pleaded in bar.

By the 4th section, it appears that it was a final order for protection of the petitioner against all process, and for vesting his estate in the assignees; which final order is, by the 5th section, named "an order for protection and distribution." This order is, by the 10th section, allowed to be pleaded in bar, in all actions brought for or in respect of a debt contracted before the date or filing of the petition. The 4th section is not expressly repealed by the subsequent act, but is inconsistent with the 22nd section of it, whereby it was enacted that the final order to be made under the provisions of the said act, as amended by this act, shall protect the person of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned (that is to say), "from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as," &c., limiting its operation to persons and claims named in the schedule. This is inconsistent with the 4th section of the former act, which applied generally to all debts contracted **[477]** before the filing of the petition; and, therefore, so far repeals it.

Upon the same principle, it appears to us, that, if the 10th section of the former act is to be imported into the 7 & 8 Vict. c. 96, it must be with the qualification that the final order shall be a bar to actions brought in respect of debts or claims mentioned in the schedule; for, to allow it as a bar in other cases, would be inconsistent with the latter act.

This was not much disputed at the bar: but it was contended, that the plea might still be pleaded in the form before given; and that, if the debt was not in the schedule, that should be replied: and the case of *Platel* v. *Berill* (2 Exch. 511) was cited as an authority to that effect: and so it is; but the question principally considered in that case was, whether a final order obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection of the person of the insolvent. The court of Exchequer decided that it is an absolute bar: and, after hearing a very able argument on that question, we are disposed to agree with that opinion, but abstain from binding ourselves by a decision on the point, inasmuch as it appears to us, that, assuming the final order to be an absolute bar in all cases where it is a protection at all, still the plea is bad. In *Platel* v. *Berill*, the attention of the court does not appear to have been drawn to the limited operation of the final order made under the 7 & 8 Vict. c. 96, viz. that it applies only to debts in the schedule, and not to all debts contracted before the filing of the petition.

In framing a plea in bar under the 10th section of the 5 & 6 Vict. c. 116, it was necessary to allege that the debt sued for accrued before the filing of the **[478]** petition, to shew that it was a matter upon which the final order might operate; although the general form of plea sanctioned by the 10th section, made it unnecessary to set out the proceedings before the commissioner; it being the intention of the legislature that matters decided by the commissioner should not be again disputed,—as was said by Tindal, C. J., in *Cook* v. *Henson* (ante, vol. i. p. 908, 3 D. & L. 177). Upon the same principle, we think, that, in order to make a plea in bar good under the 10th section of the 5 & 6 Vict. c. 116, construed with regard to the 7 & 8 Vict. c. 96, it should allege, not only that the debt accrued before the filing of the petition, but that it was named in the schedule.

For want of such an averment, it appears to us that this plea is bad, and that our judgment must be for the plaintiff.

But, considering the doubtful nature of the question that is argued, we think it right to offer the defendant leave to amend his plea, on the usual terms.

Judgment accordingly (*b*).

[479] CROLL *v.* EDGE. Feb. 25, 1850.

[S. C. 19 L. J. C. P. 261; 14 Jur. 553.]

The plaintiff declared against the defendant for an alleged infringement of a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." The defendant pleaded,—fourthly, that the plaintiff did not particularly describe his invention, and in what manner the same was to be performed, &c.,—sixthly, that the inven-

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(*b*) A special statute does not derogate from a special statute, without express words of derogation. Jenk. Cent. 198, case xi. I am seised of the manor of Dale, and, by an act of parliament, the manor is given to J. S. in fee, with a proviso that all rights of strangers be saved: Per Brooke (Serjeant): This act is void, by reason of the "contrariosity" of the proviso. And Guy Palmes (Serjeant) held (first) the case clear, that the act is good, and the proviso void. Which was affirmed by others. I did quære. M. 7 H. 8, Keilway, 174, pl. 4. And see *Walsingham's case*, Plowd. 563; *Englefield's case*, F. Moore, 309, 1 Co. Rep. 46, 47; *Dr. Foster's case*, 11 Co. Rep. 56, 62, 63; *Owen* v. *Saunders*, 1 Ld. Raym. 158, 160. See also F. N. B. 208, H. I., as to the conflict between the statute of Westm. II., stat. 1, c. 21, and the statute of Westm. II., stat. 1, c. 1 (the statute De Donis) passed in the same session.

tion described in the specification, was a different invention from that for which the letters-patent were granted, by reason whereof the letters-patent were void. At the trial, the plaintiff put in a specification, the title of which described the invention to be of "improvements in the manufacture of gas for illumination, and in the apparatus used therein and when transmitting and measuring gas;" and which stated it to relate,—"first, to a mode of manufacturing gas for the purpose of illumination,—secondly, to improvements in setting and heating clay retorts for making coal-gas,—thirdly, to a mode of manufacturing clay retorts,—fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the consumer:"—Held that there was a material variance between the invention specified, and that described in the title of letters patent; and, consequently, that the letters-patent were void; and that the objection was available under either the fourth or the sixth plea.

This was an action upon the case for the infringement of a patent.

The declaration stated that the plaintiff and one William Richards, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendant as thereinafter mentioned, were the true and first inventors of certain "improvements in the manufacture of gas for the purpose of illumination, and in apparatus used when transmitting and measuring gas:" it then proceeded to allege the grant to them of letters-patent, dated the 7th of March, 1844, subject to the usual condition for the inrolment of a specification within six calendar months; and averred that such specification was duly inrolled on the 7th of September, 1844: Breach, that the defendant, well knowing the premises, but contriving, and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he **[480]** might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and within the term of years in the said letters-patent mentioned, to wit, on the 11th of September, 1845, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave or licence, and against the will of the plaintiff and the said William Richards, or either of them, made and sold divers, to wit, one thousand apparatus to be used for transmitting and measuring gas, with certain improvements in the construction thereof, which said improvements were intended to, and did, imitate and resemble the said improvements in the said letters-patent so invented by the plaintiff and the said William Richards as aforesaid, in breach of the said apparatus, and against the privilege so granted to the plaintiff and the said William Richards and their assigns as aforesaid; whereby the plaintiff had been and was greatly injured, &c.

The defendant pleaded, amongst other pleas,—secondly, non concessit;—fourthly, that the plaintiff and the said William Richards did not, nor did either of them, particularly describe and ascertain the nature of their said invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above in that behalf alleged, concluding to the country;—sixthly, that the invention in the said instrument in writing particularly described and ascertained, was not the invention for which the said letters-patent were granted, but another and a different invention; and that, by reason thereof, the said letters-patent, and the rights, liberties, privileges, benefits, monopolies, and advantages in and by the said letters-**[481]**-patent granted, and the prohibitions therein contained, before and at the several times when, &c. were, and still remained, wholly void and of no effect, and the same were and continued wholly lost to the plaintiff; wherefore the defendant, at the said several times when, &c. in the declaration mentioned, committed the said several grievances in the declaration mentioned, as he lawfully might for the cause aforesaid; verification;—seventhly, that, before the making of the letters-patent, the plaintiff and Richards, by their petition in the said letters-patent mentioned, represented to the crown that the said invention was of, amongst other things, improvements in the manufacture of gas for the purpose of illumination; whereas, the said representation was false, and the said invention was not an invention of any improvement in the manufacture of gas for the purpose of illumination; whereby the crown had been deceived in the grant, &c., verification.

The plaintiff by his replication traversed the sixth and seventh pleas, and joined issue upon the others.

The cause was tried before Wilde, C. J., at the sittings in London after Trinity term, 1847. The letters-patent, which were put in, corresponded with the claim as disclosed in the declaration. But the specification, which was also put in by the plaintiff, recited the grant of a patent with a somewhat different title,—stating it to be for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas." The invention was described as relating,—"first, to a mode of manufacturing gas for the purpose of illumination,—secondly, to improvements in setting and heating clay retorts for making coal-gas,—thirdly, to a mode of manufacturing clay retorts,—and fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the **[482]** consumer." Reference was then made to the drawings annexed to the specification, and the specification proceeded to describe the nature and the mode of performing each of those four heads of claim.

On the part of the defendant, it was submitted that the specification shewed an invention different from that for which the patent was granted, inasmuch as it claimed, in addition to the improvements in the manufacture and measuring of gas, the making of clay retorts.

For the plaintiff, it was insisted, that the substantial object of the specification was, improvements in the manufacture of gas, and in the apparatus for transmitting and measuring it; and that the making of clay retorts was only subservient to the manufacture of gas.

The learned judge inclined to think the objection fatal; and a verdict was entered for the defendant on the fourth, sixth, and seventh issues, the jury being discharged from finding any verdict upon the other issues, and leave being reserved to the plaintiff to move to enter the verdict for him upon all or any of the issues so found for the defendant, with 40s. damages, if the court should be of opinion that the specification produced sustained the patent. It was also agreed that the lord chief justice should be considered as having given such direction as the court upon the argument should think he ought to have given, and that the party against whom the decision might be given, should be considered as having tendered a bill of exceptions to such direction, in order to obtain the opinion of a court of error.

Channell, Serjt., in the following Michaelmas term, obtained a rule nisi accordingly. He submitted,—first, that the specification, taken altogether, did not claim anything beyond what the letters-patent entitled **[483]** the patentees to,—secondly, that, if it did claim something more, the matter so claimed was so entirely distinct from and independent of the real subject of the plaintiff's claim, that it might be rejected as surplusage, and did not vitiate the patent,—thirdly, that the fourth, sixth, and seventh pleas were not properly framed to raise the objection.

Byles, Serjt., Webster, and Duncan, shewed cause, in Hilary term, 1849. The title of the letters-patent involves two-heads of claim, viz. "improvements in the manufacture of gas," and "improvements in apparatus used when transmitting and measuring gas." The invention recited in the specification is of something totally different: it is of "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas,"—clearly involving a claim for improvements in the apparatus used in the manufacture of gas. It is clear that the objection is one which must prevail, if properly taken. The allegation of the inrolment of a specification is a material one: if the specification cannot be read, the plaintiff does not support his declaration: *Walton* v. *Potter* (3 M. & G. 411, 4 Scott, N. R. 91); *Muntz* v. *Foster* (6 M. & G. 734, 7 Scott, N. R. 471, 1 D. & L. 737). There is no pretence for saying that the improved mode of making clay retorts,—by hydraulic or other pressure,—is an improvement in apparatus for "transmitting and measuring" gas: the claim is clearly referable only to apparatus to be used in the manufacture of gas: and, if so, it is a claim which is not within the patent. In *The King* v. *Wheeler* (2 B. & Ald. 345), a patent had been granted for "a new or improved method of drying and preparing malt:" in the specification it was stated that **[484]** the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process, nor the utmost degree of heat which might be safely used, nor the length of time to be employed, nor the exact criterion by which it might be known when the process was accomplished: and it was held that the patent was void—first, because the specification was not sufficiently precise,—secondly, because the patent appeared to be for a different thing from that mentioned in the specification. [Maule, J. Does every excess of claim vitiate a patent?] Yes, unless amended under the provisions of Lord Brougham's act, 5 & 6 W. 4, c. 83, s. 1. This defence is available under non concessit, which, as Tindal, C. J., observes, in *Bedells* v. *Massey* (7 M. & G. 630, 8 Scott, N. R. 337, 2 D. & L. 322), is the only way in which the defendant can raise the question whether that which the plaintiff claims is within the grant. [Maule, J. Suppose there was no specification at all inrolled,—could you shew that under non concessit?] No. In *Bunnett* v. *Smith* (13 M. & W. 552, 2 D. & L. 380), upon a motion for leave to plead non concessit, amongst other pleas, Pollock, C. B., inquires—"What is the object of pleading the plea?" Upon which Mr. Hindmarch replies—"It is the proper form of pleading, so as to enable the defendant to object that the title in the patent does not correctly describe the invention." And Parke, B., adds,—"Yes, that is so." In *Hill* v. *Thompson* (3 Meriv. 629, 1 Webster's Patent Cases, 237), Lord Eldon says: "In his directions to the jury, the judge has stated it as the law on the sub-**[485]**-ject of patents,—first, that the invention must be novel,—secondly, that it must be useful,—and, thirdly, that the specification must be intelligible. I will go further, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merits of original invention in the use of the materials. If there be a patent both for a machine, and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much." At all events, the objection is sustainable under the sixth plea, which states that the invention specified is not that for which the patent was granted. There is no case in which it has been held that any part of the claim can be rejected as surplusage. Lord Lyndhurst, in *Sturz* v. *De la Rue* (5 Russ. 324), says, that, "the description in the patent must unquestionably give some idea, and, so far as it goes, a true idea, of the alleged invention, though the specification may be brought in aid to explain it."

[486] Channell, Serjt., in support of the rule. In *Morgan* v. *Seaward* (2 M. & W. 544, 1 Webster's Patent Cases, 187) Parke, B., in delivering the judgment of the court, says: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law: and such a grant is void, not against the crown merely, but in a suit against a third person: *Travell* v. *Carteret* (3 Lev. 134); *Alcock* v. *Cooke* (5 Bingh. 340, 2 M. & P. 625). It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill* v. *Thompson* (8 Taunt. 375, 2 J. B. Moore, 424) and *Brunton* v. *Hawkes* (4 B. & Ald. 541); for, although the statute invalidates a patent for want of novelty, and, consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether is, that the consideration for the grant is novelty of all, and, the consideration failing, the crown being deceived in its grant, the patent is void, and no action maintainable upon it." In *Nickels* v. *Haslam* (7 M. & G. 378, 8 Scott, N. R. 97), letters-patent were obtained for improvements in the manufacture of a certain article: the specification described a single improvement in the mode of manufacturing that article: and it was held that this was not an inconsistency invalidating the patent. Tindal, C. J., there says: "The objection raised by this plea resolves itself into something like that which was taken in a case which we had in the Exchequer Chamber last term. In that case,—*Cook* v. *Pearce* (13 Law Journ., N. S., Q. B. 189),—it was held, that an objection cannot be taken to the title of a patent, unless some fraud upon the crown, or detriment **[487]** to the public, can be shewn. Here, the objection is only to the title, as describing the patent to have been granted for improvements in a certain manufacture, whereas the specification discloses only one improvement. This is certainly a most subtle objection: if the term improvement had been used, it would have been nomen collectivum, and would have covered any number of improvements. I cannot see why the variance, if it be one, should vitiate the patent, the objection being merely to the title of the patent, without fraud upon the crown or detriment to the public." The question here is, what is the fair meaning of the first branch of the plaintiffs' claim. They were bound to shew some sort of improvement in the mode of manufacturing gas for the purpose of illumination. They do not claim the making of retorts; but merely the use of clay retorts made upon the principle described in the specification, as ancillary to the improved manufacture of gas. [Maule, J. Then they ought to have claimed the using, and not the making of them. The specification in effect describes the claim to consist of two things,—first, the manufacture of gas, with improvements in setting and heating clay retorts,—secondly, the making the retorts. Would the making of clay retorts in the mode described, for the purpose of being used in the manufacture of gas, be an infringement of this patent?] It is submitted that it would not. The making of the retorts is not claimed, but merely the use of them as subservient to the improved manufacture of that which was the real subject-matter of the patent. The patentees were bound to describe the retorts in their specification, as a mode of producing the improved result: see Clegg's Patent (1 Webster's Patent Cases, 103).

The next question is, whether the patent is defeated **[488]** by the introduction of the matter which comprises the third head of claim in the specification: and that depends upon whether or not there is any plea upon the record adapted to raise the objection. *Boulton* v. *Bull* (2 H. Blac. 463) is an authority to shew that this part of the specification may, if necessary, be rejected as surplusage. There, a patent was granted to A. B. for a new invented method of using an old engine in a more beneficial manner than was before known. The specification stated that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention; and an act of parliament, reciting the patent to have been for the making and mending of certain engines by him invented, extended to A. B. for a longer term than fourteen years the privilege of making, constructing, and selling the said engines. This court was divided in opinion as to whether or not the patent was valid. The case afterwards came before the court of Queen's Bench, on error,—*Hornblower* v. *Boulton* (8 T. R. 95),—where it was unanimously resolved that the invention was the subject of a patent, and the patentee's right valid. Eyre, C. J., in delivering his opinion in the court below, says (2 H. Blac. 498): "Some weighty observations have been made upon parts of this specification, but those parts appear to me not properly to relate to the method described in the patent: they are rather intimations of new methods of improvement in fire-engines, and some of them, I am ready to confess, either very loosely described, or not very accurately conceived. I do not undertake to pronounce which, but one or the other is pretty clear. They are the fourth and fifth articles: the first, second, third, and sixth appear to me to belong to this method, and very **[489]** clearly to point out and explain the method to any man who has a common acquaintance with the subject, and to be intelligible even to those who are unacquainted with it. If there be a specification to be found in that paper, which goes to the subject of the invention as described in the patent, I think the rest may very well be rejected as surplusage." The defence suggested here clearly is not raised upon non concessit, which merely traverses the grant by the Queen of a patent for these improvements. The fourth plea has generally been supposed to put in issue whether or not the instructions given by the patentee in his specification are sufficient to enable a workman of competent skill to practise the invention. That plea, therefore, cannot avail the defendant. In *Neilson* v. *Harford* (8 M. & W. 806, 1 Webster's Patent Cases, 331), where there was a similar plea, Lord Abinger, in the course of the argument, says (1 Webster's Patent Cases, 333): "If the specification is inconsistent with the title, that would be sufficient." In *Derosne* v. *Fairie* (ibid 154, 158), it was held that the objection that the title is larger than the invention, is not raised by a plea of the insufficiency of the specification. This is the converse of that case; but the principle is the same. The seventh plea sets up fraud by the patentees,—not the non-performance of something that is a condition precedent. It points to a representation made by the patentees in their petition to the crown: and that clearly does not let in this defence. And, with regard to the sixth plea,—suppose the claim for making clay retorts is not within the title, it is a separate and distinct thing, and may be rejected as surplusage. In the case of an award, excess does not vitiate, where the **[490]** matter which constitutes it is capable of being severed from the rest of the award, and rejected as surplusage.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court:—

This was a motion for a new trial, in an action upon the case for an infringement of a patent, which was described in the declaration to be "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." There were several pleas: amongst others, was one,—the sixth,—which stated that the invention described in the specification was a different invention from that for which the letters-patent were granted, and that, by reason thereof, the letters-patent were void. There was likewise a plea of non concessit.

At the trial before Wilde, C. J., a verdict was found for defendant on the fourth, sixth, and seventh issues, the jury being discharged as to the other issues; and a rule nisi was afterwards obtained, pursuant to leave reserved at the trial, to enter a verdict for the plaintiff on those issues with 40s. damages. Upon the argument of that rule, the question mainly turned upon the sufficiency of the specification, regard being had to the pleas I have mentioned.

It appeared that the letters-patent had been granted for the objects mentioned in the declaration. The patent was properly described in the declaration as a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." No specification appeared to have been inrolled of any patent with that particular title; but a specification was inrolled, reciting the grant of a patent with a title some-**[491]**-what similar to that mentioned in the declaration, but with the additional words "therein and" interpolated between "used" and "when,"—so that the specification as inrolled was in its title or introductory part represented as being a specification of an invention "for improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas." The insertion is slight as to the number of words, but it adds most materially to the meaning of the sentence, and extends substantially the grant of the crown; because the title, as suggested in the specification, represents the patent as being a patent for different kinds of apparatus used for two distinct things, viz. the making of gas, and the transmitting and measuring it. The making of gas is a chemical operation, which has now become familiar, and consists in evolving from coal, or other suitable material, ordinarily by means of heat, the gas which is contained therein or capable of being produced therefrom. The improvement of the apparatus used in that process, is described in the specification as one of the objects of the patent. The other object which is mentioned in the title of the specification is, the improvement of apparatus used in "transmitting and measuring gas." The transmission and measuring of gas, as is well known, are performed by sending it through pipes and through a certain instrument called a meter, on its way to the premises of the consumer. The two objects thus referred to are evidently perfectly distinct from and independent of each other,—the manufacture of gas being one thing, and the issuing it for consumption another.

Now, the patent granted, was, a patent "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used,"—not, "when manufacturing gas," but "when transmitting **[492]** and measuring gas." The title did not profess to comprehend improvements in any apparatus used in making gas. The patentees in representing to the crown the nature of the invention which they had discovered, did not give the crown notice that they claimed the exclusive use of any apparatus for making gas. The title of the patent as described in the specification is one which comprehends as well improvements in apparatus for making gas, as improvements in apparatus used in its transmission and metage. And, when the body of the specification is looked at, one main part of the patentees' claim consists of what may be, and probably is, a new mode of manufacturing clay retorts,—an apparatus used in the manufacture, and not in the transmitting and measuring of gas. Any person reading the specification for the purpose of scertaining what the patentees claimed as their exclusive right, would see without doubt that a material branch of their claim, and of the patent the specification of which they were professing to inrol, was, an improvement in apparatus used in the manufacture of gas. Now, no patent at all has been granted to them for that: and it appears to us to be difficult to suppose that the inrolling a specification in the terms here used can have been intended as otherwise than an attempt on the part of the grantees to remedy an oversight, and so to alter and enlarge the patent. It seems to us that they have specified for a more extensive and a different patent from that which was granted to them. We therefore think the specification insufficient: and that the objection properly arises on the sixth plea. Probably non concessit, or the fourth plea,—which states that the plaintiff and Richards did not particularly describe the nature of their invention, and in what manner the same was to be performed, modo et formâ,—would equally raise **[493]** the defence, if the sixth plea were not enough for the purpose.

Upon the whole we think that the direction of the lord chief justice was substantially correct, and that the defendant is entitled to have the verdict entered for him upon the fourth or the sixth issues, or on both, at his election; and consequently that the rule for entering the verdict for the plaintiff must be discharged. The postea will therefore be stayed until the first day of the next term, to give the defendant an opportunity of making his election, and of applying to his lordship to enter the verdict accordingly.

Rule discharged.

BOULTER *v.* PEPLOW. BOULTER *v.* BROOKE. Jan. 12, 1850.

[S. C. 19 L. J. C. P. 190; 14 Jur. 248.]

A., B., and C., by an agreement in writing, hired premises of D.: the premises so hired were intended to be, and were, used for the purposes of a joint-stock company, of which A., B., and C. were at the time of the contract committee-men: rent was for some time paid by the company, but ultimately became in arrear; whereupon D. sued A., B., and C. upon the agreement: B. and C. suffered judgment by default, and D. recovered the amount of rent and costs against A.:—Held, that A. was entitled to sue B. and C. for contribution; and that his remedy against B. was not affected by the circumstance of B.'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought.

These were actions of debt for money paid, money lent, and money found due upon an account stated. The defendant in each case pleaded nunquam indebitatus; upon which issue was joined.

Boulter v. *Peplow* was tried before Wilde, C. J., at the sittings in London after Trinity term last. It appeared, that, by an agreement bearing date the 11th of April, 1846, Messrs. White and Gillett demised to Boulter, Peplow, and Brooke, who were described in **[494]** the agreement as three of the provisional committee of the Universal Gas-Light Company, certain premises situate at No. 11, Old Jewry Chambers, in the city of London, at the yearly rent of 80l., which Boulter, Peplow, and Brooke thereby agreed to pay. The premises were taken possession of, on behalf of the proposed company, on the 27th of April. The deed of settlement of the company was registered on the 29th of September, in the same year. White and Gillett having brought an action against Boulter, Peplow, and Brooke, to recover arrears of rent from Christmas, 1846, to Lady Day, 1848, Peplow and Brooke suffered judgment to go by default, and a verdict having been obtained against Boulter, the amount of the damages and costs was levied upon him; and he brought these actions against Peplow and Brooke to recover contribution.

On the part of the defendants, it was objected that the actions were not maintainable, inasmuch as Boulter, Peplow, and Brooke were partners in the company for whose use the premises were taken.

To this it was answered, that there was no partnership at the time this contract was entered into, the deed of settlement not having been registered, and no complete company having been formed.

The lord chief justice overruled the objection, reserving leave to the defendant to move to enter a verdict for him, or a nonsuit.

On the part of the defendant, a copy of the registered deed of settlement, dated the 20th of September, 1846, was offered in evidence. It was produced by a clerk from the office of the registrar-general of joint-stock companies, but was not stamped. Indorsed upon it, pursuant to the 9 & 10 Vict. c. 110, s. 7, sched. (B.), was the following certificate:—

"We do hereby certify that the within-written **[495]** deed is the deed of settlement of the Universal Gas-Light Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth."

(Signed) "JOHN M. FIELD.
"E. BOULTER."

For the plaintiff, it was insisted that the copy was not admissible to prove either the execution or the contents of the deed, but that the original should have been produced, or a certified copy or extract, according to the 7 & 8 Vict. c. 110, s. 18 (*a*).

The learned judge ruled that the copy was admissible, on the principle established by *Slatterie* v. *Pooley* (6 M. & W. 664).

It appeared that the deed had been executed by the plaintiff and by Peplow and Brooke; and, after reciting that there was due to the defendant Peplow, as one of the provisional committee, the sum of 574l. 4s. 6d., for moneys advanced by him towards the formation of the company, for contingent expenses, rent of offices, &c., the deed contained the following amongst other clauses,—1. That the company should be named "The Universal Gas-Light Company." 4. That the business **[496]** of the company should be conducted at No. 11 Old Jewry Chambers. 7. That the plaintiff and the defendants should be three of the directors. 82. That the directors should provide and maintain offices and other convenient rooms, as they should deem fit, for conducting the business of the company. 152. That the several parties to the deed did thereby ratify and confirm all acts, deeds, matters, and things which, up to that date, had been done, executed, and performed by the then directors of the company, or any of them, or by the order and direction of them or any of them, in regard to the formation and business of the company, the funds and property thereof, or in any wise relating thereto.

A verdict having been found for the plaintiff, damages 45l. 11s.,

Byles, Serjt., in Michaelmas term last, pursuant to the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant. He referred to *Sadler* v. *Nixon* (5 B. & Ad. 936), *Helme* v. *Smith* (7 Bingh. 709, 5 M. & P. 744), and *Pearson* v. *Skelton* (1 M. & W. 504), and to Collier on Partnership (2nd edit. p. 188).

Kinglake, Serjt., and Pashley, now shewed cause (*e*). The plaintiff and the two defendants, Peplow and Brooke, were clearly liable to White and Gillett. At **[497]**

(*a*) Which enacts "That every person shall be at liberty to inspect the returns, deeds, registers, and indexes which shall be made to or kept by the said registrar of joint stock companies, and that there shall be paid for such inspection such fees as may be appointed by the commissions of Her Majesty's treasury in that behalf, not exceeding 1s. for each such inspection; and that any person shall be at liberty to require a copy or extract of any such return or deed, to be certified by the said registrar; and there shall be paid for such certified copy or extract such fee as the commissioners of Her Majesty's treasury may appoint in that behalf, not exceeding 6d. for each folio of such copy or extract; and that, in all courts of law and equity, and elsewhere, every such copy or extract so certified shall be received in evidence, without proof of the signature thereto, or of the seal of office affixed thereto."

(*e*) The rules not having been moved within the first four days of Michaelmas term, but having been placed in the list of reserved motions, and no notice of that fact having been given to the plaintiff, Kinglake, Serjt., objected that the defendants ought not to be heard in support of their rules until the judgments which had been regularly signed had been set aside, and the costs paid.

Maule, J. The defendants must pay the costs.

[See *Lester* v. *Lazarus*, 4 Dowl. P. C. 444, *Doe d. Duncan* v. *Edwards*, 7 Dowl. P. C. 547, *Emblin* v. *Dartnell*, 12 M. & W. 830, 1 D. & L. 1010.]

the time the contract in question was entered into, the company had not been formed: it was not proved that there was any provisional committee: but these three persons, Boulter, Brooke, and Peplow, took upon themselves individually to hire the offices. They clearly had no authority to bind the rest of the committee, if any did exist; *Wyld* v. *Hopkins* (15 M. & W. 517); *Barker* v. *Stead* (ante, vol. iii. p. 946). There is nothing to prevent a co-contractor from bringing an action against those who may be associated with him in an undertaking of this sort. In *Lucas* v. *Beach* (1 M. & G. 417, 1 Scott, N. R. 350), the plaintiff entered into an express contract with a committee of individuals associated together for the purpose of obtaining an act of parliament for making a turn-pike road, to do certain work for a specified sum: he afterwards caused his name to be inserted in the list of subscribers, for two shares: and it was held that he was not thereby precluded from recovering upon such express contract. A mere preliminary arrangement will not constitute a partnership; as was held in *Fox* v. *Clifton* (6 Bingh. 776, 4 M. & P. 676), *Fox* v. *Frith* (10 M. & W. 131), and many other cases. Reliance was placed, on the part of the defendant, at the trial, upon *Holmes* v. *Higgins* (1 B. & C. 74, 2 D. & R. 196). There, a number of persons, including the plaintiff and the defendant, had associated themselves together for the purpose of obtaining a bill in parliament to make a railway; the defendant acted as chairman; the plaintiff, who was the surveyor, brought an action, for work done by him as such, against the defendant; and it was held, that the action was not maintainable against the partnership, on the ground that the same person could not be both plaintiff and defendant in the same action. [Cresswell, J. The decision there is put upon the ground of liability to con-**[498]**-tribution.] There, as in *Wilson* v. *Viscount Curzon* (15 M. & W. 532), there was no express contract between the plaintiff and the defendant, and no duty implied by law to indemnify the plaintiff. *Chadwick* v. *Clarke* (ante, vol. i. p. 700), where *Holmes* v. *Higgins* was referred to, is an authority to shew, that, under circumstances like those of the present case, an action will lie upon an express contract. *Edger* v. *Knapp* (5 M. & G. 753, 6 Scott, N. R. 707) is directly in point. There, four persons who had acted as directors of a proposed railway company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them, on their personal responsibility; and it was held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. [Cresswell, J. Suppose the premises had originally been taken upon the credit of the company; and, after a distress for rent, these three persons had jointly entered into an independent contract to pay the amount, and one of them had afterwards paid the whole,—could he not have sued the others for contribution?] Clearly he might. Nothing that was afterwards done here could in any respect vary the nature of the contract of the 11th of April, 1846. In Story on Partnership (§ 221), it is said: "The ground why at law, independent of any special covenant, or any distinct several contract, one partner cannot maintain a suit against the other partners for moneys paid, or advanced, or contributed, or liabilities incurred, on account of the partnership, may be readily explained in a satisfactory manner. In the first place, upon the mere technical principles of the common law, one partner cannot sue the others for a contribution or payment made for a joint partnership liability; for, in such a suit, all the partners, including himself, must be made defendants; and it is clear, upon the acknowledged principles of pleading, at the common **[499]** law, that a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself, either alone, or in conjunction with others. But a reason far more satisfactory, because it is in no shape founded upon technical principles, is, that, until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for, although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount. Now, a settlement of all the partnership concerns is ordinarily, during the continuance of the partnership, unattainable at law; and, even in equity, it is not ordinarily enforced, except upon a dissolution of the partnership. If one partner could recover against the other partners the whole amount paid by him on account of the partnership, they would immediately have a cross-action against him for the whole amount, or his share thereof; and, if he could recover only their shares thereof, then, in order to ascertain those shares, a full account of all the partnership concerns must be taken, and the partnership itself wound up. This would manifestly be a most serious inconvenience, as well as a change of the original contract, from a joint contract of all the partners, in solido, to a several contract, each for his own aliquot part of the final balance due to a particular partner upon a special transaction. And, in cases of this sort, the maxim may justly apply, 'Frustra petis, quod statim alteri reddere cogeris,' or, as it is sometimes expressed, 'Frustra peterit, quod mox rediturus esset.'" These reasons do not apply to such a case as the present. In Fitzherbert's Natura Brevium (p. 162 B. C.), it is said that "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill pro indiviso, and take the profits equally, **[500]** and the mill falleth into decay, and one of them will not repair the mill; now, the other shall have a writ to compel him to be contributory to the reparations. And, if there be three or four co-parceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden, for all the co-parceners, and the others will not allow her their proportion for her charges and losses for the same suit; that co-parcener who did the suit may have this writ of contribution." One of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties: *Cowell* v. *Edwards* (2 Bos. & Pull. 268). Here, the defendant was by the plaintiff's payment relieved from a personal liability. [Maule, J. And the plaintiff paid the money under legal compulsion,—which is equivalent to request.] Hence, an implied assumpsit arose on the defendant's part to repay his proportion. Most of the authorities upon this subject will be found collected in *Davies* v. *Humphreys* (6 M. & W. 153), and commented on by Parke, B., in delivering the judgment of the court. The law does not affect to do complete justice in these cases between the parties: where there are six sureties, three of whom turn out to be insolvent, and one of the three solvent parties pays the whole, it would seem to be but reasonable that the contribution of the other two should be in thirds; but the rule of law is otherwise, and holds each liable only to reimburse his co-surety to the extent of one sixth: *Browne* v. *Lee* (6 B. & C. 689, 9 D. & R. 700); *Kemp* v. *Finden* (12 M. & W. 421). Even in the case of a partnership, assumpsit will lie for the balance of an adjusted account: *Foster* v. *Allanson* (2 T. R. 479); *Moravia* v. *Levy* (ibid. 482 (*a*)).

[501] The certified copy of the deed of settlement was improperly received in evidence: it was not admissible to prove either the execution, or the contents, of the deed. The doctrine of *Slatterie* v. *Pooley* (6 M. & W. 664), which was supposed to justify its reception, is this,—that an admission by a party, may be proof of a fact, but not that it admits the contents of a deed. [Maule, J. What the party says, about the contents of a deed, is primary and original evidence.] The case of *Slatterie* v. *Pooley* is not to be extended. [Maule, J. It certainly is not very satisfactory in its reasons. The decision was founded upon a passage in Phillips on Evidence (*b*), which in itself does not seem to me to be very sound. What the party himself says, is not before the jury,—but only the witness's representation of what he said. What a man says is, generally, and very properly, evidence against him: but a verbal representation by a third person is quite another thing (*c*).] The doctrine of *Slatterie* v. *Pooley* was under discussion in this court in *Bringloe* v. *Goodson* (5 N. C. 738, 8 Scott, 71) and *Howard* v. *Smith* (3 M. & G. 254, 3 Scott, N. R. 574), in the latter of which it is somewhat narrowed. The deed is only before the court with reference to the admission that it is the deed referred to. [Maule, J. I rather think the rule laid down in *Slatterie* v. *Pooley* has been extended to all the words of the instrument.] The rule, at all events, does not apply, where there is an attesting witness: *Bailey* v. *Bid*-**[502]**-*well* (13 M. & W. 73); *Streeter* v. *Bartlett* (ante, vol. v. p. 562). In the latter case, it was held, that, in order to prove an admission of a debt, by the medium of an entry in a schedule filed by the defendant in the insolvent debtors court, it is necessary to prove the defendant's signature, by calling the subscribing witness,—even where the document has been acted upon by the court. [Maule, J. You might as well attempt to dispense with the attesting witness, by proving that the party had sealed and delivered the deed,—the very thing the attesting witness is required for.] The act requires the

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(*b*) 8th edit. vol. i. p. 364. But see 10th edit. vol. i. pp. 321-324.

(*c*) According to *Slatterie* v. *Pooley*, what A. states as to what B., a party, has said respecting the contents of a document which B. has seen, is admissible, whilst what A. states respecting a document which he himself has seen, is not admissible,—although, in the latter case, the chance of error is single, in the former, double.

deed to be inrolled by two of the directors: is the whole body to be bound by the admission of the two who deposit the deed? In *Molton* v. *Harris* (2 Esp. N. P. C. 549), it was held that the memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance. [Maule, J. That case was decided about half a century before *Slatterie* v. *Pooley.*] In *Doe d. Loscombe* v. *Clifford* (2 Car. & K. 448), it was held, that an examined copy of a memorial of a purchase-deed, registered in Middlesex, under the statute 7 Ann. c. 20, is only receivable as secondary evidence of the deed, against the parties to the deed, and all persons claiming under them; and that the fact that A. mortgaged the property to B., and delivered this deed to B. as mortgagee, is not sufficient to make it secondary evidence against A. That was a decision by one of the judges who were parties to *Slatterie* v. *Pooley.* [Maule, J. I cannot help thinking that "secondary" is a mistake there.] In *Wollaston* v. *Hakewill* (3 M. & G. 297, 3 Scott, N. R. 593), the registered memorial of a deed conveying lands in Middlesex, was held to be secondary evidence of the contents of such deed, against the personal representatives of the party by whom such deed is registered. The case of **[503]** *The Fishmongers' Company* v. *Robertson* (ante, vol. i. p. 60) is also an authority in favour of the plaintiff, so far as regards the opinion of Tindal, C. J., which is unaffected by the subsequent decision of the court of error (ante, vol. vi. p. 896). [Maule, J. In that case it was sought to prove an admission by a defendant, that a certain paper was the original agreement: and it was objected that that could not be done without calling the attesting witness. That can have nothing to do with this case.] The court of Queen's Bench in Ireland, in a recent case of *Lawless* v. *Queale* (8 Irish Law Reports, 382), express very strong disapprobation of the doctrine of *Slatterie* v. *Pooley.* That was an action of use and occupation: the plaintiff proved by a witness the fact of the occupation by the defendant, and, on his cross-examination, he admitted that there was a written agreement in existence, which the plaintiff did not produce: and it was held, that such instrument ought to have been given in evidence, and that a declaration by the defendant, of holding at a particular rent, was not admissible. Pennefather, C. J., there says: "Several cases were cited for the purpose of establishing, not that the broad principle of law was not right, but that, in these particular cases, certain exceptions to the rule of evidence may have been introduced, which would admit the introduction of parol evidence. The case of *Newhall* v. *Holt* (6 M. & W. 662) was relied on. That was an action for goods sold and delivered, and on an account stated; and it was held that a parol admission by the defendant of the debt due, was evidence under the account stated, though it appeared there was a written agreement relative to the goods. This was the decision of the court, though Parke, B., observes—'What a defendant says is always evidence against him, although it may have arisen out of a written agreement.' It is **[504]** not easy to encounter a loose and incorrect note of this sort, because it is impossible to say to what Baron Parke intended to apply that observation, and it is not sufficiently intelligible to be an authority. *Slatterie* v. *Pooley* is the next case, and appears to be the leading one in support of the doctrine that a parol admission by a party to a suit is always receivable as evidence against him, although it relates to the contents of a deed or other written instrument, and even although its contents be directly in issue in the cause. I cannot subscribe to what was said by Parke, B., in that case, though it is added, that Lord Abinger (who did not hear the arguments) concurred. The doctrine there laid down is a most dangerous proposition: by it a man might be deprived of an estate of 10,000l. per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged, or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." And see the remarks of Crampton, J., upon the cases of *Newhall* v. *Holt*, *Slatterie* v. *Pooley*, and *Howard* v. *Smith.* [Williams, J. It is impossible for us to overrule *Slatterie* v. *Pooley*, though we may think the reasoning not quite satisfactory (*a*).]

Byles, Serjt., and Bernard, in support of the rule. The agreement under which Boulter, Brooke, and Peplow hired the premises in question, was made by them on

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(*a*) See Taylor on Evidence, 293, 294.

behalf of the company; the premises were used for the purposes of the company; and the rent which was paid, was paid by cheques upon their [505] bankers. The company, having thus recognised and confirmed the agreement, were bound by it: *Lord Petre* v. *The Eastern Counties Railway Company* (1 Railway Cases, 462); *Gleadow* v. *The Hull Glass Company* (19 Law Journ., N. S., Chan. 44). White and Gillett might have sued the company. [Maule, J. Not upon the agreement.] For use and occupation; and, judgment having been recovered against the company, execution might have been obtained against any of the shareholders. But one member could have had no remedy against another who had paid more than himself on account of the company. The case clearly falls within the authority of *Holmes* v. *Higgins* (1 B. & C. 74, 2 D. & R. 196). It was there held that an action was maintainable by an agent employed in endeavouring to pass a bill through parliament for making a railway, against the chairman of the committee, where the agent was himself a subscriber. In *Sadler* v. *Nixon* (5 B. & Ad. 936, S. C. (nom. *Sadler* v. *Hickson*) 3 N. & M. 258), where A. recovered against B., C., and D., partners in trade, upon their joint contract, and took in execution B. only, who thereupon paid the whole sum recovered,—it was held, that B. could not recover in a court of law against his co-defendants, for contribution. In *Bovill* v. *Hammond* (6 B. & C. 149, 9 D. & R. 186), where two persons jointly undertook to procure a cargo for a vessel, for certain commission which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money,—it was held that the other could not maintain money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. So, in *Milburn* v. *Codd* (7 B. & C. 419, 1 M. & R. 238), a joint-stock company, in which A., B., and [506] C. were shareholders, was dissolved: A. and B., being sued by a creditor of the concern, employed C., who was an attorney, to defend them: and it was held, that C. could not sue A. and B. for his bill of costs. Lord Tenterden there said: "The actions which the plaintiff defended, were actions brought against the defendants as members of a partnership of which the plaintiff was also a member. When an action was commenced, it was the duty of all the partners in the late company, either to pay the money, or to resist the demand; and, in case of resistance, the expense ought to be paid by all,—the plaintiff among the rest."

The certified copy of the registered deed was properly received in evidence. [Maule, J. We all think so too.]

Charnock, who appeared for Brooke, submitted that he, at all events, was not liable in respect of rent accruing after he had resigned his office of committee-man, and his resignation had been accepted by his co-directors. [Maule, J. White and Gillett might have sued Brooke for the whole rent, and he might have sued Boulter and Peplow for contribution. If he would be entitled to contribution, it could only be by virtue of the mutual contract.]

Maule, J. Two questions have been argued this case. The court has already intimated an opinion that the copy of the deed was properly received, upon the authority of the dictum in *Slatterie* v. *Pooley* (6 M. & W. 664), which has frequently been recognised and acted upon. That being so, the only remaining question is, whether the plaintiff is entitled to recover contribution against the defendants in these two actions. It appears that [507] the plaintiff, Peplow, and Brooke, were three of several persons who were associated together for the purpose of establishing a gas-company; that the three applied to White and Gillett, the landlords of premises in the Old Jewry, to let the same to them: that White and Gillett accordingly demised the premises to them, and to them only, by a written agreement: that, rent being in arrear, the plaintiff, Peplow, and Brooke were sued in a joint action; that Peplow and Brooke suffered judgment by default; and that White and Gillett recovered a certain sum in that action, the whole of which, together with the costs, was paid by the plaintiff. Primâ facie, where one of three joint-contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two. That state of circumstances exists here: and the only question is, whether there existed any other facts which afford an answer to the plaintiff's right to such contribution. It does not appear to me that any such answer has been given. It is suggested that there was a partnership, or a quasi partnership, between the plaintiff, Peplow, and Brooke, and others, and that, consequently, the plaintiff might be entitled to have an account taken in a court of equity, but not to contribution at law. But I think, supposing such partnership did exist, it by no means follows that the plaintiff would not be entitled to recover in this action. The three entered into a joint contract with White and Gillett, who probably would not have dealt with a larger number. Those three, therefore, alone incurred a joint liability to pay the rent; and they would be subject to contribution amongst themselves. Although it may be, that, when each of the three has paid his share of the rent in respect of that joint liability, each may be entitled to charge such share in the partnership account, it by no means follows that the right of contribution inter se does not **[508]** likewise exist. Each was liable in solido to the original demand: and from that arises an implied contract that the one who pays the whole shall be reimbursed, in their respective proportions, by the other two. There is nothing that I can discover here, to shew that these parties did not intend that the ordinary implication should arise in this case. On the contrary, I think there is every reason to infer that they intended to incur the ordinary liabilities incident to such a contract as they had entered into; and that inference is not rebutted by the circumstance that the money they are called upon to pay under that contract, may be chargeable by them against the company for whose benefit they assumed the liability. Upon the simple ground, therefore, of the inference arising from the position of the parties, and of that inference not being rebutted by any of the facts found in this case, it seems to me that the plaintiff is entitled to retain his verdict. The cases cited have most of them very little to do with the matter: and none of them goes to shew, that, under circumstances like these, an action is not maintainable. I therefore think this rule must be discharged.

Williams, J. I am of the same opinion. The circumstances are shortly these:—The plaintiff, Peplow, and Brooke entered into a contract with third persons, whereby they made themselves jointly liable for rent of certain premises. The premises so hired were intended to be used as the place of business of a joint-stock company, of which those three persons were members. Whatever remedy they might have as against the other members of the company, when these persons placed themselves under this liability to the landlords of the premises, they likewise came under an implied liability inter se, that, if one should be called upon to pay, and should actually pay, the whole rent, the other two **[509]** would reimburse him to the extent of their respective shares. And this implied contract is not in any degree affected by the rule of law, that one partner cannot sue his co-partners in respect of a partnership debt.

Talfourd, J. I am of the same opinion. The contract out of which this cause of action arises, is entirely collateral to the partnership: and the defendants are liable to contribution irrespectively of the state of accounts amongst the partners.

Rule discharged.

Tassell *v.* Cooper. Same *v.* Same. Feb. 15, 1850.

[Referred to, *Hardy* v. *Veasey*, 1868, L. R. 3 Ex. 112.]

A., the farming bailiff of Lord D. (after his employment as such had ceased), received a cheque for 180l. in payment for wheat belonging to Lord D., which he had sold on his account while acting as bailiff, and paid it in to his own account with B. & Co., his bankers, who received the cash for it, and gave A. credit for the amount, but afterwards, under an indemnity from Lord D., refused to honour his drafts:—Held, that, even assuming that the cheque had been improperly obtained by A., still, as between him and his bankers, the amount was recoverable by A., as money had and received by them to his use, or money paid.

The first of these cases was an action of debt brought against the defendant, as public officer of the London and County Joint-Stock Banking Company, for money lent by the plaintiff to the company, money received by them for the use of the plaintiff, and money found to be due to the plaintiff on an account stated with them.

The defendant pleaded that the company were never indebted; and also a special plea, which the plaintiff traversed by his replication.

The second of the above actions was an action on the **[510]** case against the defendant as public officer of the same banking company, for dishonouring two cheques of the plaintiff, when he had a balance in their hands, and for exposing his account to a third person.

The first count in the last-mentioned action, stated, that Emanuel Cooper, the defendant in this suit,—one of the public officers of certain persons united in co-partnership for the purpose of carrying on, and who at the several times therein-after mentioned, and thence continually, carried on, &c., the trade and business of bankers in England, under the name of "The London and County Joint-Stock Banking Company," and who were at the time of the commencement of this suit, and still continued to be, entitled to sue and be sued in the name of one of the public officers of such co-partnership, as the nominal plaintiff or plaintiffs on their behalf, according to the statute made in the seventh year of the reign of the late King George the Fourth (7 G. 4, c. 46), for, among other things, the better regulating co-partnerships of certain bankers in England, and according to another statute made in the eighth year of the reign of our lady the now Queen, intituled "An act to regulate joint-stock banks in England" (7 & 8 Vict. c. 113), which said Emanuel Cooper had been duly nominated and appointed, and was at the commencement of this suit, and still continued, one of the public officers of the said co-partnership, according to the form and effect of the said statutes,—had been summoned to answer the plaintiff in an action on the case. It then proceeded to state, that the said London and County Joint-Stock Banking Company, before and at the several times thereinafter mentioned, were, and still continued to be, bankers, and used, exercised, and carried on the trade and business of bankers, to wit, at Tonbridge, in the county of Kent: That on the **[511]** 10th of March, 1843, the plaintiff, at the request of the said banking company, retained and employed the said company in the way of their said trade and business, to be the bankers of the plaintiff, and to receive, account for, and pay, according to the usage and custom of bankers in that behalf, such sums of money as the plaintiff might pay or intrust, or cause to be paid or intrusted, to the said company, as bankers of the plaintiff as aforesaid, or as might come to, or be in, the hands of the said company on account of the plaintiff, as such bankers as aforesaid; and the said company then accepted of, and entered upon, the said retainer and employment, and, by reason thereof, it became and was, and during all the time hereinafter mentioned continued to be, the duty of the said company, as such bankers as aforesaid, and according to the usage and custom of bankers in that behalf, to honour and pay the drafts or orders in writing of the plaintiff, duly drawn on the said company, for the amount of the cash balances of the plaintiff, or any part thereof, in the possession of the said company, when duly presented to the said company for payment, at their place of business at Tonbridge aforesaid, by any person or persons entitled to receive the amount of such drafts or orders, provided the said company should, at the time of the presentment of any such drafts or orders respectively, have in their hands, as the bankers of the plaintiff, a cash balance of the plaintiff sufficient to pay the amount of such drafts or orders respectively, without, or over and above, any just claim or lien of the said company upon the same or any part thereof, and provided such cash balance should have been in the hands of the said company a sufficient and reasonable time to enable them and their clerks to know of the same being in the hands of the said company, without, or over and above, any such claim or lien as aforesaid: That, after the plaintiff **[512]** had retained and employed the said company as aforesaid, and they had accepted of such retainer and employment as aforesaid, and while the said company were and continued to be such bankers of the plaintiff as aforesaid, to wit, on the 30th of January, 1847, the plaintiff duly made his certain draft or order in writing, dated the day and year last aforesaid, and directed the same to the said banking company, and thereby required them to pay to him the plaintiff, or the bearer thereof, 8l. 15s., and the plaintiff then delivered the said draft or order to one Thomas Poole, who thereby then became and was, and until and at the time of the presentment thereof, and refusal of payment, as hereinafter mentioned, continued to be, the bearer thereof, and entitled to receive the amount of the said draft or order: That the said draft or order was afterwards, and before the commencement of this suit, and while the said company continued to be the bankers of the plaintiff as aforesaid, to wit, on the day and year last aforesaid, duly presented by the said Thomas Poole to the said banking company, at their place of business at Tonbridge aforesaid, for payment thereof; and that, although the said company, at the time when the said draft or order of the plaintiff was so presented for payment as aforesaid, and was refused payment as hereinafter mentioned, continued to be the bankers of the plaintiff as aforesaid, and had in their hands, as the bankers of the plaintiff, a cash balance of the plaintiff sufficient to pay the amount of the said draft or order, without any just claim or lien of the said company on such balance, or any part thereof; and although the said company, at the time when the said draft or order of the plaintiff was so presented as aforesaid, and dishonoured as hereinafter mentioned, had had the said cash balance of the plaintiff in their hands a sufficient and reasonable time to enable them and their clerks to know of the same **[513]** being in the hands of the said company, without any such claim or lien as aforesaid, and, by reason of the premises, ought to have then paid the amount of the said draft or order to the said Thomas Poole: yet the said banking company, disregarding their duty as such bankers as aforesaid, and contriving and intending to injure and aggrieve the plaintiff in that behalf, did not nor would, when the said draft or order was so presented to them for payment as aforesaid, pay or honour the same, but wholly neglected and refused so to do, and then dishonoured and refused to pay the same, or any part of the amount thereof, contrary to their duty as such bankers of the plaintiff as aforesaid. [The count then proceeded in like manner to allege the dishonour of a draft for 27l. 8s. 8d., drawn by the plaintiff in favour of one Robert Billing, and concluded as follows:—] By reason of all which premises, the plaintiff not only lost the use of the said cash balance so in the hands of the said company as aforesaid, but was and is greatly injured and damaged in his credit and reputation with the said Thomas Poole, Robert Billing, William Jemmett, and Virgil Pomfret, Thomas Beeching, Horatio Beeching, and Stephen Beeching, and Francis John Headland, and with divers other persons to whom the facts aforesaid necessarily became and were known, and was obliged to give, and did give notice, to one Richard Woodhams, then being a creditor of the plaintiff, not to present for payment to the said company a certain other draft or order in writing for the payment of 14l. 17s. 4d., which the plaintiff had before then drawn upon the said company as such bankers as aforesaid, and had delivered to the said Richard Woodhams in payment of a debt then owing to him from the plaintiff; and the plaintiff had been and was, by means of the premises, otherwise greatly injured and damnified.

The second count stated, that, while the said com-**[514]**-pany were such bankers as aforesaid, and used and exercised the said trade and business as aforesaid, to wit, on the 10th of March, 1843, the plaintiff, at the request of the said company, retained them, in the way of their said trade and business, to be the bankers of the plaintiff, and to receive, account for, and pay, as such bankers, such sums of money as the plaintiff might pay or intrust to the said company as the bankers of the plaintiff, or as might come to their hands on account of the plaintiff, as such bankers as aforesaid, and to perform and keep the duties of bankers to and for the plaintiff: that the said company then accepted of and entered upon the last-mentioned retainer and employment: that, by reason of the premises, it thereupon became and was the duty of the said company, as such bankers to and for the plaintiff, while they should remain and continue such bankers of the plaintiff as last aforesaid, among other things, to keep an account of all moneys from time to time received and paid by them as such bankers as last aforesaid, for or on account of the plaintiff, and not to expose or disclose the state or particulars of the said account so to be kept by them as aforesaid, without the licence or authority of the plaintiff, to any person or persons, except the plaintiff and the clerks, agents, or servants employed by the said company in their said business, and except to any person who might present for payment to the said company any cheque, bill, or note, drawn, accepted, or made by the plaintiff, upon, or payable by, the said company, which the said company might be entitled to dishonor, for want of sufficient funds of the plaintiff of right applicable to the payment thereof, or unless compelled by due course of law so to do: that the said company remained and continued to be such bankers of the plaintiff as last aforesaid, from the time of their being so retained and employed as in that count afore-**[515]** said, until and at and after the time of the committing of the grievances thereinafter mentioned: that, during the time while they were such bankers of the plaintiff as last aforesaid, and before the committing of the grievances thereinafter mentioned, the said company, as such bankers of the plaintiff as last aforesaid, received and paid divers and very many large sums of money for and on account of the plaintiff, under and by virtue of their said last-mentioned retainer and employment, and kept such an account thereof as aforesaid, under and in pursuance of their said retainer and employment, and of their said duty in that behalf; and, at the time of the committing of the grievances thereinafter mentioned, the said account was still current, not wound up, or determined: nevertheless, the said company, wholly disregarding their duty in that behalf, and contriving, and wrongfully intending, to injure and aggrieve the plaintiff, and to destroy and ruin his fame and credit, while they were such bankers of the plaintiff as last aforesaid, and kept such account as aforesaid, to wit, on the 20th of January, 1847, wrongfully and unjustly, and without the licence or authority of the plaintiff, exposed and disclosed the state and particulars of the said account so kept by them of the said moneys received and paid by them as such bankers as last aforesaid for and on account of the plaintiff, to a certain person to wit, Philip Charles, Baron De L'Isle and Dudley, who was not a servant, clerk, or agent employed by the said company in their said business, and who did not present for payment to the said company any cheque, bill, or note, drawn, accepted, or made by the plaintiff, and without being compelled, by due course of law, or otherwise, so to do, contrary to their duty to the plaintiff, as such bankers as last aforesaid, and in breach of the trust reposed in them by the plaintiff, as in that count aforesaid: and that, by reason thereof, the plaintiff was then [516] greatly injured in his credit with the said Philip Charles, Baron De L'Isle and Dudley, and the said Philip Charles, Baron De L'Isle and Dudley, was thereby induced and caused to lay claim, and did lay claim, to the cash balance of the plaintiff then in the hands of the said company as such bankers as aforesaid, and was also thereby led and induced to make, and did make, divers other claims and demands on the plaintiff, to the great trouble, expense, anxiety, vexation, and annoyance of the plaintiff; and the plaintiff had been and was, by means of the premises, otherwise injured and damnified, &c.

The defendant pleaded,—first, that the said banking company were not guilty,—secondly (and sixthly), that the plaintiff did not retain and employ the company as bankers,—thirdly (and fourthly), that the company had not any cash balance of the plaintiff in their hands sufficient to pay the cheques,—fifthly (and seventhly), that, before and at the time when the plaintiff retained the said banking company as in the declaration mentioned, the plaintiff was the farm-bailiff and agent of Baron De L'Isle and Dudley, and that the plaintiff retained and employed the said banking company, as in the declaration mentioned, as such bailiff and agent as aforesaid, at the request and by the direction of the said baron, but in his own name, and without disclosing to the said company that the said baron was his principal, and that he the plaintiff retained and employed the said banking company as the agent of the said baron, and not on his own account: that the said cash balances which were so in the hands of the said banking company as in the declaration mentioned, at the several times when the said drafts or orders were so respectively presented for payment, and so refused payment, as in the declaration mentioned, were respectively cash balances composed of moneys belonging to the said baron, [517] and which the plaintiff had, as such agent and bailiff as aforesaid, before the accruing of any of the causes of action in the introductory part of the plea mentioned, to wit, on the 20th of January, 1847, paid to and deposited with the said banking company, in his own name, and without disclosing to the said company that the said baron was his principal, or that the said moneys were the proper moneys of the said baron: that the said cash balances were the proper moneys of the said baron, and that the plaintiff, at any time, had not any lien upon the said cash balances as against the said baron, nor any right to have the said cash balances, or any part thereof, paid to him, the plaintiff, by the said banking company, except as such agent of the said baron as aforesaid, and by the permission of the said baron: that, after the plaintiff had so retained and employed the said banking company as aforesaid, and whilst the said cash balances were so in the hands of the said banking company as aforesaid, and before the said drafts or orders, or either of them, were so drawn, or were so presented for payment, as in the declaration mentioned, to wit, on the 22nd of January, 1847, the said baron gave notice to the said banking company of all the premises in this plea mentioned, and then directed and required the said banking company to retain in their hands the said cash balances for the use of him the said baron, and not to pay or deliver the same, or any part thereof, to the plaintiff or his order; to which said request of the said baron, the said banking company then assented,—of all which premises in this plea aforesaid, the plaintiff afterwards, and before he drew the said drafts or orders in the declaration mentioned, or either of them, had notice: and that therefore the said banking company, at the several times when, &c. in the declaration mentioned, did refuse to pay the said [518] drafts or orders, and did dishonour the same, as they lawfully might for the cause aforesaid,—which were the same grievances as in the declaration mentioned; verification.

The plaintiff joined issue on the first, second, third, fourth, and sixth pleas; and replied to the fifth, that he, the plaintiff, did not retain or employ the said banking company as in the declaration first mentioned as such bailiff and agent, or as such bailiff or agent as in the said fifth plea mentioned, nor were the said cash balances which were so in the hands of the company as in the declaration and fifth plea mentioned, or either of them, composed of moneys belonging to the said baron, or which the plaintiff, as such agent and bailiff, or as such agent or bailiff as aforesaid, paid to or deposited with the said banking company, in manner and form as the defendant had in his said fifth plea above alleged,—concluding to the country: and to the seventh plea he replied de injuriâ.

The defendant joined issue on the replications to the fifth and seventh pleas.

The above causes were tried at Guildhall before Wilde, C. J., and by special juries, at the sittings after Hilary term, 1848, when a verdict was found for the plaintiff in the first action, for 128l. 1s. 10d. and in the second action for 40s. damages,—subject to the opinion of the court, in both actions, upon the following case:—

The plaintiff, William Tassell, at the times in question, resided at Penshurst, in Kent, and kept a banking account with the London and County Joint-Stock Banking Company,—a partnership of more than six persons, who carried on business as bankers in London and Tunbridge and other places, under the provisions of the statutes 7 G. 4, c. 46, and 7 & 8 Vict. c. 113: and he brought the first of those actions to recover 128l. 1s. 10d., being the balance in his favour on the said banking **[519]** account; and the second action, to recover damages by reason of the company's having dishonoured two of his cheques—one for 8l. 15s., and another for 27l. 8. 8d., hereinafter mentioned, and also for having exposed the particulars of his account to Lord De L'Isle.

In the years 1843 and 1844, the plaintiff, who is a practical farmer, and one Palmer, were tenants of a large farm,—upwards of seven hundred acres,—at Penshurst, in Kent, belonging to Lord De L'Isle and Dudley; and during this tenancy the plaintiff opened a banking account, in his own name, with the London and County Joint-Stock Banking Company, at their branch bank at Tunbridge, in the county of Kent: which account continued, from that time down to the occurrences which gave rise to these actions, and was carried on in the usual manner between bankers and their customers.

In 1844, the plaintiff and Palmer ceased to be tenants of the said farm; and the plaintiff then entered into the service of Lord De L'Isle as his farming-bailiff, and continued in that employment down to the time of his discharge hereinafter mentioned. In the course of that employment, the plaintiff had the management of the farm as such bailiff, and the sale of the produce of it; and from time to time received large sums of money arising from the sale of the crops and other produce thereof, on account of Lord De L'Isle, and paid the various charges, expenses, and outgoings of the farm, as such farming-bailiff. During the continuance of the said banking account, the plaintiff was in the habit of paying in to the credit of his said account at the Tunbridge bank of the said banking company, many of the sums of money received by him on account of Lord De L'Isle as aforesaid, as also other sums of money belonging to himself and others; and he also, from **[520]** time to time during the continuance of the said banking account, made payments on account of the said Lord De L'Isle and other parties, and also on his own private account, by cheques drawn on the said banking company, upon the balance standing to his credit in the said account. The company occasionally discounted bills for the plaintiff, and placed the money thence arising to his credit in the said account, and sometimes allowed him to overdraw his said account. The whole of the cheques drawn by the plaintiff against the said account, and paid by the company out of it, were signed by the plaintiff in his own name only; and the account, as well as the usual pass-book, was kept by the company under the plaintiff's name only. Until the company received the notice from Lord De L'Isle hereinafter mentioned, they were not aware that his lordship had any concern with the plaintiff's account with them, or that the plaintiff was his farming-bailiff.

At the trial, the pass book containing the said banking account, as entered and made up by the banking company, was put in, and proved to have been delivered to the plaintiff on the 20th of February, 1847. The items on both sides of the account, down to the end of the year 1846, are very numerous, and are not thought to be material to be set out: but the following is a copy of the entries in the pass-book from January 1, 1847, to the end of the account, shewing the receipts by the company from the plaintiff, and payments made by them on his cheques during the said month of January, with the respective dates of such receipts and payments:—

Receipts.

1847.	Jan.	1.	Balance	£167	14	11
	,,	20.	Cash	180	4	8
				£347	19	7

[521] Payments.

1847.	Jan.	2.	Self	£125	0	0
	,,	5.	Bates	5	0	6
	,,	,,	Chapman	5	2	7
	,,	,,	Collins	4	3	1
	,,	8.	Self	10	0	0
	,,	22.	Whisson	11	13	0
	,,	,,	Self	30	0	0
	,,	23.	Wood	6	15	7
	,,	26.	Constable	8	15	6
	,,	,,	Humphrey	13	7	6
				£219	17	9

The balance of the account shewn by the said pass-book in favour of the plaintiff on the 1st of January, 1847, was, 167l. 14s. 11d., being the sum remaining after deducting the payments made by the company in 1846 from their receipts of the plaintiff during the same year. As well the receipts as the payments of 1846 consisted of sums of money paid in and drawn out on his own account and on account of the other parties.

The only sum paid in by the plaintiff to his credit after the above date, was, a cheque drawn by Vines & Tomlin on Barclay & Co., for 180l. 4s. 8d., dated the 19th of January, 1847, which was paid in by the plaintiff on the same date to the said Tunbridge branch bank, and was cashed in London by the said banking company, and was placed to the plaintiff's credit on the 20th of January. This cheque had been received by the plaintiff from Vines & Tomlin in payment for some wheat of Lord De L'Isle's arising from the said farm, which wheat the plaintiff, as such bailiff of his lordship as above mentioned, had, in December, 1846, employed Vines & Tomlin to sell.

It will be seen by the pass-book, that there were ten [522] of the plaintiff's cheques paid by the company between the 1st and the 27th of January.

On the 19th of January, 1847, the balance appearing due to the plaintiff in his said banking account was 18l. 8s. 9d. On the 20th of January, he was credited with 180l. 4s. 8d., the proceeds of Vines & Tomlin's cheque, thereby making a balance in his favour of 198l. 13s. 5d.: but, on the 22nd, he drew out by two cheques 41l. 13s., and, on subsequent days, the further amount of 28l. 18s. 7d., and thereby reduced the balance due to him to 128l. 1s. 10d., which still remains unpaid to him, and is the amount claimed in the action of debt,—the banking account having remained in the same state down to the present time.

On the 27th of January, 1847, the plaintiff drew a cheque on the said banking company, in the usual form, for 27l. 8s. 8d., in favour of the Rev. R. Billing, or bearer, and which cheque he delivered on the same day to the Rev. R. Billing in payment of a debt of that amount due from the plaintiff to him. The Rev. R. Billing, through his banker's clerk, F. J. Headland, duly presented this cheque for payment, on the 29th of January, to the said branch bank at Tunbridge, where the plaintiff's account was kept; and the said company refused to pay the same, but referred the bearer of the cheque to the plaintiff.

On the 30th of January, 1847, the plaintiff also drew a cheque on the said company, in the usual form, for 8l. 15s., payable to self, or bearer, and caused the same to be duly presented by his agent, Thomas Poole, for payment, on the same day, to the said branch bank: but the said company refused to pay the same, and referred the bearer thereof to the plaintiff.

The dishonour of these two cheques arose out of the following circumstances:—After Michaelmas, 1846, Lord De L'Isle became dissatisfied with the state of the accounts between himself and the plaintiff as his farm-bailiff, and, on the 11th of January, 1847, his lordship, **[523]** through Mr. Glendinning, told the plaintiff he was not from that time to deal any more with Lord De L'Isle's property, but to confine his services to giving orders to the men, and to seeing that they did their work on the farm.

Some time between this date and the 28th of January, Lord De L'Isle, having learnt that the plaintiff had an account with the said banking company, went with Mr. Glendinning to the said Tunbridge branch bank, and applied to the company's manager there for leave to inspect the plaintiff's banking account which the company kept in their books there according to the usage of bankers. This the manager refused, unless he had instructions to do so from the principal office of the bank in London. Lord De L'Isle, having applied to that office, obtained such instructions, and again, in company with Mr. Glendinning, applied to the Tunbridge branch bank on the 28th of January; and they were then allowed by the manager there to inspect the plaintiff's account, of which he furnished them with a copy. Upon inspecting this account, Lord De L'Isle served the bank with a notice, signed by him, of which the following is a copy:—

"To the London and County Joint-Stock Banking Company.

"28th January, 1847.

"Please to hold in your hands, until further correspondence, the balance of 128l. 1s. 10d. on credit of the account of Mr. Tassell, the same being formed of money belonging to me; and I engage to hold you harmless for so doing."

(Signed) "De L'Isle."

It was in consequence of this notice that the company dishonoured the plaintiff's cheques, as above mentioned.

[524] After inspecting the account, Mr. Glendinning, on the same day, by authority of Lord De L'Isle, went to the plaintiff, and told him he had been receiving money for Lord De L'Isle's wheat; to which the plaintiff replied that he had. Mr. Glendinning then said—"How dare you do it, after my orders? Did I not tell you that you were not to deal with Lord De L'Isle's property, when I gave you orders some time ago?" The plaintiff replied—"You did: but you did not tell me not to receive money; and I had a right to receive it." To this Mr. Glendinning rejoined—"If you don't consider money property, I don't know what is." Glendinning then demanded the plaintiff's books, which he refused to give up: and he also refused to give a cheque for the balance of his said banking account, which Glendinning demanded. The latter then, by Lord De L'Isle's authority, discharged the plaintiff from his lordship's service, and put a person in possession of the farm.

On a subsequent investigation of the accounts rendered by the plaintiff to Lord De L'Isle, of the plaintiff's receipts and disbursements as farming-bailiff to his lordship, it appeared, that, on the 29th of September, 1846, there was a balance of 446l. 19s. 4d. in favour of his lordship; and, by a supplemental account rendered in March, 1847, it appeared, that, on the 22nd of January, 1847, that balance had increased to 517l. 2s. 2d. in his lordship's favour.

The said balance of 517l. 2s. 2d. also included the said cheque received of Vines & Tomlin. But, in these accounts, the plaintiff had not taken credit for the salary which was due to him from Lord De L'Isle, for his services, from Michaelmas, 1844, and which, according to the defendant's evidence, amounted to at least 180l., at the end of 1846.

On the 20th of February, 1847, the plaintiff served the banking company with a notice in writing, signed **[525]** by him, demanding payment of the said balance of 128l. 1s. 10d., and giving them notice that interest would be claimed from the date of such demand until the time of payment.

On the 22nd of February, 1847, these actions were brought.

It is agreed that the court shall be at liberty, if they shall think fit, to draw such inferences from the above facts, as a jury would have been justified in doing, or to send back the case to be amended or re-stated.

The question for the opinion of the court is, whether, upon the above facts and pleadings, the plaintiff or the defendant is entitled to the verdict on the issues joined in these actions, or either of them.

If the court shall be of opinion that the plaintiff is entitled to the verdict in the first action, then the verdict is to be entered for the plaintiff, for 128l. 1s. 10d., debt, and damages equal to the interest on that sum at 5l. per cent. per annum, from the 20th of February, 1847, till judgment: but, if the court shall be of opinion that the defendant is entitled to a verdict in that action, then it is to be entered for him accordingly.

If the court shall be of opinion that the plaintiff is entitled to the verdict in the second action, on either count or breach, then the verdict is to be entered for the plaintiff, damages 40s.: but, if the court shall be of a contrary opinion, then the verdict is to be entered for the defendant.

J. Brown, for the plaintiff. This is an action by a customer against his bankers, to recover the balance of a banking account. It is admitted, upon the face of the case, that there is a balance; but the answer attempted to be set up is, that that balance consists of the proceeds of a cheque which was the property of Lord De L'Isle, and was paid into the bank by **[526]** the plaintiff as the agent of Lord De L'Isle, or was tortiously obtained by the plaintiff, and that therefore the bankers were justified in withholding it from him, under a notice from Lord De L'Isle. On the part of the plaintiff, it will be submitted, that the balance which is now claimed is not composed wholly of Lord De L'Isle's cheque; that the cheque was not paid in as agent and on account of Lord De L'Isle, but on the plaintiff's own private account; that the defendants could not themselves set up the jus tertii, nor, by improperly disclosing the state of the plaintiff's account to a stranger, enable such stranger to interpose; and that the money in question was money lent by the plaintiff to the banking company.

The facts stated on the face of the case shew clearly that the balance in question did not consist wholly of money belonging to Lord De L'Isle. At the time the cheque for 180l. 4s. 8d. was paid in, the balance in the plaintiff's favour was 18l. 8s. 9d. On that cheque being cashed, therefore, the defendants were indebted to the plaintiff in the sum of 198l. 13s. 5d. The cheques subsequently drawn were not paid out of one part of that balance more than out of another. [Maule, J. The 18l. 8s. 9d. stands first in order of date. Cresswell, J. It is now settled, that money paid in by a customer to his banker, is money lent to the latter: *Pott* v. *Clegg* (16 M. & W. 321). Money paid out to the customer pays off the earlier debt; if this were not so, the earlier debt might be barred by the statute of limitations.] In *Mills* v. *Fowkes* (3 N. C. 455, 462, 7 Scott, 444, 455), Tindal, C. J., says: "In *Peters* v. *Anderson* (5 Taunt. 596, 1 Marsh. 238), where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment, **[527]** without appropriating them to either debt in particular, it was held that the plaintiff might appropriate them to the debt for which he had the worse security. In *Bosanquet* v. *Wray* (6 Taunt. 597, 2 Marsh. 319), it was held that a creditor receiving money without any specific appropriation by the debtor, might be permitted, in a court of law, to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt. These cases shew clearly that the receiver has a right to appropriate, if the payer omit to do so; and *Simson* v. *Ingham* (2 B. & C. 65, 3 D. & R. 249) shews that he may make the appropriation at any time before action." It will be said that the contract under which the defendants received the money in question, was a contract made by them with the plaintiff as agent of an undisclosed principal. The facts, however, shew that this was the plaintiff's private banking account, quite independent of Lord De L'Isle, and opened before the plaintiff became Lord De L'Isle's agent. Lord De L'Isle could not have drawn cheques upon this fund, mixed up as it was with the plaintiff's own moneys. *Sims* v. *Bond* (5 B. & Ad. 389) is precisely in point; it was there held, that, where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such: and, where A., as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the East India Company, to pay to the said owners, or bearer, the sums of money therein mentioned, for freight, and A. deposited these warrants in the hands **[528]** of his bankers, and they received the money due on them, and gave him credit for it in account; it was held, on assumpsit brought, after A.'s death, by the surviving part-owners against the bankers, that, on proof of the above facts, they could not recover the money, because it was not shewn that the loan was upon their account; for, the fact of the warrants being the property of all the part-owners when placed in the bankers' hands was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. Lord Denman, in delivering the judgment of the court, there said: "Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker: *Carr* v. *Carr* (1 Meriv. 541, n.); *Devaynes* v. *Noble* (1 Meriv. 568); and the plaintiffs, who seek to recover the balance of such an account, must prove that the loans were made by them. It is a well established rule of law, that, where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. But, where money is lent by another, in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He cannot shew that the loan, though nominally that of another, was really intended to be his own. It was incumbent, therefore, in this case, upon the plaintiffs to prove, that, when Charles Gribble lent the proceeds of the freight-warrants to the defendants, and had them placed to his credit in an account kept in his own name, he was **[529]** acting in that respect as the agent of the plaintiffs, as well as on his own account, and really lending the money to the defendants on the plaintiff's account as well as his own. In this the plaintiffs certainly failed; they only shewed that the warrants were, at the time they were placed in the hands of Charles Gribble, their property; which is quite consistent with the supposition that the loan of the proceeds to the defendants was Charles Gribble's loan." The same position is laid down by the court of Exchequer, in *Cooke* v. *Seeley* (2 Exch. 746).

As to the second action, the defendants cannot be permitted to set up their own breach of duty as letting in the claim of a third party. [Maule, J. The allegation of duty in the special count seems to be mere allegation of law.] Where a duty is alleged as matter of law, no traverse can be taken on it: but, where it is alleged as matter of fact, it must be traversed, or it is admitted: *Trower* v. *Chadwick* (3 N. C. 336, 350, 3 Scott, 699); *Hallifax* v. *Chambers* (*c*). It is clearly contrary to the duty of a banker to disclose to a stranger the state of his customer's account: the banker is in the nature of a confidential agent to his customer. In *Taylor* v. *Blacklow* (3 N. C. 235, 3 Scott, 614), the defendant, an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender certain defects in the plaintiff's title, per quoad the plaintiff was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest: and it was held, that this was a breach of duty for which an action lay against the defendant, notwithstanding he had been **[530]** the attorney of the proposed lender before his retainer by the plaintiff. The defendants here are, in effect, attempting to put the plaintiff to interplead with Lord De L'Isle, which they cannot be allowed to do; *Nickolson* v. *Knowles* (5 Madd. 47); *James* v. *Pritchard* (7 M. & W. 216). In *Roberts* v. *Ogilby* (9 Price, 269), it was held that an insurance-broker could not, as an agent, dispute the claim of his only known principal for the amount of losses received by him, on the ground that other persons were interested in the subject-matter of the insurance. *Gosling* v. *Birnie* (7 Bingh. 339, 5 M. & P. 160) is to the same effect.

If the defendants had intended to rely on the fact of the cheque having been obtained by fraud, that being a matter in confession and avoidance, it ought to have been specially pleaded.

Couch, for the defendants. The cheque in question was paid in to the bankers by the plaintiff, as agent for, and to be cashed for the use of, Lord De L'Isle. [Cress-

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(*c*) 4 M. & W. 662. See *Lucas* v. *Nockells*, 10 Bingh. 157, 3 M. & Scott, 627, 1 Clark & Fin. 438, *Brown* v. *Mallett*, ante, vol. v. p. 599.

well, J. And the cash to be held at the disposal of Lord De L'Isle?] As agent for an undisclosed principal, who, when he disclosed himself, would have a right to draw the money out. [Maule, J. Then, you will contend that the plaintiff was guilty of a breach of duty to Lord De L'Isle in not opening a separate account in his name?] There would be no breach of duty, if the plaintiff only drew upon this particular cheque for Lord De L'Isle's purposes. [Maule, J. We all think there was a total absence of original contract between Lord De L'Isle and the banking company,—which there would be if your argument were tenable. You must, if you can, shew some circumstances aliundè to excuse the non-payment **[531]** of the cheques.] The authority of the plaintiff to receive money on Lord De L'Isle's account ceased on the 11th January, 1847, when he was informed that he was no longer to deal with his lordship's property, but to confine his services to the performance of the ordinary duties of a farming-bailiff. After his authority was so determined, he improperly received this cheque from Vines & Tomlin. [Maule, J. Were not Vines & Tomlin justified in treating the plaintiff as a person authorised to receive the money? Does Lord De L'Isle adopt it as a payment?] He is not bound to do so. [Maule, J. Does he?] No. [Maule, J. Then, how can the cheque, or its proceeds, be his?] Having got possession of it by means of an imposition,—for, the court may infer that he obtained it by a tacit assertion that his agency continued,—the plaintiff could acquire no title to the cheque: *Madden* v. *Kempster* (1 Campb. 12); *Hardman* v. *Willcocks* (9 Bingh. 382, a.).

There was no necessity to plead the fraud; for, if the cheque was obtained by fraud, Lord De L'Isle had a right to interpose and say that the proceeds were money had and received by the banking company to his use. [Maule, J. Suppose Lord De L'Isle had not interposed, but the other facts could be established,—could the company have set up this defence?] Until some claim was made, they could not. [Maule, J. Does their right arise upon notice from Lord De L'Isle?] Yes. [Maule, J. Then, up to the time of notice, the plaintiff would have a good right of action?] The notice would relate back. [Maule, J. Suppose Lord De L'Isle had interposed during the trial,—would you say that his claim would afford the bankers any defence upon non assumpsit or nil debet?] A fact occurring since the commencement of the action could not be **[532]** used as a defence. [Maule, J. It might, if it had the retrospect you mention. According to the maxim "Omnis ratihabitio retro trahitur, et mandato æquiparatur," the ratihabitio must be prior to the fact done which is the subject of the mandatum. The right of Lord De L'Isle at all events could not exist until notice.] The right would exist, but the bankers would not be bound until notice. [Maule, J. The transaction clearly would be valid, until Lord De L'Isle elected to claim the proceeds. The question is, what is the effect of his notice.] It is submitted, that, under the circumstances, the proceeds of this cheque never was money had and received to the use of the plaintiff, but money had and received to the use of the person to whom it rightfully belonged. [Maule, J. The nature of the contract is evidenced by the account; and the form of that,—the mixture of items,—negatives its being an agency account.]

The second count in the second action is clearly bad: the facts do not raise the duty alleged. [Maule, J. The probability is, that the second count is not sustainable: but, if we think either count good, and sustained by the evidence, the defendants are to pay 40s.

Brown consented to abandon the second count; and he was not called upon by the court to reply as to the other.

Maule, J. It seems to me to be quite clear, that the account in question is a banking account of the ordinary kind, by the plaintiff, on his own account, with the London and County Joint-Stock Banking Company; and that it is not competent to any third party to interpose, and to say that the banking company in reality contracted with him. This is plainly evidenced by the way in which the account was kept: **[533]** it was a general account, embracing as well the plaintiff's own moneys, as moneys received by him in his capacity of agent for Lord De L'Isle, and purporting to be an account between the plaintiff and the bankers only. As between these parties, it seems to me that the cheque was the property of the plaintiff. But, at all events, after it was turned into money, the bankers were indebted to him as for money had and received to his use, or money lent, and became liable to account to him for it whenever he chose to call for it. It was perfectly competent to Lord De L'Isle to allow his agent to receive money on his account, and to deal with it as if it were his own; and the evidence shews that that was the state of things before the plaintiff was told that his authority to interfere with Lord De L'Isle's property was put an end to, and that he was to confine himself in future to giving orders to the men. It appears that he had before this, being duly authorised so to do, sold some corn to Vines & Tomlin. He might very well suppose, notwithstanding his authority as agent was to some extent recalled, that that did not prevent him from completing transactions which he had already commenced on Lord De L'Isle's account. But, assuming that the plaintiff had no authority to receive this cheque, and that he received it under a tacit assertion that he had authority; still, having got the cheque and given it to his bankers, it seems to me that it was not competent to the bankers to say that they did not receive the money on his account, because he obtained the cheque in a wrongful manner. The result of the case, in my view, is, that the money in question was, at the time it reached their hands, money lent by the plaintiff to the banking company, or money had and received by them to his use: and it would have continued so, if Lord De L'Isle had not interfered. At the utmost, Lord De L'Isle's rights accrued only after the [534] liability of the banking company to the plaintiff arose: and that would be a matter of excuse, which should have been pleaded. But, putting that out of the question, it seems to me, that the banking company, having received the money on behalf of the plaintiff, and given him credit for it, became debtors to him for the amount; and that the circumstance that the receipt of the cheque by the plaintiff might have been blameable, does not afford any answer to this action. The transaction was regular and lawful so far as the plaintiff and the bankers were concerned: it was a simple transaction of loan; and consequently I think the plaintiff is entitled to recover in the first action.

As to the second action, I am of opinion that the plaintiff must have a verdict for 40s. upon the first count, and that the defendant is entitled to a verdict on the second count.

Cresswell, J. I am of the same opinion. The account purported to be an account between the plaintiff and the banking company only: there is no pretence for saying that Lord De L'Isle had anything to do with it. It is said that the cheque of Vines & Tomlin was received by the plaintiff in defiance of an order from Lord De L'Isle not to receive it. Assume that it was: if the plaintiff had himself received the cash for that cheque, and had paid the money in to his account with the banking company, they clearly would have been responsible to him for it: and I cannot see that it makes the slightest difference, that, instead of doing so, he handed the cheque to the bankers to get cashed, they having no notice at the time they obtained the money for it, that the cheque was not the property of the plaintiff. As to the plaintiff's being unauthorised to receive this cheque, I cannot help thinking there is a good deal of doubt about that. It seems that Lord [535] De L'Isle was dissatisfied with the state of the account between himself and the plaintiff, and that Mr. Glendinning, at his request, intimated to the plaintiff that he was to deal no more with his lordship's property. It may be very questionable whether the plaintiff might not fairly have understood that as prohibiting him from making any more sales, but not from getting in money from persons to whom he had already sold corn,—especially as he does not seem to have been asked to render an account of the sales which he had already effected. The case of *Hardman* v. *Willcocks* (9 Bingh. 382 (*a*)) differs essentially from this case. There, the plaintiff had obtained possession of the goods by a fraud between him and the insolvent, and therefore could be in no better situation than the insolvent himself: the goods not being in reality the plaintiff's goods, the rights of the assignees intervening, the defendant was not bound to account to him for the proceeds of the sale.

Williams, J. I am of the same opinion. If we were to decide otherwise, I think we should be promulgating a doctrine that would be found very injurious to bankers.

As to the second action, I think the second count does not disclose a cause of action. But all difficulty as to that is removed by Mr. Brown's concession that a verdict may be entered for the defendant as to that count.

Judgment accordingly.

[536] HITCHINS v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. Feb. 16, 1850.

[Commented on, *In re Skegness and St. Leonards Tramways Company*, 1888, 41 Ch. D. 235.]

By the 65th section of the companies clauses consolidation act, 1845,—8 & 9 Vict. c. 16,—it is provided that all the money raised by the company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act, and all expenses incident thereto, and, secondly, in carrying the purposes of the act into execution:—Held, that the expenses of obtaining the special act were recoverable against the company in an action of debt.

Debt. The first count of the declaration stated, that, before and at the time of the passing and coming into operation of the Kilkenny and Great Southern and Western Railway act, 1846 (9 & 10 Vict. c. ccclx.), and before the commencing of this suit, to wit, on the 7th of August, 1846, there was due to the plaintiff a large sum, to wit, 3000l., for costs and expenses by the plaintiff, before the passing of the said act, incurred in obtaining the said act, and for expenses incident thereto, to wit, for the price and value of work before the passing of the said act done, and materials for the same provided, by the plaintiff, and for money by the plaintiff before the passing of the said act paid, laid out, and expended in and about obtaining the said act, and in and about divers other matters, things, and expenses necessarily incident thereto: that, after the passing and coming into operation of the said act, to wit, on the 18th of August, 1846, the defendants had notice of the premises, and that the said sum was so as aforesaid due to the plaintiff for costs and expenses incurred in obtaining the said act, and for expenses incident thereto: that afterwards, to wit, on the day and year last mentioned, and on divers other days and times between that day and the commencement of this suit, they, the defendants, being "The Kilkenny and Great Southern and Western Railway Company" in the said act men-[537]-tioned, by virtue of the said act, and of the powers and provisions therein contained in that behalf, raised and received divers sums of money, amounting in the whole to a large sum, to wit, 20,000l., being more than sufficient to pay and satisfy all the costs and expenses incurred in obtaining the said act, and all expenses incident thereto,—and of which said sums so raised and received by the defendants as aforesaid they the defendants, at the time of the making of the request by the plaintiff hereinafter next mentioned, had in their hands a large sum, to wit, 5000l., out of which the defendants could and might and ought to have paid and satisfied the plaintiff the said sum so due to him as aforesaid, to wit, the said sum of 3000l.: that thereupon it became and was the duty of the defendants, out of the said sums of money so raised and received by them as aforesaid, to pay to the plaintiff the said sum so due to him as aforesaid, and the defendants, after the said sums of money had been by the defendants so raised and received as aforesaid, to wit, on the 1st of July, 1847, were requested by the plaintiff to pay him the said sum so due to him as aforesaid: Yet that the defendants did not then apply, nor had they ever in any manner whatsoever applied, the said sums of money so by them raised and received as aforesaid, or any part thereof, in or towards paying or discharging the said sum so due to the plaintiff as aforesaid; and that thereby, and by reason of the non-payment of the said sum, an action had accrued, &c.

To this count the defendants demurred specially, assigning for causes,—that the said first count discloses no ground or cause of action upon which the defendants are liable to be sued, inasmuch as there is no statute which casts any duty or liability upon them, as a company, and in a corporate capacity, to pay the moneys sought to be recovered by the first count, out of the first [538] moneys coming to their hands, as alleged in the first count;—that it appears by the said first count, that no legal claim existed against any person before the passing of the said act in the first count of the declaration mentioned, in respect of the claims and causes of action in that count mentioned, inasmuch as it does not appear in and by the first count that the said work and labour therein mentioned was done or bestowed, or the said money paid, by or in consequence of any request from any one, or in any wise on the contract of the defendants, and the said act of parliament does not give the plaintiff any claim against the defendants which the plaintiff had not before against some individual;—that the said first count discloses no privity of contract between the plaintiff and the said company, and it is not shewn therein that the debts therein mentioned were contracted at the request of the defendants;—that, if the said first count is based upon any statute, such statute should have been followed, and the specific remedy therein provided should have been adopted;—that the said first count discloses (if any cause of action whatever) a common law duty, and a breach of it, for which an action on the case ought to have been brought;—that the said first count should have shewn that the works therein mentioned, and the money therein stated to have been paid by the plaintiff for the said company, were done and performed and paid respectively at the request of the said company;—and that, if the plaintiff complains of a misapplication of the funds of the company, such complaint is properly a ground for an action on the case, and not for an action of debt.

The plaintiff joined in demurrer.

Pearson, in support of the demurrer. The first count is clearly bad. It does not allege that any money was **[539]** due to the plaintiff upon any contract before the passing of the act: every word contained in the declaration may be perfectly true, and yet the plaintiff may have no cause of action against the company. The money claimed may be due from somebody other than the company. Reliance will be placed, on the part of the plaintiff, upon the 65th section of the companies clauses consolidation act, 1845,—8 & 9 Vict. c. 16,—which provides "that all the money raised by the company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act, and all expenses incident thereto, and, secondly, in carrying the purposes of the company into execution." If the plaintiff complains of any misapplication of the funds collected by the company, the proper remedy would have been by an action upon the case: *Cane* v. *Chapman* (5 Ad. & E. 647, 1 N. & P. 104); *Wilkes* v. *The Hungerford Market Company* (2 N. C. 281, 2 Scott, 446); *Wells* v. *Iggulden* (3 B. & C. 186, 5 D. & R. 13); *Moore* v. *The Metropolitan Sewage Manure Company* (3 Exch. 333, 18 Law Journ., N. S., Exch. 164). [Williams, J. How do you distinguish *Carden* v. *The General Cemetery Company* (5 N. C. 253, 7 Scott, 97) from the present case?] There, the question arose, not on demurrer to the declaration, but to the plea: and it arose under a statute which contained no clause similar to the 142nd section of the act now under consideration, which enacts, that, "in all cases where any damages, costs, or expenses, are by this or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be **[540]** ascertained and determined by two justices; and, if the amount so ascertained be not paid by the company, or other party liable to pay the same, within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid: and the justices by whom the same shall have been ordered to be paid, or either of them, on application, shall issue their or his warrant accordingly." The plaintiff's remedy was under that clause: *Crisp* v. *Bunbury* (*a*).

Unthank, contrà. This is not a case in which the justices have any jurisdiction. The act contemplates several things, amongst others, the ascertainment of the amount of the expenses, and that moneys have come to the hands of the company,—which could not be inquired into by justices. The 142nd section, therefore, has no application to a debt in respect of services rendered in relation to the formation of the company. The general point is settled by *Tilson* v. *The Warwick Gas-Light Company* (4 B. & C. 962, 7 D. & R. 376) and *Carden* v. *The General Cemetery Company* (5 N. C. 253, 7 Scott, 97). In the former, an act of parliament for incorporating a gas-light company enacted that all the costs of obtaining the act should be paid and discharged out of the moneys subscribed, in preference to all other payments; and it was held, that the attorneys who obtained the act might maintain an action of debt, founded upon the statute, for their costs. And in the latter, by the act incorporating the company, they were to apply the first moneys received under the act in discharge of expenses incurred in obtaining the act; and it was held, that the plaintiff, though a member of the **[541]** company, might sue them (in indebitatus assumpsit) for his time and trouble, and

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(*a*) 8 Bingh. 394, 1 M. & Scott, 646. And see *The King* v. *The Trustees of the Mildenhall Savings Bank*, 6 Ad. & E. 952.

money expended, in obtaining the act. The judgment of the court in the latter case is quite decisive.

MAULE, J. We all think it is impossible to distinguish this case from *Tilson* v. *The Warwick Gas-Light Company*, and *Carden* v. *The General Cemetery Company.*

Judgment for the plaintiff.

YATES AND OTHERS, Assignees of Samuel Seal, a Bankrupt, v. HOPPE. Feb. 13, 1850.

[S. C. 19 L. J. C. P. 180; 14 Jur. 372.]

Where money is paid by A. to B., to be applied by the latter pursuant to a binding contract between the parties, A. cannot revoke its destination.—A., the drawer of an accommodation bill, a few days before its maturity, handed over money to B., the acceptor, for the purpose of meeting the bill. A fiat having been issued against A. between the day of such deposit and the maturity and payment of the bill:—Held, that, the money having been handed over to B. in pursuance of a binding contract, upon a good consideration, viz. an implied contract of indemnity, the bankruptcy of B. was no revocation of A.'s authority to apply the money in satisfaction of the bill; and consequently that B.'s assignees could not recover it back from him in an action for money had and received to their use.

Assumpsit for money had and received by the defendant to the use of the plaintiffs as assignees of Samuel Seal, after the bankruptcy of Seal.

The defendant pleaded, except as to 3l. 5s. 5d., non assumpsit, and as to that sum, payment into court.

The plaintiffs joined issue on the first plea, and as to the 3l. 5s. 5d., accepted it in satisfaction pro tanto.

The cause was tried before Cresswell, J., at the first sitting in London in Michaelmas Term last. It appeared that the action was brought to recover a sum of 200l., which was handed by the bankrupt, a few days before the issuing of a fiat against him, to the defendant, **[542]** for the purpose of enabling the latter to take up a bill for 196l. 14s. 7d., which he had accepted for the bankrupt's accommodation. The examination of the defendant before the commissioner, which was put in, shewed that the bankrupt had brought the 200l. to him in bank-notes on the 15th or 16th of March, 1849, and that the defendant paid the bill when presented at its maturity on the 23rd of the same month, with the same notes which had been handed to him by the bankrupt.

The fiat against Seal was issued on the 21st of March.

The learned judge left it to the jury to say,—first, whether the payment by the bankrupt to the defendant was a voluntary payment,—secondly, whether it was made in contemplation of bankruptcy,—thirdly, whether it was intended as a payment, or whether the money was delivered to the defendant merely as a stakeholder, to hand it over to the person who might be entitled to receive it as holder of the bill.

The jury found,—first, that the payment was voluntary,—secondly, that it was not made in contemplation of bankruptcy,—thirdly, that the money was delivered to the defendant for the purpose of being kept by him until the bill arrived at maturity, and of being then paid over to the person who might present the bill.

The learned judge thereupon directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to move to set it aside, and enter a verdict for him, if the court should be of opinion that the above state of facts, and the finding of the jury thereon, entitled him to do so.

Byles, Serjt., in the same term, obtained a rule nisi accordingly.

H. Mills now shewed cause. The authority of the **[543]** defendant to apply this money in satisfaction of the bill, was revoked by the intervening bankruptcy of the drawer, and the money became from that moment the property of the assignees. Where money is placed in the hands of an agent for the purpose of being paid over, it remains until it is paid over the property of the depositor, and the authority of the agent is revocable at any time; and the acceptor of an accommodation bill has no greater authority in this respect than an ordinary agent: *Williams* v. *Everett* (14 East, 582); *Wedlake* v. *Hurley* (1 C. & J. 83); *Toovey* v. *Milne* (2 B. & Ald. 683); *Simpson*

v. *Sikes* (6 M. & Selw. 295); *Moore v. Barthrop* (1 B. & C. 5, 2 D. & R. 25). It was contended, on moving for this rule, that the money in question was paid pursuant to a contract between the bankrupt and the defendant, to apply it to the purpose for which it was left with the defendant, and therefore that the payment was irrevocable, inasmuch as it was made pursuant to an authority which was coupled with an interest. There was no evidence of any such contract, and no principle of law to warrant that position. What is the contract which the drawer of an accommodation bill enters into with the acceptor? It is an open contract of indemnity: *Reynolds* v. *Doyle* (1 M. & G. 753, 2 Scott, N. R. 45): and see the precedents in 2 Chitty on Pleading, 7th edit., p. 232, Pearson on Pleading, 134. To give a man an authority coupled with an interest, there must be a good consideration existing at the time: *Walsh* v. *Whitcomb* (2 Esp. N. P. C. 565); *Gaussen* v. *Morton* (10 B. & C. 731, 5 M. & R. 613); *Smart* v. *Sandars* (ante, vol. v. p. 895). The only exception, if it be one, is, where the authority has been assented to by all parties. In *Walker* v. *Rostron* (9 M. & W. 411), the plaintiff sold goods to B., taking his **[544]** acceptances for the price, and sent them to the defendant as B.'s agent, who consigned them to his partners abroad for sale. While the acceptances were running, the plaintiff, doubting B.'s solvency, required further security; whereupon it was agreed between the plaintiff, and B., and the defendant, that B. should write and deliver to the defendant a letter authorising him, out of any remittances he might receive against the net proceeds of the above consignments, to pay the acceptances as they became due, if not honoured by him, B., previously to the receipt of such net proceeds. The letter was accordingly delivered to the defendant, and he assented to the terms of it. Before the bills were due, B. became bankrupt, and the defendant, having received the net proceeds of the goods, refused to pay any part thereof to the plaintiff, but handed them over to B.'s assignees. It was held, that the plaintiff was entitled to recover the amount of the acceptances from the defendant, in an action for money had and received; this being an appropriation irrevocable except by the consent of all parties, for which the existing debt, although not then payable, was a good consideration. Here, however, there was no consideration: there was no debt due from the bankrupt to the defendant during the currency of the bill, but a mere possibility of contingent damage. [Williams, J. After depositing the money with the defendant, was Seal any longer under any duty to indemnify the defendant?] If the view of the contract presented by the plaintiffs be correct, clearly not. [Williams, J. What plea would you plead, to a declaration against him for not indemnifying?] A special plea setting out all the circumstances. [Talfourd, J. You say he could not plead that he had indemnified the acceptor?] Precisely so. The jury have found as a fact that the bankrupt had no intention that the defendant should **[545]** have any other interest in the money than that of an ordinary stakeholder. [Maule J. It is quite clear that the payment was not meant as a payment out and out under all circumstances; for instance, the defendant would have had no right to retain the money, if he was never called upon to pay the bill at all. The money was to be paid over on the bill being presented. The question is, whether this appropriation of the money was revocable.] The mere coincidence of authority and interest will not make that irrevocable which would otherwise have been revocable. *Humphries* v. *Wilson* (2 Stark. N. P. C. 566) is substantially this case: there, A., shortly before his bankruptcy, on being applied to by B., to whom he owed 47l., to pay the debt, gave him a bill of exchange to get it discounted, to pay his own debt, and pay over the surplus: before the bill was discounted, A. became bankrupt; and it was held that B. could not retain the bill against the assignees. So, in *Buchanan* v. *Findlay* (9 B. & C. 738, 4 M. & R. 593), A. & Co., merchants at Liverpool, remitted a bill to B. & Co. in London, with directions to get it discounted, and apply the proceeds in a particular way. B. & Co. did not get the bill discounted, but received the money when it became due. Before that time, A. & Co. had stopped payment, and desired to have the bill returned to them. A commission of bankruptcy having been issued against them before the money was received on the bill by B. & Co.,—it was held, that the latter were liable to be sued for the amount by the assignees of A. & Co., as money received to their use; and that B. & Co. could not set off a debt due to them from A. & Co. Here, the defendant was merely an agent to pay the bill: *Reay* v. *Packwood* (7 Ad. & E. 917). *Guthrie* v. *Crossley* (2 C. & P. 301) differs from the present case in some of its circumstances: there, **[546]** there was no intervening bankruptcy; and the case went off on the ground of fraudulent preference: the money was not sent for the specific purpose of meeting the bills which the defendant had accepted for the accommodation of the bankrupt, but generally "to help him over his payments." That case was followed by a case of *Abbott* v. *Lawrence*, cited in *Abbott* v. *Pomfret* (1 N. C. 462, 1 Scott, 470), which also went off on the ground of fraudulent preference. The payment here was voluntary and without consideration: there was no subsisting debt; and, if there had been, the defendant could not avail himself of mutual credit as a defence under non assumpsit: *Wood* v. *Smith* (4 M. & W. 522); Pearson on Pleading, 393. [Maule, J. That surely cannot be so.]

Byles, Serjt., in support of the rule. The jury having disposed of the question of fraudulent preference, it is now sought to get rid of the effect of their finding, by saying that the payment by the bankrupt to the defendant was revocable. It is submitted, however, that that argument cannot be sustained,—first, because the payment was made in pursuance of the bankrupt's implied undertaking to indemnify the defendant against the consequences of his acceptance: and, further, it is submitted, that, even if there were no such implied undertaking, a new contract arose upon a sufficient consideration; and that, when the defendant obtained possession of the money, he became an acceptor for value. The first ground, however, will suffice to dispose of the case. The contract into which the drawer of an accommodation bill enters with the acceptor is, that he will provide funds to meet the bill, or take it up himself, or indemnify the acceptor against the consequences of his omission to do so. The declaration in *Reynolds* v. *Doyle* (1 M. & G. 753, 2 Scott, N. R. 45) was framed upon a **[547]** breach of the contract to indemnify. That case shews that the drawer's contract is, to do that which an ordinary acceptor for value is bound to do. If the bill is made payable at a particular place, as between the drawer and the accommodation acceptor, the latter is not bound to have the money there, but the former is; and, if he has it there, it is in pursuance of his original contract. In *Young* v. *Hockley* (3 Wils. 346), the declaration, in assumpsit by an accommodation acceptor against the drawer, alleged the promise to be, that the defendant "would pay the said bill, or supply the plaintiffs with property for payment thereof, when it became due, and would indemnify and save the plaintiffs harmless against all costs, charges, and expenses which they would sustain by reason of their acceptance thereof." That is the true contract which the drawer enters into. This payment, therefore, was a payment made by the bankrupt in pursuance of his original liability: it was not even a premature payment. [Williams, J. Suppose there had been no bankruptcy, and, the bill being due, the accommodation acceptor omits to apply the money in payment of it, and afterwards is sued upon it, and pays the amount, and the costs of the action, and afterwards sues the drawer upon the contract of indemnity,—how would you set up the previous payment?] By alleging, that, before breach, a new contract was entered into between the parties, by which the drawer was discharged. [Maule, J. Probably it might be said in that case that there was no promise to indemnify.] If so, the answer would arise on non assumpsit, or a traverse of the damnification. The matter, however, has been decided. Lord Ellenborough, in *Willis* v. *Freeman* (12 East, 656, 659), says: "The case of *Wilkins* v. *Casey* (7 T. R. 711) has established that, if a **[548]** man who has funds in his hands belonging to a trader who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, to the discharge of his own acceptance, though a commission of bankruptcy may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied." [Maule, J. At all events, it is mutual credit.] In *Madden* v. *Kempster* (1 Campb. 12), it was ruled by Lord Ellenborough, that, if A. is under acceptance to B., he may retain money of B.'s in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it. In *Morse* v. *Williams* (3 Campb. 418), it was held, that, where a sum of money has been lodged with a party, to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the statute of limitations has run upon them. [Cresswell, J. I feel a difficulty in discovering a consideration for the new contract which you rely on. That matter was a good deal discussed in *Walker* v. *Rostron* (9 M. & W. 411).]

Maule, J. This is an action for money had and received, brought by the assignees of a bankrupt to recover a sum of money paid by the bankrupt to the defendant before the bankruptcy. The payment, it appears, was made voluntarily, but not in contemplation of bankruptcy, and was for the purpose of enabling the defendant to take up a bill which he had accepted for the bankrupt's accommodation. Under these circumstances, the case seems to reduce itself to the same question as if the action were brought by the bankrupt **[549]** himself. The circumstances under which the money was paid were these:—The defendant had, at the request, and for the accommodation, of the bankrupt, accepted a bill for 196l. 14s. 7d. It does not appear that there was any special agreement between the parties: but it is clear that there is an implied contract in all these cases, that the person for whose accommodation the acceptance is given shall provide for the bill, or in some way take care that the acceptor shall not be damnified by his acceptance. That is the situation in which this bankrupt stood to the defendant. The bill being within a few days of its maturity, the bankrupt handed to the defendant a sum of money, which the jury find was handed over for the express purpose of taking up the bill when it should be presented for payment. The question is, whether the bankrupt could have revoked that destination of the money, and could have called upon the defendant to return it to him. The ground upon which the defendant contends that he could not is, that the contract affords a defence: and it seems to me that it does, because the drawer of the bill, being under an obligation, not specifically to provide funds at a particular time to meet the bill, but one which might be performed in the whole or in part by doing so, adopts a reasonable and usual course for that purpose, by providing the acceptor beforehand with a sum of money to be applied to the payment of the bill. An act done in performance of a binding contract is not revocable. The acceptance of the bill was a good consideration for the contract to indemnify. An ordinary mode of indemnification is, to provide funds to meet the bill. That mode the drawer has adopted. In ordinary cases, where a man is bound to pay money on or before a given day, a payment made before the day is not revocable. This is a case of that nature: the drawer, by handing to the acceptor the sum necessary to meet the bill, discharged **[550]** himself by performance of his contract. As he could not have recalled the payment, so neither can his assignees. The money clearly never was money had and received by the defendant to their use; and, consequently, the rule to enter the verdict for the defendant must be made absolute.

Cresswell, J. The case is to be considered quite independently of the bankruptcy of Seal, the jury having found that the payment, though made voluntarily, was not made in contemplation of bankruptcy. The bankrupt could not, I apprehend, have recovered back the money. *Walker* v. *Rostron* was a totally different case from this. The acceptance of the bill by the defendant was ample consideration for the bankrupt's promise to indemnify him, in any of the ordinary modes of indemnification. The payment was, therefore, a payment made in pursuance of a promise made upon good consideration; and the bankrupt could not revoke it. His assignees, therefore, have no claim.

Williams, J. The bankrupt was under an implied contract, founded upon a good consideration, to indemnify the defendant against the consequences of his acceptance. He elected the mode of performing his contract, by providing funds to meet the bill. It was not competent to him afterwards to recall that step, and claim the money.

Talfourd, J. Lord Abinger's judgment in *Walker* v. *Rostron* in principle decides this case. By handing over the money to the defendant, the bankrupt was taking lawful means to perform his contract. He could not retrace his steps: and his assignees can be in no better situation.

Rule absolute.

End of Hilary Vacation.

[551] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco during this term, were—Wilde, C. J., Cresswell, J., Williams, J., and Talfourd, J.

MARSH v. HIGGINS AND ANOTHER. April 25, 1850.

[S. C. 19 L. J. C. P. 297.]

Clear and unambiguous words are necessary to give a retrospective effect to an act of parliament, so as to deprive a party of a vested right of action.—The 225th section of the 12 & 13 Vict. c. 106, enacts, "that no such deed or memorandum of arrangement (as mentioned in s. 224) shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months (calendar, by the interpretation clause, s. 276) from the time at which such creditor shall have had notice from such trader, of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid:"—Held, that this clause is not to be construed retrospectively, so as to deprive the creditor of his right to continue an action duly commenced by him before the act came into operation.—Held also, that an intimation to a creditor, from one of the trustees named in the deed, that such a deed had been executed by the majority of the creditors, accompanied by a request to him to sign it, was sufficient evidence of notice, without the production of the deed itself.—A plea under this section contained an averment that "three months from the time at which the plaintiff had notice from the defendants of their suspension of payment, and of the deed, expired before the commencement of this suit:"—Held (the plaintiff having pleaded over), that this must be taken to mean three calendar months.

This was an action of assumpsit by the indorsee against the acceptors of a bill of exchange.

The defendants pleaded,—first, a traverse of the indorsement by the payees to the plaintiffs. Secondly—[552] that, before the commencement of this suit, to wit, on the 1st of November, 1847, by an indenture then made between the defendants of the first part, Charles Groves and Joseph Fry of the second part, and the several other persons, creditors of, or claimants for damages against, the said parties of the first part, to wit, the defendants, who, by themselves or their agents should subscribe and affix their names and seals, or otherwise assent to the said indenture, of the third part; and which said indenture was at the time of the making thereof, and is, sealed with the respective seals of the defendants, and which said indenture has never been, and is not now, in the possession, custody, or power of the defendants, or either of them, and which they cannot produce to the court here,—reciting that the defendants were indebted to, or admitted claims for damages due to, the several parties thereto of the third part, and were then unable to pay those debts and claims; and that, at a meeting of their creditors, then recently held, it was agreed and determined that the defendants should execute an assignment of all their estate and effects for the benefit of, and receive a general release from, their creditors and claimants, provision being made, as a primary trust of such assignment, for the discharge of the claims of the three parties in the said indenture after-named, on the principle and in the manner thereinafter declared, viz. the Coalbrook-Dale Iron Company, Messrs. Blockow & Vaughan, and Mr. James Batson, having respectively [553] claims upon the said defendants for damages for non-performance of contracts made with them by the said defendants for the purchase of iron, it was agreed that the said three above-named parties in manner therein-mentioned (which is not material here to set forth); and that, in and by the said indenture, in pursuance of the said first-mentioned agreement, they, the said defendants, by the direction and on the nomination of the parties thereto of the third part, testified by their severally executing or assenting to the said indenture, did thereby assign unto the said Charles Groves and Joseph Fry, their executors, administrators, and assigns, all and singular the household goods, books, furniture, stock in trade, bonds, bills, money, and securities for money, debts, and credits, and all other the personal estate and effects belonging or owing to them the said defendants, and each of them, and in particular a certain right of action and suit against the National Exchange Company, and certain damages to be recovered against the said National Exchange Company (save and excepting out of the said assignment the necessary wearing apparel of them the said defendants respectively, and their respective families), and all the right and title, possession, property, claim and demand whatsoever, at law and in equity, of the said defendants, and of each of them, into, out of, or upon the said premises respectively, together with all books, accounts, writings, bills, notes, and receipts, papers, and vouchers touching the same, or any part thereof,—To have, receive, and take the said goods, chattels, stocks, moneys, securities for money, bonds, bills, and all and singular other the premises intended to be thereby assigned, unto the said Charles Groves and Joseph Fry, their executors, administrators, and assigns, upon certain trusts in the said indenture expressed, that is to say, upon trust to get in the estate in manner therein mentioned; and, after **[554]** making certain payments in the said indenture mentioned, then upon trust that the said trustees should apply all the moneys which should be received under or by virtue of the trusts of the said indenture, in payment of all the debts and sums of money which should be owing by the said defendants to such of their creditors (save and except the said Coalbrook-Dale Iron Company, and the said Messrs. Blockow & Vaughan, and the said James Batson,) therein named as should have executed the said indenture, rateably and in proportion to the amount of their respective debts, without priority or preference of any one or more of them over the others, or any other of them, until each of the same creditors, or his, her, or their executors or administrators, should have received the full amount of the debt due to him or her respectively; and should assign, pay, and apply the residue and surplus, if any, of the said trust estate, moneys, and premises, to the said defendants, their executors, administrators, or assigns, for their own proper use and benefit, or as they should direct: That it was thereby declared and agreed that it should be lawful for the said trustee or trustees, if they should think proper, but not otherwise, to pay to all or any creditors of the said defendants whose claims respectively should not exceed the sum of 10l., the full amount of such claims respectively, so as to supersede the necessity of their being parties to the said indenture: That, in and by the said indenture, in consideration of the assignment and covenant therein contained, and of other the premises, the said several creditors and claimants parties thereto, did thereby, for themselves severally, and for their respective heirs, executors, and administrators, covenant with the said defendants, their executors and administrators, that they, the respective covenantors, or their respective heirs, executors, administrators, or assigns, should and would not, at any **[555]** time thereafter, sue, implead, or attach the said defendants, or either of them, their, or either of their heirs, executors, or administrators, estate or effects, for or by reason or on account of any debt, damages, claim, or demand then owing, or claimed to be owing, by the said defendants to the covenantors respectively; and, in case the covenantors, or any of them, should act contrary to their covenant therein-before contained, being the said covenant, and the true intent of the said indenture, then the said defendants, their heirs, executors, or administrators, should and might plead the said indenture as a general release in bar of all or any such actions, suits, or attachments (*a*): That, before and at the time of making and entering into the said deed, the defendants were traders liable to become bankrupts under the laws then in force relating to bankrupts, and within the meaning of the statute hereinafter mentioned: That the said deed was signed and executed by or on behalf of more than six sevenths, to wit, by twelve thirteenths, in number and value of those creditors whose debts amounted to 10l. and upwards, accounting every creditor a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendants, or either of them, would appear to be the balance due to him,—that is to say, the said deed was signed and sealed by a great many respectively of the said creditors, and was signed and sealed on behalf of the residue of the said creditors, the said

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(*a*) Vide *Gibbons* v. *Vouillon*, ante, vol. viii. p. 483.

residue being, to wit, one hundred; and the said creditors by whom and on behalf of whom the said indenture was so signed and executed, thereby assented to the said indenture, and to be bound thereby: That, at the time of the making [556] and entering into the said deed, the plaintiff was a creditor of the defendants in respect of the said bill in the first count mentioned, and was a creditor of the defendants in respect of the same, within the meaning of the provisions of an act made in the session of parliament held in the 12th and 13th years of her present Majesty, intituled "An act to amend and consolidate the laws relating to bankruptcy," with respect to arrangements by deed; and the said creditors so being more than six sevenths in number and value, were also, at the time of making and entering into the said deed, more than six sevenths, within the meaning of the said provisions of the said act with respect to arrangements by deed, in number and value of those creditors of the defendants whose debts amounted to 10l. and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendants, appeared to be the balance due to him: That the said indenture was and is an arrangement by deed, and a deed of arrangement, within the meaning of the provisions of the said act with respect to arrangements by deed: That, before and at the time of making and entering into the said deed, they, the defendants, as such traders and debtors, suspended payment; and, that the plaintiff, to wit, on the 1st of November, 1847, had notice from the defendants of their said suspension, and of the said deed: That, to wit, after the said bill became due and payable, and after the said statement of account in the introductory part of this plea mentioned, three months from the time at which the plaintiff had notice from the defendants of their suspension of payment, and of the deed, expired before the commencement of this suit, and (the said deed having been at all times from the making and entering into the [557] same, and being still, in force) the said deed then became, and had thence continued, and was, effectual and obligatory in all respects on the said creditors by whom and on behalf of whom it was signed as aforesaid, and upon the plaintiff as such creditor of the defendants, and as effectual and obligatory in all respects upon and against the plaintiff as if he had duly executed and signed the same: That the trustees in the said deed named accepted the said trusts thereof, and had at all times acted in performance of the same: And that, by reason of the premises respectively, the defendants, before the commencement of this suit, became and were released from the said claims and demands of their said creditors by whom and on behalf of whom the said deed was so signed.

To the second plea, the plaintiff replied that he had no notice of the deed,—upon which issue was joined.

The writ was issued on the 2nd of July, 1849: the declaration was delivered on the 8th of August, and the defendants pleaded on the 1st of November in the same year. The statute 12 & 13 Vict. c. 106, upon which the second plea was framed, received the royal assent on the 1st of August, 1849, and came into general operation on the 11th of October, 1849.

The cause was tried before Wilde, C. J., at the sittings in London after last Hilary Term. In order to prove that the plaintiff had notice of the defendants' suspension of payment, and of the deed of arrangement mentioned in the second plea, the defendants called Joseph Fry, one of the trustees. He stated that he had two interviews with the plaintiff upon the subject,—the one on the 6th, the other on the 26th of January, 1848; that, upon both occasions, he held in his hand the document which he held in his hand at the time of giving evidence (and which was represented to be the deed of arrangement mentioned in the plea), but that [558] he did not read it to the plaintiff, but merely told him shortly what was the nature of its provisions, asking him to sign it, which he declined to do; that, at the first interview, the plaintiff admitted that he was aware that the defendants had suspended payment: and that, upon the second occasion he, the witness, told the plaintiff that the deed had been executed by nearly all the creditors.

The deed was not produced.

On the part of the plaintiff, it was submitted that there was no evidence at all to support the second issue; for, that, to constitute the conversations deposed to notice of the deed, the deed ought to have been produced; and, further, that the plea, if proved, afforded no answer to the action.

A verdict was found for the plaintiff on the first issue, and for the defendants on the second; and leave was reserved to the plaintiff to move to enter the verdict for him on the second issue, or for judgment non obstante veredicto.

Keating, on a former day in this term, moved accordingly. If the defendants meant to rely upon Fry's evidence as proof that the plaintiff had notice of the deed, the deed itself ought to have been produced, otherwise there was nothing to show that the instrument set out in the plea was the same as that which formed the subject of the alleged conversations. [Cresswell, J. Upon an issue upon notice of dishonour of a bill, is it necessary to produce the bill?] The plaintiff's admission at the most amounts to this,—I know that a deed has been prepared, and that it is executed by certain creditors: but that does not shew that the plaintiff had the notice which this act of parliament requires. The issue was upon the defendants; they were bound to put in the deed.

[559] The plea is clearly a bad plea. The 224th section of the 12th & 13th Vict. c. 106, enacts, "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be, or be liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section then provides, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for **[560]** the court, within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." The notice contemplated by this section must be a notice under, and given subsequently to, the passing of the act. The legislature clearly could not have intended to render valid a previous notice. That which is relied on as a notice here, took place on the 6th, or the 26th, of January, 1848. It could have no effect whatever until the act passed; and the act did not come into operation until the 11th of October, 1849, which was after the commencement of the action, and after issue joined. The notice clearly was intended to be prospective: consequently, the plea is bad. [Cresswell, J. The 224th section is prospective.] The 225th cannot, by any fair intendment, be so construed. The plea is also bad for not alleging that three calendar months had elapsed: three lunar months' notice would not be sufficient. [Talfourd, J. May we not read that allegation by the light afforded by the interpretation clause, section 276, which enacts that the term "month" shall mean a calendar month?] The court cannot look at the interpretation clause to construe the plea. [Cresswell, J. The objection might be good on special demurrer; but, after pleading, over we must assume that the judge properly told the jury that the notice must be a three calendar months' notice.]

Wilde, C. J. This rule is moved on two grounds,—first, to enter a verdict for the plaintiff on the second **[561]** issue, which is joined upon the question whether or not the plaintiff had notice of the deed referred to in the second plea,—secondly, to enter a verdict for the plaintiff on the second issue non obstante veredicto, on the ground that the plea, if proved, is no answer to the action.

Upon the first point, it is material to see what deed it is that the creditors are bound by, and then to consider whether or not the plaintiff had notice of that deed. By the 224th section, it appears that it is not any particular description of deed that is to be binding upon the creditors, but that a deed of any kind, "signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching the trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto," shall, subject to the conditions thereinafter mentioned, be effectual and obligatory upon all the creditors. What are those conditions? Having already provided that a deed of the nature before mentioned, and signed as above, shall bind the creditors, the legislature proceed, in section 225, to enact, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid." Now, what was the notice here? The witness says, I held the deed in my hand, [562] and told the plaintiff that it was a deed of arrangement between Messrs. Higgins and their creditors, and that it was signed by nearly all the creditors (*a*). Suppose such a notice had been served upon the plaintiff in writing, I apprehend it would have been a perfectly good notice, and would call upon the plaintiff to inform himself whether or not the deed was such a one as the statute contemplated. The plaintiff might have read the deed. I remember a case where an arbitrator had locked himself in a room in order to prevent his being served with a deed of revocation of his authority; and Lord Tenterden told the jury, that, if the arbitrator had the means of knowledge, but wilfully abstained from acquiring it, it was the same as if he had been duly served. So, here, it is the same as if the creditor had said,—"It is immaterial what the nature of the deed may be; I will not execute it." For these reasons, I am of opinion that there should be no rule upon the first point. As to the motion to enter judgment non obstante veredicto, the rule may go.

Cresswell, J. I agree with my lord that there is no ground for disturbing the finding of the jury upon the second issue. The plea sets out a deed of arrangement, with an averment that the plaintiff had notice of it. The plaintiff, by his replication, merely traverses that he had notice of the deed. The evidence is, that he had notice of a deed, which, as far as the statement shews, corresponds with that stated in the plea. There is no suggestion that there was any other deed, in order to raise any ambiguity. I therefore think the evidence sufficient. The other branch of the motion, [563] as to the validity of the plea, raises a question that is well worthy of consideration.

The rest of the court concurring, a rule nisi was granted to enter judgment non obstante veredicto on the second issue.

Byles, Serjt., and Aspland, shewed cause. The main question is, whether the 12 & 13 Vict., which came into operation after the commencement of the action, but before plea pleaded, is applicable to this case? The 224th section, upon which this plea is founded, clearly applies to past deeds: it speaks of "every deed or memorandum of arrangement now or hereafter entered into." That is the substance of the thing: the notice is a mere incident. The 226th, 227th, 228th, and 229th sections also clearly are retrospective as well as prospective. Where the provision is intended to be prospective only,—as in ss. 135, 136, 137,—the words "after the commencement of this act" are used. Section 201 is both prospective and retrospective in its language. The 211th and following sections are prospective only. There is no clause providing that the act shall be construed beneficially for creditors. [Wilde, C. J. I do not wonder at the omission; for, many judges have said that they did not know what it meant.] There can be no hardship in putting such a construction upon the act, which was intended to favour these arrangements, as will deprive a hostile creditor of the power of harassing his debtor. [Wilde, C. J. To justify us in con-

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(*a*) Quære, whether a notice that "nearly all the creditors" had signed the deed, amounted to notice that "six sevenths in number and value of those creditors whose debts amounted to 10l. and upwards" had executed it?

struing a statute to be retrospective, the words must be very explicit.] That, no doubt, is the general rule, as is laid down in *Moon* v. *Durden* (2 Exch. 22), where it is said that "the general rule, in construing recent statutes, **[564]** is, 'Nova constitutio futuris formam imponere debet, non præteritis;' but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation." Many instances might be cited, of statutes, the language of which construed grammatically would import the future only, being read retrospectively. Thus, in *Towler* v. *Chatterton* (6 Bingh. 258, 3 M. & P. 619), the 1st section of Lord Tenterden's act, 9 G. 4, c. 14,—which enacts, "that, in actions of debt, &c., no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the statute of limitations (21 Jac. 1, c. 16), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby,"—was held to have a retrospective operation. The same point had already been ruled by Lord Tenterden, in *Hilliard* v. *Lenard* (M. & M. 297), and *Ansell* v. *Ansell* (ibid. 299, n.), and by Hullock, B., in *Kirkhaugh* v. *Herbert* (Carlisle Spring Assizes, 1829). So, in *Freeman* v. *Moyes* (1 Ad. & E. 338, 3 N. & M. 883), under the 3 & 4 W. 4, c. 42, s. 31, executors were held liable to costs in actions commenced before the statute came into operation, and tried after. And see *Doe d. Payne* v. *The Bristol and Exeter Railway Company* (6 M. & W. 320).

The plea alleges that the defendants had suspended payment before the making of the deed, and that the plaintiff, to wit, on the 1st of November, 1847, had notice of the suspension, and of the deed. The day, though laid under a videlicet, being material, the videlicet may be rejected. The word "month" in the **[565]** plea must, at all events after verdict, be read with the aid of the interpretation clause, and therefore means "calendar month." Reading it with the context, even without the aid of the interpretation clause, it must be so intended: *Titus* v. *Lady Preston* (1 Stra. 652): *Lang* v. *Gale* (1 M. & Selw. 111); *Cockell* v. *Gray* (3 Brod. & B. 186, 6 J. B. Moore, 483). [Cresswell, J. All the cases on the subject are considered in *Simpson* v. *Margitson* (11 Q. B. 23).] Where the opposite party has pleaded over, and the pleading is capable of a construction which will support it, the court will give it that construction. Besides, the day is involved in the issue; and the jury have found it. It may be said, as was said in *Gibbons* v. *Vouillon* (ante, vol. viii. p. 483), that this defence might have been pleaded puis darrein continuance: but the three months since the passing of the act have now elapsed, and the court will give the right judgment on the whole record, although the prayer of the plea may be informal: *Le Bret* v. *Papillon* (4 East, 502); *Charnley* v. *Winstanley* (5 East, 266); *Allen* v. *Hopkins* (13 M. & W. 94); *Cobbett* v. *Sir George Grey* (4 Exch. 729). [Talfourd, J. The plea is bad or good at the time of pleading.] The defendants might have pleaded puis darrein continuance at nisi prius.

Keating and Winston, in support of the rule. To give a retrospective construction to an act of parliament, the court will require very clear and unambiguous words indicating an intention on the part of the legislature that a vested right of action should be thereby affected. *Moon* v. *Durden* is a strong instance of the disinclination of the courts to construe statutes retrospectively. Parke, B., there says (2 Exch. 22): "It seems a **[566]** strong thing to hold, that the legislature could have meant that a party who, under a contract made prior to the act, had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation. It is a still stronger thing to hold, that, if he has already commenced an action, with an undoubted right to recover both his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary, by being obliged to discontinue, or be non-prossed, to have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section (*a*), and holding that they

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(*a*) 8 & 9 Vict. c. 109, s. 18: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained, in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

apply to future contracts, and actions on such future contracts, only,—at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice." In *Hitchcock* v. *Way* (6 Ad. & E. 943, 2 N. & P. 72), it was expressly decided, that, where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shew a clear intention to vary the mutual relation to such parties. [Williams, J. This statute violates the general principle of construction, by applying itself to deeds already executed. The difficulty is, to say where that violation is to stop.] Reading the words of the 225th section fairly and according to their ordinary grammatical construction, they clearly import future dealings only. Many mate-**[567]**-rial words in the clause are wholly inconsistent with any other construction.

No doubt, in construing mercantile contracts, "month" may mean lunar or calendar, according to the intention of the parties, as evidenced by custom or the surrounding circumstances. But, in a record, it means primâ facie a lunar month only. [Williams, J. Upon this record, it is capable of meaning "calendar month:" and, if so, it must be assumed that the judge told the jury so. Cresswell, J. What is the object proposed to be attained by the notice? Aspland suggested that it was to give the creditor an opportunity of inquiring into the genuineness of the deed. Cresswell, J. That's a strong reason for holding the provision in question to be prospective. The creditor would have had no interest in making the inquiry before the passing of this statute.]

Wilde, C. J. The court is placed in great difficulty in dealing with this act of parliament; and we are by no means enabled to arrive at a satisfactory conclusion as to some parts of it. We must, however, enter upon the consideration of it with a due regard to the well-known general principle, that statutes are not to be held to operate retrospectively, unless they contain express words to that effect. Sometimes, no doubt, the legislature finds it expedient to give a retrospective operation to an act to a considerable extent; but then care is always taken to express that intention in clear and unambiguous language. It is plain that this act was meant to be retrospective to a limited extent,—to establish certain deeds executed before the passing of the act. It is contended that the act was meant to operate retrospectively in another respect, which is quite contrary to the ordinary practice of the legislature,—viz., to take away an action which has been **[568]** well commenced in respect of a vested right. It must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced: and we have carefully considered the act with a view to discover if it will bear such a construction as is contended for on the part of the defendants; but we are unable to arrive at any certain and satisfactory conclusion in the affirmative. Some expressions have been relied on as shewing that a retrospective operation was contemplated. But those expressions do not seem to us necessarily to bear the interpretation sought to be put upon them; for, we find the very same words used elsewhere in a sense which clearly could not be retrospective. The general rule of construction being as I have already stated, viz., that the words of an act are to be construed to be prospective only, unless the intention of the legislature to the contrary is unequivocally expressed, and there being nothing to shew that the act was intended to be retrospective with reference to the matter now in question, we must construe it as being prospective only. This action, therefore, having been well brought, and there being nothing in the act to warrant us in saying that the legislature meant to take it away, the plaintiff is entitled to the judgment of the court.

Cresswell, J. I am entirely of the same opinion. At the time this action was commenced, the plaintiff had a clear right to bring it; and it is for the defendants to make out that the statute is retrospective, for the purpose of ousting the plaintiff of that right. If there is any ambiguity in the language of the act, the defendants' argument fails. I cannot say that the statute has any such effect, though it is possible that it may have been intended to be retrospective. Construing it, **[569]** therefore, according to the general rule, we are bound to hold it to be prospective only. The words at the commencement of the 225th section which seem capable of a retrospective construction, are again used at the close of the section, where they clearly can only be construed prospectively. Two or three instances have been cited where statutes have been allowed to have a retrospective effect so as to take away a vested right of action. There is no question that such things have occurred,—whether intentionally or not, is not for us now to inquire, the language used admitting of no doubt. One of the examples referred to arose upon the 1st section of Lord Tenterden's act of 9 G. 4, c. 14, which was passed for the purpose of relieving parties from the difficulties arising from the doctrine of the revival by new promises of debts barred by the statute of limitations. The language of that provision is, that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract," &c.,—necessarily referring to the time when the judge is to determine whether the evidence tendered is sufficient or not. The court, therefore, could not escape from the inevitable conclusion that the section was intended to have a retrospective operation. The defendants in this case failing to satisfy us that the statute in question is retrospective in the manner contended for, fail to establish the validity of the plea, and, consequently, the plaintiff must have judgment.

Williams, J. I am of the same opinion. It is a general rule, in the construction of acts of parliament, that new laws are to be understood to apply to future things, and not to things past. That rule, no doubt, like every other rule of construction, will yield to a clearly expressed intention that the language used should be taken to be retrospective. In that part of **[570]** the statute now under consideration, I find no such clearly expressed intention, and therefore I feel bound to hold the act to be prospective only.

Talfourd, J. I am of the same opinion. The general rule of construction is not denied ; and it seems to me that its application to this case is sufficiently clear. "Such time," in the 225th section, means such time as a future deed or memorandum of arrangement has been duly signed by or on behalf of a majority of the creditors, and therefore must mean time future,—after the passing of the act. My Brother Byles suggests that the court may give judgment on the whole record, and that, after verdict, it will be assumed that the three months had elapsed after the passing of the act. That, however, would be an unwarrantable application of the rule of pleading. We must construe the pleadings as they are, not as they might have been. This plea being no good bar, the rule for entering judgment for the plaintiff non obstante veredicto must be made absolute.

Rule absolute.

Ellison *v.* Collingridge. April 15, 1850.

[S. C. 19 L. J. C. P. 268 ; 14 Jur. 869.]

Held, that an instrument in the following form,—"Port of London Sea, Fire, and Life Assurance Company. To the cashier. Fifty-three days after date, credit Messrs. P. & Co., or order, with the sum of 500l., claimed per 'Cleopatra,' in cash, on account of this corporation.—A. C., Managing Director,"—was properly declared on as a bill of exchange.

Assumpsit. The first count was upon a policy of assurance made by the Port of London Sea, Fire, and Life Assurance Company. The second count charged the defendant as the drawer of a bill of exchange for 500l., indorsed to the plaintiff. The third count described the same instrument as a promissory note. The fourth count was upon an account stated.

[571] The defendant pleaded non assumpsit to the first and last counts, traversed the drawing and making respectively of the bill and note in the second and third counts, and further pleaded a plea of fraud to the whole declaration.

The cause was tried before Wilde, C. J., at the sittings in Middlesex after the last term. The plaintiff put in an instrument as follows :—

"Marine Department.

"Port of London Sea, Fire, and Life Assurance Company.

"To the cashier.

"£500. "31 Cornhill, 10th September, 1849.

"Fifty-three days after date, credit Messrs. Plummer & Co., or order, with the sum of five hundred pounds, claimed per 'Cleopatra,' in cash, on account of this corporation. "Augustus Collingridge, Managing Director."

A verdict was entered for the plaintiff on the second count for 500l., subject to leave reserved to the defendant to enter a verdict for him if the court should be of opinion that the instrument in question was not a bill.

Byles, Serjt., now moved accordingly. This is not an order to pay a sum of money. It is no more than a direction by the manager of the corporation to the cashier to open a cash credit to the extent of 500l. with the persons mentioned in the document. [Wilde, C. J. What is the effect of that? Does it not mean, "pay them that amount?"] That would depend upon the other side of the account. [Wilde, C. J. This was the only transaction between the parties.] Supposing it does amount to an order to pay,—how much is to be paid? That must depend upon whether or not the **[572]** payees were debtors to the company at the maturity of the bill. If they were debtors, it would amount to an order to pay them the balance. [Cresswell, J. We cannot take into consideration any counter claim in construing this instrument.] This is, in truth, a mere order or direction from a principal to an agent. In *Russell* v. *Powell* (14 M. & W. 418), J. M., by indenture assigned to the plaintiff a ninth part of his share in the residue of the estate of T. H. deceased. By an order of the 29th of July, 1842, made in a suit in Chancery, of *Powell* v. *Norwood*, the Vice-Chancellor ordered the defendants in that suit to retain 250l., being part of the produce of J. M.'s share of the residuary estate of T. H., to be paid to such person as the now defendant and J. M. should jointly direct. It was afterwards agreed between the parties, that 50l., to be considered as part of the sum of 250l., should be paid by the defendant to the solicitors for J. M. and the plaintiff. An action having been brought to recover this sum of 50l., the plaintiff tendered in evidence the following document:—"To the executors of T. H., deceased. *Powell* v. *Norwood*. Gentlemen,—We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of 250l., being the amount directed by the order of the 29th of July last to be paid to our order.—We are, &c., J. M. December 16th, 1842." This document was signed by J. M. only, and was unstamped. It was held (Rolfe, B., dissentiente), that it was not a bill of exchange, and that it was admissible in evidence without a stamp. [Cresswell, J. Who ever heard of a negotiable right to be credited in a book? Wilde, C. J. Suppose this instrument had been accepted by the cashier, what would have been the consequence?] He would not have been liable to be called upon to pay it. **[573]** This is not unlike the case of *Jenny* v. *Herle* (1 Stra. 591), where it was held that a bill drawn payable out of a particular fund is not a bill of exchange. At the utmost, this is an order to pay out of the moneys of the corporation.

WILDE, C. J. I think this instrument is a bill of exchange. There is nothing ambiguous in its terms; nothing to be inferred but that the sum therein mentioned is to be paid. As I understand the words "credit in cash," this is an order by one person on another, to hold to the use, or at the command, of a third party, a certain sum. That means "pay the money to him." I see no ground for a rule.

CRESSWELL, J. "Credit in cash" clearly means "pay over the money." The case of *Russell* v. *Powell* differs essentially from this. There, a very special agreement was entered into: but the judgment of Rolfe, B., shews pretty strong reasons for construing the instrument to be a bill of exchange.

WILLIAMS, J. I am of the same opinion. "Credit in cash" is equivalent to "pay."

TALFOURD, J., concurred.

Rule refused.

[574] ALLEN *v.* THE SEA FIRE AND LIFE ASSURANCE COMPANY. April 18, 1850.

[S. C. 19 L. J. C. P. 305; 14 Jur. 870 (*n*). Referred to, *R.* v. *Kay*, 1870, L. R. 1 C. C. 261.]

An instrument issued by a company, completely registered pursuant to the 7 & 8 Vict. c. 110, in this form,—"Sea, Fire, Life Assurance Company. To the cashier. Thirty days after date, credit Mrs. A., or order, with the sum of 311l. 9s. 6d., claims per 'Susan King,' in cash, on account of this corporation,"—and signed by two of the directors of the company:—Held, to be a promissory note, and binding on the company, notwithstanding it might not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding upon the shareholders.

Assumpsit. The first two counts were upon a policy of assurance,—the defendants being described in the first count to be a joint-stock company completely registered, by the name of the Sea, Fire, Life Assurance Society, and to have obtained a certificate of complete registration conformably to the statute 7 & 8 Vict. c. 110, intituled "An act for the registration, incorporation, and regulation of joint-stock companies."

The third count stated that the defendants theretofore, to wit, on the 28th of October, 1849, made their promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, in the said note described as Mrs. Ann Allen, or order, the sum of 311l. 9s. 6d., thirty days after the date thereof, and that the note was unpaid, &c.

The defendants traversed the making of the note mentioned in the third count.

At the trial, before Wilde, C. J., at the last assizes at Maidstone, the plaintiff put in an instrument in the following form, bearing an 8s. 6d. stamp:—

"Marine Department.
"Sea, Fire, Life Assurance Society.
"31 Cornhill, October 20th, 1849.

"689,617. £311 9s. 6d.

"To the cashier.

"Ninety days after date, credit Mrs. Ann Allen, or order, with the sum of three hundred and eleven pounds, [575] nine shillings, and sixpence, claims per 'Susan King,' in cash, on acount of this corporation.

"A. Davis, }
"W. Ogilvie, } Directors.

"Entered, F. F. A., Accountant."

On the part of the defendants, it was submitted that this was not a promissory note at all, but a mere order for the payment of money: and that, if a promissory note, it was not drawn with the formalities required by the statute 7 & 8 Vict. c. 110, s. 45 (*a*).

(*a*) Which enacts,—"With regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon,—that, if the directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the name of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received, by or on behalf of the company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or indorsed as aforesaid, shall, immediately after the making, accepting, or indorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay, or be liable to pay, in respect of such bill or note: Provided always that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of

[576] Under the direction of his lordship, a verdict was found for the defendants upon all the issues except the third, which was found for the plaintiff; and leave was reserved to the defendants to move to enter the verdict for them on the third issue also, if the court should think either of the objections well founded.

Shee, Serjt., now moved accordingly. 1. The instrument produced at the trial was not a promissory note: it was not a note in terms necessarily for the payment of money. [Wilde, C. J. We held the other day, in *Ellison* v. *Collingridge* (ante, p. 570), that "credit in cash," without the aid of extrinsic circumstances, meant "pay."] This is quite consistent with satisfaction by set-off. [Wilde, C. J. So is a cheque.] But then it does not appear upon the face of the instrument. [Wilde, C. J. There is no mutuality between the person to whom the order is addressed and the holder: it is a direction by the employers to their clerk to pay the money.] This is more like a bill of exchange than a promissory note. It is addressed to a person who is not a member of the corporation,—to one who would have been personally liable upon it if he had accepted it. [Cresswell, J. What more is necessary to make it a promissory note? Wilde, C. J. Is not this like a party drawing upon himself? It has been held that an instrument purposely made ambiguous, may be declared on as a promissory note: *Allan* v. *Mawson* (4 Campb. 115); *Edis* v. *Bury* (6 B. & C. 433, 9 D. & R. 492, 2 Car. & P. 559): and see *Brown* v. *De Winton* (ante, vol. vi. p. 336, 6 D. & L. 62).]

[577] 2. Assuming that this was a promissory note,—it is not drawn in conformity with the company's deed of settlement, under which alone it could be drawn. The 23rd clause provides that there shall be not less than three, or more than ten, directors of the company. The 44th authorises the directors to make, accept, and indorse bills and notes, in the whole not exceeding 100,000l.: if they exceed that sum, the shareholders are not liable. [Cresswell, J. Are the shareholders charged here?] They will be, when execution comes to be issued. [Cresswell, J. It might afford an answer to a motion for leave to issue execution against a shareholder. The instrument is binding upon the company, though it may not be upon a shareholder, except to the extent of the value of his shares.] Then, the deed contains no clause impowering two directors to draw or accept. [Cresswell, J. The 45th section of the 7 & 8 Vict. c. 110, gives authority to two directors to draw: the deed was made after the passing of that act, and this is one of the very things contemplated by it.] The note should have been countersigned by the secretary or other appointed officer of the company. [Wilde, C. J. This is countersigned by the accountant.] There was no evidence that he was the appointed officer of the company.

Wilde, C. J. I think there should be no rule in this case. The first objection is, that the instrument declared on in the third count is not a promissory note. What is necessary to constitute a promissory note? These parties issue this instrument, importing that the company promise to pay. The note is addressed by the drawers to their own clerk. My Brother Shee treats the cashier as a drawer. But at the trial it was insisted for the plaintiff, that the instrument was precisely what we think it is. The company indicate that they mean to pay, by a direction to their officer to pay,—"credit **[578]** in cash," meaning, as we held in the former case, "pay"; and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential to constitute a promissory note. It is then said, that assuming it to be a promissory note, it is not made in conformity with the deed of settlement. This note, however, is issued by the company; and the action is brought against them. The restrictions in the deed cannot be prayed in aid in an action wherein the shareholders do not appear to be charged. What may be its operation as to them remains to be seen. Next it is said that the note does not purport to be signed by all the directors: but that objection is answered by the authority given by the deed, and by the 45th section of the statute, which provides, that, "if the directors of the company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the name

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exchange or promissory note shall be made, accepted, or indorsed, in manner and form aforesaid, shall and may sue and be sued thereon as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal."

of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company." There is no stipulation in the deed which is inconsistent with that. This note, therefore, is properly signed by two directors. It is next objected that the note is not countersigned by the secretary or other officer appointed by the company. How are parties to know who is an officer appointed by the company? By "countersigned," I understand that the instrument must appear to have passed under the signature of some appointed officer. Here, the accountant has authenticated this instrument by his signature. I think there is no foundation for either of the objections.

The rest of the court concurring,

Rule refused.

[579] BEAVAN *v.* COX AND ANOTHER. May 6, 1850.

Upon error coram vobis to reverse an outlawry, a verdict having been found for the plaintiff in error upon a traverse of the assignment of errors, and the time for moving for a new trial having passed,—the plaintiff is entitled to a rule absolute to reverse the outlawry, upon production of the record and postea.

Judgment in outlawry having been recovered against the plaintiff at the suit of the defendants, the former brought a writ of error coram vobis to reverse the outlawry, assigning for error, that he, the plaintiff, was, "before and at the time of awarding and issuing of the writ of exigi facias upon which the said judgment of outlawry was pronounced, and thence continually afterwards until the time of pronouncing the said judgment of outlawry, and afterwards, was in parts beyond the seas."

Prideaux,—upon an affidavit stating the above facts, and also stating that the defendants by their plea traversed the said assignment of error, that the cause was tried on the 29th of April last, when a verdict was found for the plaintiff in error, and that the habeas corpora in the cause was returnable on the 27th of April last, and that no rule for a new trial had been granted, and upon production of the record and postea,—moved to reverse the outlawry. He stated that this course had been adopted in a case of *Greville* v. *Stulz* (in Q. B., Michaelmas Term, 1847).

WILDE, C. J., after conferring with the masters, said that the rule might be absolute in the first instance.

Rule accordingly.

[580] HALLETT AND OTHERS *v.* WIGRAM AND OTHERS. April 26, 1850.

[S. C. 19 L. J. C. P. 281. Referred to, *The Daring*, 1868, L. R. 2 Ad. & E. 264. Discussed, *Walthew* v. *Mavrojani*, 1870, L. R. 5 Ex. 120. Approved, *Harrison* v. *Bank of Australasia*, 1872, L. R. 7 Ex. 49. See *Atwood* v. *Sellar*, 1879-80, 4 Q. B. D. 354; 5 Q. B. D. 293; *Svensden* v. *Wallace*, 1884-85, 13 Q. B. D. 91; 10 App. Cas. 404.]

A claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship and the rest of the cargo from an impending danger: not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea.

This was an action of assumpsit. The first count of the declaration stated that the defendants, before and at the several times hereinafter mentioned, to wit, on the 15th of March, 1847, were owners of and interested in, and in possession of, a certain ship or vessel called the "Harpooner," then being at a certain port, to wit, at Adelaide, in South Australia, and bound from thence to a certain port in the United Kingdom, to wit, to Swansea, in South Wales: that theretofore the plaintiffs, to wit, on the day and year aforesaid, at the special instance and request of the defendants, caused to be shipped and loaded in and on board of the said ship, at Adelaide aforesaid, divers goods and merchandises of them the plaintiffs, to wit, five hundred tons of copper ore, of great value, to wit, of the value of 20,000l., to be carried and conveyed in the said ship by the defendants for the plaintiffs, from Adelaide aforesaid to Swansea aforesaid, and there, to wit, at Swansea aforesaid, to be delivered by the defendants to the plaintiffs, the dangers and accidents of the seas and navigation only excepted, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf: That thereupon, afterwards, to wit, on the day and year aforesaid, the said ship set sail and proceeded on her said voyage from Adelaide aforesaid to Swansea aforesaid, with the said goods and merchandises of the plaintiffs, and certain other cargo, on board thereof, and afterwards, and while she was so proceeding on her said voyage, with the said goods and merchandises and cargo on board thereof as aforesaid, [581] to wit, on the day and year aforesaid, the said ship was, by the force and violence of ths winds and waves, and by means of stormy and tempestuous weather, in the course of such voyage, greatly damaged and injured; and thereupon, and in consequence of the said injury and damage so sustained as aforesaid, the master of the said ship did, to wit, on the day and year aforesaid, cause the said ship to, and the said ship did then, put back and sail back again to Adelaide aforesaid, to have the said injury and damage repaired; and the said injury and damage was, by the direction of the said master, to wit, on the day and year aforesaid, then and there repaired: That the costs and expenses thereby then and there incurred by the defendants as owners of the said ship as aforesaid, in and about the repairing the said damage and injury, and in and about the providing the necessary stores and victuals for the supply of the said ship, and the crew thereof, amounted in the whole to a large sum, to wit, to the sum of 10,000l.; and, because the master of the said ship had not then, and could not obtain, moneys for the repairs of the said ship, and without such moneys the said ship could not then have been repaired, and the same, and the freight to be earned by the carriage of the said goods, would then have become wholly useless and lost to the defendants, the said master did then, for the preservation of their said ship as aforesaid, and in order to enable them to earn the said freight of the said ship for the said voyage as aforesaid, and to pay the costs and expenses so incurred as aforesaid, take a large portion, to wit, three hundred tons of the said copper ore of the plaintiffs, of great value, to wit, of the value of 10,000l., so delivered to them the defendants to be carried and conveyed and delivered to the plaintiffs as aforesaid, and did then sell the same for a certain sum of money, to wit, the sum of 5000l., with which last-mentioned [582] sum of money so realised by the sale of the said copper ore as aforesaid, the costs and charges so as aforesaid incurred in and about the premises were paid, to wit, by the defendants; and the said ship afterwards, to wit, on the day and year aforesaid, so repaired, resumed her voyage, and afterwards, to wit, on the day and year aforesaid, arrived in safety at her destined port: That the defendants did then, in consideration of the premises, promise the plaintiffs that they would, on the request of the plaintiffs, pay to them, the plaintiffs, the value of the said copper ore so sold as aforesaid, and contracted to be carried, conveyed, and delivered as aforesaid, for which the same might have been sold, had the same then been delivered by the said defendants to the said plaintiffs at Swansea aforesaid: That the value of the said copper ore so sold as aforesaid, for which the same might have been sold at Swansea aforesaid, had the same then been delivered there to the plaintiffs as aforesaid, amounted to a large sum of money, to wit, the sum of 10,000l.,—of all which premises the defendants then had due notice, and were afterwards, to wit, on the 1st of June, 1848, requested by the plaintiffs to pay to them the said last-mentioned moneys, &c.

To this count the defendants pleaded, secondly,—except as to the non-payment by the defendants of the sums of 1680l. 17s. 8d. and 770l. 4s. 11d., parcels respectively of the said sum of 10,000l. for which the said copper ore so sold as in that count mentioned, might have been sold, had the same been delivered by the defendants to the plaintiffs at Swansea aforesaid, as in the said first count mentioned,—that, on the occasion of the said ship so being by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured as in the said first count mentioned, the said ship became and was, in [583] consequence of the said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, and in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the master of the said ship did so cause the said ship to sail back and put back as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said ship could be repaired or made fit to prosecute her said voyage: That the said cargo then was unloaded, and the said ship repaired, for such common benefit and advantage as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were necessary and requisite for the **[584]** completion of the said voyage, and the said costs and expenses in the first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid: That the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purposes of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship, if the said cargo could otherwise have been conveyed to the said port of delivery; and, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause or procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to the said port of delivery, to wit, to Swansea aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo,—he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and bonâ fide deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said copper ore so sold as aforesaid, amounted to a certain sum, to **[585]** wit, the sum of 1680l. 17s. 8d., and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port and place where the same was so sold as aforesaid, and then used due care and diligence and his utmost endeavours to obtain for the said port of the said copper ore so sold as aforesaid the best and highest possible price; and the said part of the said copper ore, and the said part of the said cargo so sold as aforesaid, then being a proper and convenient part to be so sold on such emergency, and being such part as could be sold with as little loss as possible: That the master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and the remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the first count mentioned, and did afterwards, to wit, on the 1st of January, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, at Swansea aforesaid, the same then being of great value, to wit, of the value of 5000l., and having been safely and securely carried and conveyed on board the said ship from Adelaide aforesaid to Swansea aforesaid: that the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid, would then have been a certain sum, to wit, the sum of 5707l. 3s. 4d., and no more; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss (exceeding the value of the said ship when so repaired as aforesaid) was incurred, to wit, to the amount of 4026l.

5s. 8d., the same being the difference between the produce of the said sale and the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, and which [586] the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4026l. 5s. 8d. was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantage of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid; and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all parties interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That the amount of such contribution to be by them, the defendants, contributed in proportion to their interest in the said ship, freight, and cargo, amounted to a certain sum, to wit, the sum of 770l. 4s. 11d., and no more: That the defendants, by reason of the premises, became and were discharged from the payment of any larger sum in respect of the said copper ore so sold as aforesaid, and the value thereof for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at Swansea aforesaid, other than and beyond the amount of the proceeds of the sale of the said copper ore so sold as aforesaid, to wit, the said sum of 1680l. 17s. 8d., and the amount of the said last-mentioned contribution, to wit, the sum of 770l. 4s. 11d., which said two sums of 1680l. 17s. 8d. and 770l. 4s. 11d. are the sums in the introductory part of this plea mentioned, and therein excepted.

Third plea, to the first count,—so far as the same relates to the non-payment by the defendants of the sum of 3342l. 17s., parcel of the value of the said [587] copper ore so sold as in that count mentioned, for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at Swansea aforesaid, as in the said first count mentioned,—that, on the occasion of the said ship so being, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured, as in the said first count mentioned, the said ship became and was, in consequence of the said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, or in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the said master of the said ship did so cause the said ship to sail back and put back, as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid, then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said [588] ship could be repaired or made fit to prosecute her said voyage; and the said cargo then was unloaded, and the said ship repaired, for such common benefit as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were requisite and necessary for the completion of the said voyage: That the said costs and expenses in the said first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid, and the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purpose of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship if the said cargo could otherwise have been conveyed to the said port of delivery: That, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause and procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to her said port of delivery, to wit, to Swansea aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo, and shipped and delivered on board the said ship, to be by the defendants, as owners **[589]** of the said ship, conveyed on board the same from Adelaide aforesaid to Swansea aforesaid, he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and bonâ fide deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said cargo, to wit, the said copper ore and other goods so sold as aforesaid, amounted to a certain sum, to wit, the sum of 2410l. 2s. 3d., and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port as aforesaid, and then used due care and diligence, and his utmost endeavours to obtain for the said part of the said cargo so sold as aforesaid the best and highest possible price, and the said part of the said cargo so sold as aforesaid then being a proper and convenient part to be so sold on such an emergency, and being such part as could be sold with as little loss as possible: That the said master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the said first count mentioned, and did afterwards, to wit, on the 1st of January, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, Swansea aforesaid, the same then being of great value, to wit, the value of 5000l., and having been safely and securely carried and conveyed on board the said ship from Adelaide aforesaid to Swansea aforesaid: That the value to the owners of the said part of the said cargo so **[590]** sold as aforesaid was, and, if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid, would then have been, a certain sum, to wit, the sum of 6541l. 3s. 1d.; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss, exceeding the value of the said ship when so repaired as aforesaid, was incurred, to wit, to the amount of 4258l. 14s. 11d., the same being the difference between the proceeds of the said sale and the value of the said part of the said cargo so sold as aforesaid, and which the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4258l. 14s. 11d. was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantage of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid: and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all persons interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That, by the usage and custom of merchants, the said defendants, as owners of the said ship, were and are liable to reimburse and make good to the owners of the said goods so sold as aforesaid, the amount in respect of the said loss to which such last-mentioned owners were and are entitled by reason of such sale: That the said defendants, as such ship-owners, so being liable to reimburse and make good the said loss, were and are, by the said usage and custom of merchants, entitled to receive the contributions to such general average: That **[591]** the amount of such contribution to be by the plaintiffs contributed, in proportion to their interest in the said copper ore and cargo, amounted to a certain large sum, to wit, the said sum of 3342l. 17s., whereof the defendants, before the commencement of this suit, to wit, on the 1st of January, 1849, had notice, and the same always had been and still remained unpaid and unsatisfied by the plaintiffs; and thereupon, by reason of the premises in that plea mentioned, and by the usage and custom of merchants, the defendants became and were before the commencement of this suit, and thence hitherto had been, and still were, entitled to deduct the last-mentioned sum of money from the said sum in the said first count alleged to be payable from the defendants to the plaintiffs, as the value of the said copper ore so sold as aforesaid, and to set off and allow the said sum of 3342l. 17s. against an equal amount of the value of the said copper ore of the plaintiffs so sold as aforesaid, and to have such equal amount liquidated and discharged: That the amount of contribution to be contributed by the plaintiffs as aforesaid, was ascertained before the commencement of this suit, to wit, on the day and year last aforesaid, and the defendants then were, and thence hitherto had been ready and willing to have the amount of the said contribution deducted from the value of the said copper ore, and that an equal amount of the value of the said copper ore should be set off and allowed against the said amount of contribution, and should be thereby liquidated and discharged,—of all which the plaintiffs then, to wit, on the day and year last aforesaid, had notice, and were then, and before the commencement of this suit, required by the defendants to make and allow such allowance, deduction, and set-off as aforesaid; and the defendants thereby, according to the usage and custom of merchants, became and were discharged from the [592] payment of the said sum of 3342l. 17s. in the introductory part of this plea mentioned, the same being equal to and equalled by the amounts of such contribution so to be by the plaintiffs contributed as aforesaid,—verification.

To these pleas, the plaintiffs demurred specially.

Sir F. Kelly (with whom was Barstow), in support of the demurrer. The facts which appear upon the record are these:—The "Harpooner" received on board at Adelaide a quantity of copper ore belonging to the plaintiffs, with which she sailed on her voyage to Swansea. In the course of the voyage, the ship sustained sea damage which compelled her to return to Adelaide. Considerable repairs being found necessary to enable the vessel to pursue her voyage, and the master being unable otherwise to raise money to effect such repairs, and being unable otherwise to forward the rest of the cargo to the port of destination, a portion of such cargo, belonging to the plaintiffs, was sold, and the vessel, being repaired, afterwards completed her voyage, and delivered the rest of the cargo at Swansea. The second plea, admitting the facts stated in the declaration, and admitting the liability of the defendants to pay the value of the goods so sold at the port of discharge, alleges that the vessel put back for the common benefit of the plaintiffs and all persons interested in the ship, freight, and cargo, and in the performance of the voyage; that the ship was repaired for such common benefit and advantage, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the ship, more, or in a greater degree, than of the owners of the cargo; that the repairs were necessary; that the costs of the repairs greatly exceeded the value of the ship when repaired (not the value of the ship and freight); [593] that the master, being unable, by bottomry, hypothecation, or otherwise, to raise money to pay for the repairs, or to get them done on credit, as a matter of urgent necessity, sold a portion of the cargo, reasonably and bonâ fide considering it to be, as in fact it was, the best that could be done for all parties concerned in the voyage, and especially for the owners of the remainder of the cargo; that the master, with the money thus obtained, repaired the ship, completed the voyage, and delivered the residue of the cargo at its destined port; that the difference between the sum realized by such sale and the price the ore so sold would have fetched at Swansea, was a loss incurred for the common benefit, and was by the usage and custom of merchants the subject of general average contribution by and amongst the parties interested in the ship and cargo, and the completion of the voyage, and in the freight to be therein earned by the ship, in proportion to their respective interests. The allegation is, that the costs of repairing the ship at Adelaide exceeded the value of the ship when repaired,—not the value of the ship and freight. This is in truth an attempt to convert a sale of part of the cargo into a jettison. The plaintiffs are clearly entitled to the value which the copper would have realized if it had been delivered according to the bills of lading: *Alers* v. *Tobin* (cited in Abbott on Shipping, 8th ed. 371, 372); *Brandt* v. *Bowlby* (2 B. & Ad. 792). This is a claim for general average.

The circumstances disclosed upon the record clearly afford no foundation for such a claim. [Wilde, C. J. Would bottomry interest be general average?] Certainly not. If there could be a doubt upon the subject, it is removed by the recent case of *Duncan* v. *Benson* (1 Exch. 537). The question is glanced at in *Powell* v. *Gudgeon* (5 M. & Selw. 431); but it was ex-[594]-pressly decided in *Power* v. *Whitmore* (4 M. & Selw. 141). In this latter case, the wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there, on account of adverse winds and tempests; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded. Lord Ellenborough there said "that general average must lay its foundation in a sacrifice of part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience; and the damage incurred was by the violence of the wind and weather." And his lordship explained and modified a doctrine which had been imputed to him in the report of a former case of *Plummer* v. *Wildman* (3 M. & Selw. 482). Is the case at all varied by the fact that the repairs exceeded the value of the ship, and that the benefit was mutual? If a ship puts back damaged, the master must determine whether he will repair her or not. It may be that it is not his duty to repair, where the cost of repair will exceed the value of the ship and freight when the repairs are executed: but, if he does in fact repair her, he does so as the agent, and upon the sole responsibility, of the owners. That is settled beyond all doubt. The only case on which any doubt could arise, is that of *The Gratitudine* (3 Rob. Adm. Rep. 257). But, when the particular circumstances of that case are looked at, it will be found not to be [595] inconsistent with the other authorities. It is thus that that case is explained by the court of Exchequer in *Duncan* v. *Benson*, confirmed by the Exchequer Chamber in *Benson* v. *Duncan* (3 Exch. 644). In that case, the court of Exchequer say: (1 Exch. 555): "It is the primary duty of the master, acting for the owner, to do his best to convey the cargo to its place of destination in the same ship, and, in case of damage, to repair it. 'He ought to look out for the means of accomplishing his own and his employer's contract; that is, the safe conveyance of the property intrusted to his care, and in the same vehicle which he had contracted to furnish:' *The Gratitudine*. The owner of the goods is under no obligation to contribute to any expenses, except such as constitute a general average, and that of the repairs in this particular case does not fall under that description." Every circumstance that exists in this case existed there; and there was this further circumstance in that case, which does not occur here, viz. that the expense of repairs exceeded the value of the ship and cargo, when repaired: and still the court held that it was not a case of general average. The judgment proceeds: "To accomplish the object of repairing the vessel, the master is authorised to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale: *Richardson* v. *Nourse* (3 B. & Ald. 237), and in this case the shipper may sue the ship-owner: or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to [596] recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the ship-owner on his account, and for his use, to enable him to do his duty by repairing the vessel; and in all the ship-owner must repay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case." [Wilde, C. J. If the goods had been hypothecated here, instead of sold, that case would have been precisely this.] It would. It is unnecessary to notice the special grounds of demurrer. The pleas are clearly bad in substance.

Channell, Serjt. (with whom was Rew), contrà. The decision in *Duncan* v. *Benson* does not affect this case to the extent that has been supposed. Since the case of *The Gratitudine*, it had been imagined, that, where a bonâ fide necessity existed, the master, in selling the goods, acted as the agent of the owner of the goods, and not as the agent of the ship-owner. What *Duncan* v. *Benson* decided was in truth this,—that, where the master, under a justifiable necessity, sells goods, or pledges or hypothecates them, he does so as the agent of the owner of the ship, and not as agent of the owner of the goods, except so far as is necessary to give title to the vendee or pawnee. No point was made there as to whether the case was one of general average. It must be conceded that the shipper is entitled to claim the value of the goods at the port of delivery: that seems to be settled by *Richardson* v. *Nourse* (3 B. & Ald. 237). But the sale having taken place under circumstances of urgent necessity, and for the benefit of all parties concerned, it is properly a subject of general average. The principle on which general average rests is thus laid down in Abbott on Ship-**[597]**-ping (8th edit. p. 498): "We have seen, in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel be disabled by the perils of the sea, from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, and that no other vessel can be obtained, he is at liberty to sell part of the goods intrusted to him, to enable him, by repairing his ship, to carry the remainder to their destination. Goods thus sacrificed for the benefit of the owners of the rest of the cargo, seem to have been considered by Lord Stowell, in the case of *The Gratitudine*, and have been considered in other cases, to be the proper subject of a general average (*b*). The motive of the sale, in the case supposed, is no other than the motive for jettison. It is the same thing to the merchant whose goods are taken from his control, whether they are sold or thrown into the sea. In either case, it is a sacrifice submitted to by him for the benefit of all, and which ought therefore to be made good by general contribution." The law is similarly laid down in 2 Arnould on Insurance, p. 891, where it is said, that "when such a sale is clearly made out to have been for the general benefit, it entitles the owner of the goods so sold to claim a general average contribution in respect of the loss he has sustained by the transaction, just as though the goods had been jettisoned" (*c*). The like is stated in Benecke's Principles of Indemnity, p. 271. That the master is justified in selling a portion of the cargo for the repairs of the ship in a foreign port, in case of urgent necessity, is **[598]** conceded in *Campbell* v. *Thompson* (1 Stark. N. P. C. 490). In *Plummer* v. *Wildman* (3 M. & Selw. 482), where a ship, in the course of her voyage, was ran foul of by another ship, and damaged, and the captain was in consequence obliged to cut away part of the rigging, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea,—it was held, that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, and of unloading the goods for the purpose of making the repairs, were a general average. And Lord Ellenborough said: "If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment." That doctrine is certainly somewhat modified by the subsequent case of *Power* v. *Whitmore* (4 M. & Selw. 141). A sale under circumstances like those in this case was held, in the case of *La Constancia* (2 W. Rob. Adm. Rep. 487), to constitute general average. In the case of *The Packet* (3 Mason's Rep. (American), 255), it was held, that, if the property of a shipper be taken and sold for the ship's necessities, and to enable her to perform the voyage, the party has a right of contribution over against the other shippers, and his remedy is not confined to the ship-owner. Mr. Justice Story, in an **[599]** elaborate judgment delivered in that case, says: "In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison; for, the owner is deprived of his property for the common good; and

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(*b*) Citing *Hobson* v. *Wilson*, 3 Campb. 480, *Richardson* v. *Nourse*, 3 B. & Ald. 237.

(*c*) Kent's Comm. vol. iii. p. 342 (*b*), edit. 1844.

to him it must be immaterial whether the loss be by a sacrifice at sea or on shore. In the case of *The Gratitudine* (3 Rob. Adm. Cas. 260), Lord Stowell manifestly treated it as a case of contribution. His language is, 'All must finally contribute in the case of an actual sale of a part;' and then, adverting to the case of bottomry of the whole, which he considered as equivalent to a sale of a part, he added, 'All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.' This opinion is again intimated in *The Hoffnung* (6 Rob. Adm. Cas. 383), although the facts of that case did not require its application. The same doctrine is supported by Emerigon (Emerigon on Maritime Laws, ch. iv. § 9, ch. xii. § 4), who expressly holds that the owner of the goods sold has a right of contribution against the owners of the goods saved, whatever may, in the event of a successful voyage, be the ultimate right of recovery over against the owner of the ship. There is also no inconsiderable weight of authority in its favour from other maritime sources" (*d*). That the sale here was not for the exclusive benefit of the ship-owners, is clear from the **[600]** statement that there were no other means of carrying the residue of the cargo to its destination.

Sir F. Kelly was heard in reply.

Wilde, C. J. The question presented for our decision in this case is undoubtedly one of considerable importance in its consequences, though it may be doubted whether it be one of much difficulty. The plaintiffs, who had shipped certain copper ore on board the defendants' vessel at Adelaide, to be conveyed to Swansea, bring this action to recover damages for the sale of a portion of the ore at Adelaide, claiming what it would have fetched at the port of delivery—Swansea. The defendants, in their pleas, set out in detail the circumstances under which the sale took place, and, admitting the plaintiffs' right to the proceeds at the port of sale, insist that the rest is in the nature of general average. The pleas, in substance, state, that, after the vessel, with the cargo in question, and other goods on board belonging to other persons, had sailed from Adelaide, she encountered a storm and sustained damage, and it became necessary for the preservation of the ship and cargo, and to enable her to complete the voyage, that she should put back for repair; that she accordingly did put back, and was repaired for the common benefit and advantage of the owners of the ship and cargo; that the costs of the repairs exceeded the value of the ship when repaired, and ought not and would not have been incurred if the cargo could otherwise have been conveyed to the port of delivery; that the master, being unable otherwise to raise money to pay for the repairs, necessarily sold a portion of the copper, in order to enable him to do the repairs, and convey the remainder to Swansea; that the ship sailed, and the residue of the ore was duly delivered at **[601]** Swansea; that the loss on the sale,—the difference between the proceeds of the sale at Adelaide and the value of the ore to plaintiffs if it had been conveyed to the port of delivery,—exceeded the value of the ship when repaired, and was incurred for the common benefit and advantage of the owners of ship and cargo; and that the loss so incurred was by the usage and custom of merchants the subject of a general average contribution between and amongst all parties interested in the ship, freight, and cargo, and in the completion of the voyage; and that the defendants were not liable to contribute to the loss beyond the amount of the proceeds of the sale, and the amount of general average payable by them in respect of their interest in the ship and freight. It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination, that the pleas shew that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent. The pleas allege that the cargo could not be conveyed to its port of delivery by any other ship: but it appears both from the declaration and the pleas, that the cargo consisted of other goods besides those of the plaintiffs; and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This, therefore, is the case of ordinary sea damage, which the ship-owner must repair at his own

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(*d*) Stevens on Average, pp. 19, 24, 28, 29; Weskett, General Averages, pp. 252, 256, 259, art. 16; Consolato del Mare, ch. 104, 105; Abbott on Shipping, part iii. ch. viii. §§ 5, 8.

expense. The claim for general average arises where a part of a shipper's goods is sold or destroyed for the purpose of relieving the rest from some impending peril. For instance, in the case of goods thrown overboard to lighten a ship in distress. So, the cutting away a mast, or otherwise damaging the ship, in order to **[602]** enable her to escape the danger. In those cases, the loss or damage being incurred for the purpose of insuring the safety of the rest of the cargo, or preventing the ship from going to the bottom, it is but reasonable that the expense should be sustained by those for whose benefit it is incurred, in proportion to their several interests. But how is that analogous to this case? The passage cited from Abbott on Shipping, 8th edit. p. 478, is, I think, adverse to the claim of the plaintiffs. "Not only," says Lord Tenterden, "may the loss of goods become the subject of general contribution, but also, in some cases, the expense incurred in relation to them. Thus, where a ship went into port in distress, and wanting repairs, it became necessary to take out the cargo; and, there being no warehouses at hand, it was put on board other vessels: Lord Stowell said, that, as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo, as well as for its own repair, the expense incurred by it must be considered as general average." The cases the learned author cites for this position, are, *The Copenhagen* (1 Rob. Adm. Rep. 289), *Da Costa* v. *Newnham* (2 T. R. 407), and *The Gratitudine* (3 Rob. Adm. Rep. 257). On referring to *Da Costa* v. *Newnham*, I find it laid down, that, where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. But it has since been determined otherwise. The learned author then goes on,—"Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her **[603]** to prosecute and complete her voyage, it has been held that the expense of unloading, warehousing, and reshipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage." The reason there assigned might be applicable to the case the author had in his mind,—*Plummer* v. *Wildman* (3 M. & Selw. 482); but, as a general proposition, it is too large; it would throw upon the shipper much of the expense which properly belongs to the ship-owner. In that case, there were undoubtedly some expressions of Lord Ellenborough which would seem to justify the passage: but, in the subsequent case of *Power* v. *Whitmore* (4 M. & Selw. 141), his lordship explains that that decision proceeded upon the ground that the master "was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed." The expressions, therefore, in *Plummer* v. *Wildman* are repudiated and explained away. The result of these cases is thus summed up in Abbott on Shipping, p. 497,—"It seems to result from these decisions, that, if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port-charges, wages, and provisions during the stay, are to be considered as general average; but, if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the ship-owner, 'to keep his vessel tight, staunch, and strong,' during the voyage for which she is hired." In the following page, we find this passage,—"We have seen, **[604]** in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel is disabled by the perils of the sea from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, and that no other vessel can be obtained, he is at liberty to sell part of the goods intrusted to him, to enable him, by repairing his ship, to carry the remainder to their destination. Goods thus sacrificed for the benefit of the owners of the rest of the cargo, seem to have been considered by Lord Stowell, in the case of *The Gratitudine* (3 Rob. Adm. Cas. 257), and have been considered in other cases, to be the proper subject of a general average. The motive of the sale, in the case supposed, is no other than the motive for jettison. It is the same thing to the merchant whose goods are taken from his control, whether they are sold or thrown into the sea. In either case, it is a sacrifice submitted to by him for the benefit of all, and which ought, therefore, to be made good by general contribution." It seems to me that the fair import of what Lord Tenterden lays down, is, to exclude from general average damage like this. Here, the ship had returned to port. There was no immediately impending peril. It is true that the cargo could not have been carried to its destination by the particular ship, unless she were repaired. We had recently a case in this court, where it appeared that the vessel might have been sufficiently repaired so as to bring home about half her cargo, without absorbing the whole value of the ship and freight, when repaired,—and it was held not to be a case of total loss (*b*). In the present case, **[605]** although it is stated that the cost of the repairs would exceed the value of the ship when repaired, it does not appear that they would have exceeded the value of the ship and freight. *Duncan* v. *Benson* (1 Exch. 537), seems to me to go far towards deciding this case. There, the master of a ship damaged by perils of the seas, hypothecated at a foreign port, by one bottomry-bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realised less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the court of Admiralty by the obligee of the bond: and it was held that the plaintiff might maintain an action against the owner of the ship, on an implied promise to indemnify. One cannot help thinking that the claim for general average, if well founded, would not have escaped the counsel who argued that case. At all events the court considered it; for, in giving judgment, Pollock, C. B., says: "The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average, and that of the repairs in this particular case does not fall under that description" (1 Exch. 555). The principle of that case applies very strongly here. When one considers how often ships have been hypothecated in foreign ports, in order to enable the master to bring them home, it is singular that it never should have been considered that bottomry interest could be made the subject of general average. I cannot think it could have been overlooked. I therefore think that the sale of part of the cargo under the circumstances stated upon this record, does not give any right to the owners to claim general average. Without, therefore, advert-**[606]**-ing to the special grounds of demurrer, I think the pleas are bad, and the declaration good; and therefore the plaintiffs are entitled to our judgment.

Cresswell, J. I also am of opinion that the plaintiff is entitled to the judgment of the court upon this record. The first question arises upon the declaration. My Brother Channell did not struggle much to shew that the declaration did not disclose a good cause of action. It having been settled as a rule of law, that the master may under certain circumstances be justified by urgent necessity in selling a portion of the cargo, upon the terms of the owner's being paid the value of the part so sold at the port of discharge, I think the law implies a promise to the effect stated in this declaration. I also think that the two pleas demurred to, which are founded upon the claim to general average, are bad; no legal claim to average contribution arising upon the facts disclosed on this record. There has been no such loss as becomes the subject of general average. Damage done to the ship by stormy and tempestuous weather never yet has been held to be the subject of general average. The pleas adopt the description of the damage in the declaration. They then go on to say, that, in consequence of such damage, it became expedient and necessary for the vessel to put back to Adelaide. Could it be said at that time that there was an average loss? The only instance where this has been supposed to be so, prior to the case of *Plummer* v. *Wildman*, is, in the passage in Beawes's Lex Mercatoria (page 245), cited by Buller, J., in *Da Costa* v. *Newnham*, where it is said that "the charges of unlading a ship, to get her into a river or port, ought not to be brought into general average, but when occasioned by an indispensable necessity to prevent the loss of ship and cargo; as, **[607]** when a ship is forced by a storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; in which case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel, to the day of her departure from it, with all the charges of unlading and relading, anchorage, pilotage, and every other due and expense occasioned by this necessity." But there was no authority in the

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(*b*) *Moss* v. *Smith*, ante, p. 94.

English law, that I am aware of, until the case of *Plummer* v. *Wildman*, which undoubtedly does go to that extent. But Lord Ellenborough was in the next case that occurred anxious to protect himself from being thought to have intended to lay down the principle so largely: he qualifies and explains that case, in *Power* v. *Whitmore*, where he states the rule exactly according to what has always been, and still is, understood to be the law as to general average. And Lord Tenterden never meant to lay down the law larger than that. He refers, in Abbott, 8th ed. p. 475, to the Rhodian laws. "The rule of the Rhodian laws," he says, "is this: 'If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all.' The goods must be thrown overboard; the mind and agency of man must be employed; if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard to lighten the ship; if they are cast overboard by the wanton caprice of the crew or the passengers, they, or the master and owners for them, must make good the loss. The goods must be thrown overboard for the sake of all; not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the [608] fault of those who had shipped or received the goods; but because, at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure that may facilitate the motion or passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure may be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all. But, if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss." "From the rule thus established by the Rhodians, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if, to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, and into which it cannot enter without taking out a part of her cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods [609] for the general benefit, must be repaired by general contribution." That is, where part of the cargo is sacrificed for the purpose of lightening the ship, in order to get her into a port of safety. The learned author then speaks of the decision of Lord Stowell, in the case of *The Gratitudine*; and he goes on (page 478),—"Thus, if it be necessary to unload the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expense of unlading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion uf the voyage." For this he refers,—and evidently with an expression of doubt,—to *Plummer* v. *Wildman*, which, as before observed, was afterwards explained by Lord Ellenborough himself. I never heard of general average of the nature disclosed by these pleas.

Williams, J. I am of the same opinion. It is important to bear in mind the principle upon which general average is grounded; and that is, that it would be unjust that the goods of one should be sacrificed for the benefit of all, and that one alone should suffer for the common safety. These pleas do not by any means shew that the copper in question was sold for the general benefit of all: their foundation, therefore, wholly fails.

Talfourd, J., concurred.

Judgment for the plaintiffs.

[610] LEWIS *v.* SMITH AND BROOKFIELD, Survivors, &c. May 7, 1850.

[S. C. 19 L. J. C. P. 278.]

In consideration of A.'s having consented and agreed with B. to allow his (A.'s) name to be placed on the list of the provisional committee of a projected railway company, and to take certain shares therein, and to pay deposits thereon, B. undertook and promised "to indemnify A. from all personal responsibility, and to hold him harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying the company, applying for an act of parliament, or anything relating thereto." C., an advertising agent, afterwards unsuccessfully sued A. in the Exchequer, for moneys paid for the insertion of advertisements in divers newspapers at the request of the secretary of the company:—Held, that the extra costs incurred by A. in the defence of that action were not costs, charges, and expenses incurred in and about the formation of the company, within the meaning of the indemnity.

This was an action of assumpsit. The declaration stated, that, before and at the time of the making of the promise thereinafter mentioned, of the defendants and William Witham, and in the lifetime of the said William Witham, and before the commencement of this action, a certain company was in the course of formation, that is to say, a company or association of persons called and known by the name of "The Central Kent Railway Company," and thereupon, before the commencement of this suit, to wit, on the 19th of October, 1845, in consideration that the plaintiff, at the request of the defendants and of the said William Witham, had, to wit, then consented and agreed with the defendants and the said William Witham to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said company, and also then agreed with the defendants and the said William Witham to take divers, to wit, fifty shares in the said company, and to pay the deposits on the said shares, subject to any arrangement to be thereafter made respecting the application of that and other deposits, upon the terms and understanding of the defendants' and the said William Witham's then undertaking, and promising him, the plaintiff, to indemnify him, the **[611]** plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless from and against all costs, charges, and expenses that then had been, or might thereafter be, incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto, they, the defendants and the said William Witham, then undertook, and promised the plaintiff, to indemnify him, the plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto: that, by reason and in consequence of the said consent and agreement so made as aforesaid, the name of him, the plaintiff, was, to wit, on the day and year aforesaid, placed on the list of the provisional committee of the said company; and that divers, to wit, ten thousand, advertisements of and relating to the said company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times before the making of the said promise of the defendants and the said William Witham; and that divers, to wit, ten thousand, other advertisements of and relating to the said company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times after the making of the said promise, and before the commencing the suit thereinafter mentioned, to wit, of one George Reynell; and that the said several advertisements had been and were so published, made, and inserted by the said George Reynell, and had been and were so published, made, and inserted in and about **[612]** the formation of the said company; and that the costs and charges of the said George Reynell for and on account of the said advertisements so published, made, and inserted, amounted to a large sum, to wit, 700l.; and the same costs and charges were incurred in and about the said formation of the said company, and the carrying out the same company; and that, thereupon, the said costs and charges remaining and being unpaid, the said George Reynell, after the making of the said promise, and after the said advertisements had been so published, made, and inserted as aforesaid, to wit, on the 16th of March, 1846, commenced and prosecuted a certain action in Her Majesty's court of Exchequer of Pleas at Westminster, in the county of Middlesex, to wit, an action of debt, against the plaintiff, to recover against and from the plaintiff the said costs and charges of him the said George Reynell; and that the said action was commenced and prosecuted against the now plaintiff as aforesaid, for and by reason and in consequence of his, the plaintiff's, having consented and agreed to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said company as aforesaid, and of his said name being so placed as aforesaid (*a*); and that, although the defendants and the said William Witham, to wit, on the day and year last aforesaid, had notice of the premises, the defendants and the said William Witham, not regarding their said promise, did not nor would hold the plaintiff harmless from and against the said costs and charges so incurred as aforesaid; and that, by reason and in consequence thereof, the plaintiff was obliged to expend, and did expend, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, divers sums of money, amounting in the whole to **[613]** a large sum, to wit, 2000l., in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the prosecution of a suit in Her Majesty's High Court of Chancery against the said George Reynell, William Henry Smith, William Witham, and Charles Austin Brookfield, rendered necessary and expedient by and by reason of the said action of the said George Reynell, which said sum, so expended as aforesaid, still remained wholly lost to the plaintiff; and was also, on the said days and times, forced to become liable, and did become and still remained liable, to pay divers other sums of money, amounting in the whole to a further large sum, to wit, 2000l., in and about and in relation to the said action and suit: And, for assigning a further breach of the said promise of the defendants and the said William Witham, the plaintiff said, that, although he, the plaintiff, was, before the commencement of this suit, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, obliged to expend, and did expend, divers sums of money, amounting in the whole to a large sum, to wit, 2000l., in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the said suit, and the prosecution thereof,—of all which premises the defendants and the said William Witham in his life-time, to wit, on the 1st of March, 1848, had notice; yet the defendants and the said William Witham, further disregarding their said promise, did not nor would indemnify him, the plaintiff, from all personal responsibility from and against the said costs and charges so incurred as aforesaid, but neglected so to do, and, by reason and in consequence thereof, the plaintiff had lost and been deprived of the said sums so expended as aforesaid: To the damage, &c.

Special demurrer, assigning for causes, amongst **[614]** others, that the consideration for the promise in the declaration mentioned, is so stated as to render it doubtful whether the same were executed or executory;—that the said consideration is stated to have been an executed, and not an executory consideration, and yet it does not appear that the same had been so executed at the request of the defendants and the said William Witham;—that the consideration stated is insufficient in law to support the promise alleged, inasmuch as the plaintiff's having agreed to allow his name to be placed on the provisional committee, and to take shares in the said company as therein alleged, can form no sufficient consideration for a promise to hold the plaintiff harmless from and against all costs, charges, and expenses which had been or might be thereafter incurred in or about the formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto;—that it is not stated or alleged, nor doth it appear by the said declaration, that the plaintiff ever allowed his name to be placed on the list of provisional committee of the said company;—that the recital of the plaintiff's having consented and agreed to allow his name to be so placed on the said list, is insufficient in that behalf, and that such allowance ought to have been positively and directly averred, with certainty of time, and other particularity;—that it is consistent

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(*a*) See *Reynell* v. *Lewis*, 15 M. & W. 517.

with the said declaration, that his name was so placed on the said list adversely to, and without the licence, consent, or allowance of the plaintiff;—that it is not stated or alleged, nor doth it appear, that the plaintiff ever took shares in the said company, or paid the deposit thereon;—that it is not stated or alleged, nor doth it appear with sufficient or any certainty, that the said advertisements, were reasonable, proper, or necessary advertisements, or that the same were inserted by the said company, or any person connected **[615]** therewith, or otherwise within the terms of the said promise;—that, as regards such as had been inserted before the making of the said promise of the defendants and the said William Witham, the declaration discloses no liability in the plaintiff to pay for the same, or in the defendants to indemnify him from the costs of the action in respect thereof;—that it does not appear that the plaintiff, the company, or any other person connected therewith, ever incurred any responsibility in respect of the said advertisements;—that it is not stated or alleged, nor doth it appear that the said George Reynell ever had any cause of action against the plaintiff in respect thereof;—that, the promise of the defendants being merely to indemnify the plaintiff from personal responsibility, and to hold him harmless from and against costs, charges, and expenses incurred in or about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto, the same does not extend to the costs, charges, and expenses in the said breaches in the declaration mentioned;—that the allegation that the action was commenced and prosecuted against the plaintiff for and by reason and in consequence of his having consented and agreed to allow his name to be placed on the lists of the provisional committee as aforesaid, is unintelligible and absurd, it being nowhere stated in the declaration that he had consented or agreed; and that, even if he had done so, still the same would not have rendered him liable to the said action, or been any legal reason or ground for the bringing of the said action against the plaintiff;—that the costs of the said action and suit, or the defence of him, the plaintiff, are not within the terms of the said promise;—that the said promise of the defendants must receive a reasonable construction, and cannot extend to all such costs, charges, and expenses as the plaintiff or **[616]** any other person may wantonly or maliciously incur in advertisements, or defending actions, or bringing suits, and yet the declaration discloses nothing to shew that the said advertisements, action, and suit, costs, and charges were not so incurred.

The plaintiff joined in demurrer.

Crompton, in support of the demurrer. The indemnity declared upon is applicable only to claims rightfully made against the plaintiff, and does not extend to any actions which might be wrongfully brought, for which the law already provides a sufficient remedy. In Comyns's Digest, Condition (I.), it is said: "If a condition be, to save harmless from all actions which may arise upon the releasing of D. out of execution, he ought to indemnify him from an action upon his promise not to release. But, if a condition be, to save harmless from all things contained in an indenture, he is not bound to indemnify from a collateral thing; as, from an obligation in which he is bound to perform the covenants in the same indenture. Nor from actions in which he has a lawful defence without the obligor (citing 1 Rol. 432, l. 42). So, a covenant to indemnify from all rents payable to the lessor is not broken, if the rent be in arrear; or if an illegal distress be taken for the rent." So, in Sheppard's Touchstone, p. 390, it is laid down, that, "If the condition be, that the obligor shall save the obligee harmless from such a debt, for which the obligee is surety for the obligor, and the [second] obligee cometh at the time and to the place when and where the money for which he is engaged is to be paid, and, finding nobody ready to pay the money, he doth pay it himself, to save the forfeiture of the obligation; hereby the condition to save harmless is broken, and the obligation forfeit. And therefore much more if the obligee be sued, arrested, outlawed, or taken in **[617]** execution for the debt of the principal: so also, if the obligee be put in fear of arrest for the debt of the principal, and therefore dare not go about his business; by this the condition is broken. But, if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise; or, if the bond in which he is bound be against law, and void, and he suffer himself to be unjustly vexed thereupon, it seems there is no breach of the condition of the bond to save harmless." The rule is analogous to that of a covenant for title, as to which the cases are collected in the notes to *Wotton* v. *Hele* (2 Wms. Saund. 177 a. (8)), where it is said: "The law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose; for, the law itself doth defend every man against wrong, and therefore, though one warrants land to another expressly, yet he does not defend against tortious entries." "But (ib. note (*c*)), where a person covenants to save harmless from all acts of a particular person, there he is bound to indemnify against the acts of that person, whether by title or not:" *Foster* v. *Mapes* (Cro. Eliz. 212); *Chaplain* v. *Southgate* (10 Mod. 384); Cruise Dig. Deed, c. 24, § 55; *Nash* v. *Palmer* (5 M. & Selw. 374). In this latter case, Lord Ellenborough says: "The rule has been correctly stated, that, where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world: but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has purposely restrained it within its reasonable import, **[618]** that is, to lawful title. It is, however, different where the individual is named; for, then, the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance by him, whether by lawful title or otherwise." Here, the plaintiff has not incurred any responsibility for or in respect of any costs and expenses incurred in and about the formation of the company, or relating thereto, in the words of this covenant. [Cresswell, J. He has not been made personally liable to any such thing: Reynell tried to impose such a liability upon him, but did not succeed.] The declaration does not shew that the plaintiff ever took any shares in the railway. [Cresswell, J. Was not the agreement to do so enough for this purpose?] Scarcely.

Cowling (with whom was Channell, Serjt.), contrà. The question is, what was the meaning of the parties, and what the extent of the indemnity intended? The defendant undertakes to indemnify the plaintiff from all personal responsibility, and "to hold him harmless" from and against all costs, &c., that then had been, or might thereafter be incurred in and about the formation of the company, &c. The words are larger than those of an ordinary covenant to indemnify. In *Fowle* v. *Welsh* (1 B. & C. 29, 2 D. & R. 33), the defendant covenanted to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both at law and in equity, which might be made, commenced, or prosecuted by A. or B.: the breaches assigned were,—first that A., on, &c., at, &c., who then and there made a claim and demand, and claimed to have a right and title to the premises, entered, and cut trees, &c., and procured the occupier to attorn to him,—secondly, that certain title-deeds **[619]** relating to the premises were withholden by one A. W., at the instance, and through the claim and demand of B. The defendant pleaded, to the first breach, that A. had no lawful claim or title to the premises,—and a similar plea to the second breach, as to B.; and it was held, on demurrer, that, A. and B. being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise. If Reynell had been named in this covenant, that case would have been in terms the same as this: and it is submitted that the omission of the name makes no substantial difference.

Crompton, in reply, was stopped by the court.

Cresswell, J.(*a*). I am of opinion that the covenant to indemnify in this case must be construed in the ordinary way,—to indemnify the plaintiff against lawful claims. Taking the language most strictly, it cannot apply to this demand. The defendants contract to indemnify the plaintiff "from all personal responsibility, and to hold him harmless from and against all costs, charges, and expenses that then had been or might thereafter be incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto," —defining the particular class of costs the indemnity was intended to apply to. Costs incurred by means of Reynell's action clearly are not included in it. It refers to costs and expenses in relation to the proceedings in forming and establishing the company. The declaration is bad in substance.

Williams, J., and Talfourd, J., concurred.

Judgment for the defendants.

(*a*) Wilde, C. J., was absent.

[620] LOMAS *v.* BRADSHAW. April 26, 1850.

[S. C. 19 L. J. C. P. 273.]

In an action by the payee against the maker of a promissory note, it is no answer for the latter to plead that the only consideration for the giving of the note was money advanced to the maker out of the funds of a friendly loan society of which both maker and payee were members, and that the payee was suing as treasurer and trustee on behalf of the society.

This was an action of debt. The first count of the declaration alleged that the defendant, on the 30th of May, 1845, made his promissory note for 45l., payable, three months after date, to the plaintiff or his order.

The defendant pleaded,—thirdly, that, before and at the time of the making of the said promissory note, there was, and thence until the time of the commencement of this suit continued to be, and still was, a certain co-partnership of persons using, and known by, the name of "The Manchester Dog and Partridge Thirty Pound Money Society," the names of which persons, except those of the plaintiff and the defendant, were to the defendant unknown; and that, before and at the time of the making of the said promissory note, and thence until the commencement of this suit, the plaintiff and defendant were and still continued respectively members of and co-partners in the said co-partnership; that the said promissory note was so made by the defendant, for the purpose of securing the re-payment to the said co-partnership of a certain sum of money, to wit, 45l., then advanced by the said co-partnership to the defendant from and out of the funds of the said co-partnership, for and to the use of the said co-partnership; that there never was any consideration or value for so as aforesaid making the said promissory note, except as aforesaid; and that the plaintiff had brought the present action against him, the defendant, and then sued him, the defendant, upon the said note, on behalf of and for the use and benefit of himself, the [621] plaintiff, and of him, the defendant, and the other members and co-partners of and in the said co-partnership,—verification.

Fourthly, that, before and at the time of the making of the said promissory note as thereinafter mentioned, there was, and thence until and at the commencement of this suit there continued to be, and still was, a certain co-partnership of persons using, and known by, the name of "The Manchester Dog and Partridge Thirty Pound Money Society," the names of which persons, except that of the defendant, were to the defendant unknown; that, before and at the time of the making of the said promissory note, as thereinafter mentioned, he, the defendant, was a member of and co-partner in the said co-partnership, and the plaintiff was, before and at the last-mentioned time, the treasurer and trustee of the same co-partnership; that the defendant, as in the first count mentioned, made and delivered the said promissory note to the plaintiff, as treasurer and trustee as aforesaid, for securing the repayment by the defendant to the said society, of a certain sum of money, to wit, the sum of 45l., then advanced by the said co-partnership to the defendant, as such member as aforesaid, out of the funds of the said co-partnership, to be repaid by the defendant to the said co-partnership for and to the use of the said co-partnership; that he, the defendant, as in the declaration mentioned, made and delivered the said promissory note to the plaintiff, as such treasurer and trustee as aforesaid, for securing the re-payment by the defendant to the said society of a certain sum of money, to wit, the sum of 45l., then advanced by the said co-partnership to the defendant as such member as aforesaid, out of the funds of the said co-partnership, for and to the use of the said co-partnership; that there never was any consideration or value [622] for the said making of the said note, except as aforesaid; and that, at the time of the commencement of this suit, the plaintiff held, and still continued to hold, the said note, as treasurer and trustee of and for the said co-partnership, and commenced this suit, and then sued thereon, as such trustee on behalf and for the benefit of the defendant and the other members of the said co-partnership,—verification.

Demurrer, and joinder.

Cowling, in support of the demurrer. The pleas are bad. The grounds of defence here relied on are two,—first, a total absence of consideration for the giving of the note,—secondly, that, inasmuch as both the plaintiff and the defendant are interested in the funds of the partnership, the plaintiff is not in a situation to sue upon the note; being, in effect, both debtor and creditor. The first objection is clearly without foundation. It is perfectly consistent with the pleas, that the defendant received the whole 45l.; and the receipt of the money would be ample consideration for the note. To constitute a defence, the defendant should shew that the failure of consideration was such, that, if this were money, instead of a promissory note, he could have recovered it back as money had and received to his use. The case of *Stephens* v. *Wilkinson* (2 B. & Ad. 320) is very much in point. There, in an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it was held to be no defence, that, two months after the delivery of the goods to the vendee, the vendor forcibly re-took possession of them; for, the vendee cannot treat that act as a rescinding of the contract, but must bring trespass. Parke, J., there says: **[623]** "Assuming that all the goods were taken possession of by the vendor (which does not distinctly appear), to constitute want of consideration a defence to a bill of exchange, there must be such a total failure as would have enabled the vendee to recover back the whole money, if money had been paid instead of the bill. Total failure of consideration is, where the party has been deprived entirely of all benefit of the thing for which the thing was given; and then he might recover back the money paid, if there had been a money payment." Apply that here: if the defendant would have had no defence had this been money, he clearly has none to this note. So, in *Jones* v. *Jones* (6 M. & W. 84), in debt by the payee against the maker of a promissory note payable on demand, a plea that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorised by him, and that there was not any consideration or value for the making or payment of the note, except as aforesaid,—was held bad on general demurrer. The plaintiff's right to sue upon the note is in no degree affected by the relative position of the parties. In *Sharp* v. *Warren* (6 Price, 131), it was held that assumpsit for money had and received may be maintained against one who had been a member of a benefit club, for money intrusted to his keeping by the rest of the society, in the name of the officers properly appointed for managing their affairs, under the articles; and it is no objection to such an action, that the defendant was a partner or tenant in common. In *Jackson* v. *Stopherd* (2 C. & M. 361), Bayley, B., says: "Upon the general rule of law there is no difficulty. **[624]** One partner cannot maintain an action for a balance on the partnership account, until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made. But there may be special bargains by which particular transactions are insulated and separated from the winding up of the concern, and are taken out of the general law of partnership." Here, the note declared upon is made payable to the plaintiff, and he alone has a legal right to sue upon it. *Jones* v. *Woollam* (5 B. & Ald. 769, 1 D. & R. 393, 2 Chitt. R. 322) is also an authority to shew that this objection is not well founded.

Crompton, contrà. The pleas are good. There was clearly no consideration for the giving of the note, as between these parties, though there might have been as between the plaintiff and the other members of the society and the defendant.

Wilde, C. J. I am of opinion that neither of these pleas affords any defence to this action. The defendant, a member of the society, borrows out of a fund in which the whole are interested a certain sum of money for his own individual use, and gives a promissory note for the amount, payable to the plaintiff. I see no pretence for suggesting any want or failure of consideration, or any principle upon which the plaintiff is prevented from enforcing the security.

The rest of the court concurring,

Judgment for the plaintiff.

[625] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judges who sat in banco during this term were—Wilde, C. J., Cresswell, J., Maule, J., and Talfourd, J.

HUDSPETH *v.* YARNOLD. May 22, 1850.

[S. C. 19 L. J. C. P. 321; 14 Jur. 578. Referred to, *Carlill* v. *Carbolic Smoke Ball Company*, [1892] 2 Q. B. 490; [1893] 1 Q. B. 256.]

A., the manager of a theatre, by letter, proposes to B., an actor, an engagement at 2l. per week, determinable by a month's notice. B. performs under this proposal. Notice is given by letter to B. to determine the employment, unless B. will consent to a reduction of salary. In a third letter, A. writes, "I have received your letter, and upon re-consideration, will give you the same terms, 2l., for the summer season." Held, that the first and third letters contained merely proposals, and that as no agreement was constituted between the parties until those proposals had been expressly accepted, or tacitly acquiesced in, by B., the correspondence was admissible in evidence without an agreement stamp.—In debt for 50l. the defendant pleaded as to 15l. 16s. 8d. non-joinder of a co-debtor, and as to the residue, never indebted. The defendant obtained a verdict upon the non-joinder. As to the residue, the plaintiff proved a debt for 35l. 5s. 8d., reduced by payments to 11l. 5s. 8d. Held, that the defendant was entitled to a suggestion to deprive the plaintiff of costs, under the County Courts Act, 9 & 10 Vict. c. 95, s. 129.

Debt, for 50l. due for wages. The defendant, as to 15l. 6s. 8d., pleaded non-joinder of J. K., a co-debtor; and, as to the residue, nunquam indebitata.

At the trial before Wilde, C. J., at Westminster, after the last term, it appeared that the plaintiff acted at the **[626]** Pavilion Theatre, of which the defendant was manager, from Christmas, 1848, to May, 1849, when the defendant took J. K. into partnership; and that the 15l. 6s. 8d. mentioned in the plea was for services performed during the partnership. To prove his title to salary for twenty-two weeks at the rate of 2l. per week, the following letters were offered in evidence:—

"17th November, 1848.

"Sir,—If you are disposed to take a weekly salary of 2l., and a clear half-yearly benefit, I think I could receive you at Christmas, provided the terms suit you, and a month's notice on either side in case of separation. I beg to apologise for not answering a former application. Perhaps you will be more polite, and let me have your reply. "EMMA YARNOLD."

"14th April, 1849.

"Sir,—I am desired by Mrs. Yarnold to inform you, that . . . she can only offer you for the ensuing summer season, the sum 1l. 10s. per week. Should this not meet your views, Mrs. Y. is reluctantly compelled to inform you that your services will not be required after the 26th June, 1849. An answer is required not later than the 18th of April.

"CHARLES GERRARD, for
"MRS. YARNOLD."

"21st April, 1849.

"Sir,—I have received your letter, and, on reconsideration, will give you the same terms, 2l. per week, for the summer season. "EMMA YARNOLD."

It was objected that these letters could not be read for want of a stamp.

This objection was overruled, and the plaintiff obtained a verdict for 11l. 5s. 8d., being the amount of sa **[627]**-lary due at 2l. per week, after deducting the 15l. 6s. 8d., for which the defendant was not solely liable, and payments to the amount of 24l. made on account. Leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the letters were not admissible in evidence under the circumstances.

In Easter term, Hawkins obtained a rule nisi to enter a nonsuit, or a suggestion to deprive the plaintiff of costs under the County Courts Act (9 & 10 Vict. c. 95, s. 129).

Joyce now shewed cause. The first letter contained a proposal, accompanied by a request that the plaintiff would reply to it. The proposal appears to have been acceded to, on the part of the plaintiff, either expressly by parol, or tacitly by acting under it. But such acquiescence would not have the effect of converting the proposal itself into an agreement requiring a stamp. The actual agreement between the parties would consist partly of the proposal in writing, and partly of matter extrinsic of the writing; *Vollans* v. *Fletcher* (*b*). In that case, a letter of allotment of shares in a railway company was held not to require a stamp, the contract not being complete until acceptance of the allotment, though made in answer to an application for shares. The second letter merely contains a notice for determining the then current engagement. The third letter simply renews the original proposal. There was no contract between the parties until that proposal was acceded to either expressly or tacitly. [Maule, J. Is there not a case in the Exchequer Chamber in which a **[628]** letter of allotment of railway shares was held to be receivable in evidence without a stamp?] That is the case of *Moore* v. *Garwood* (19 Law. Journ. (Exch.), N. S. 15).

Again, to make a stamp necessary, the instrument must, upon the face of it, refer to a matter exceeding the value of 20l. The engagement might last only a few weeks; it might be put an end to at any time by giving a week's notice.

With respect to that part of the rule which prays for the entry of a suggestion under the County Courts Act, the first objection is, that the affidavit is insufficient. Where an affidavit describes the deponent as a party to the suit, it may not be necessary to give the addition of the deponent, but the place of residence, here omitted, should appear. In *Sharpe* v. *Johnson* (4 Dowl. P. C. 324; S. C. 2 New Cases, 246; 2 Scott, 407; 1 Hodges, 298), Tindal, C. J., observes: "The object of that rule (Reg. Gen. H. T. 2 W. 4, s. 5) was to make the opposite party acquainted with the residence of the deponent; but I am of opinion that it does not apply to the case of a prisoner. He is, in effect, on the floor of the court; and it would be absurd to require him to state his residence, when the plaintiff, by opposing his discharge, must know where he is." [Maule, J. The object of the rule is to identify parties. Is it not the general practice merely to describe the plaintiff and the defendant as "the above-named plaintiff and defendant?" What rule is there which requires a plaintiff, every time he makes an affidavit, to shew where he resides? The learned judge referred to the case of *Shirer* v. *Walker* (2 M. & G. 917; 3 Scott, N. R. 255).]

This is not a case in which the plaintiff might have brought his action in the county court. In those courts, a plea in abatement for non-joinder is not **[629]** allowed. At the time the action was commenced, it was brought for more than 20l. The jury gave him 12l. beyond the 15l. 6s. 8d. With regard to the latter sum, the plaintiff's right of action in this court is suspended until the co-debtor is joined as a co-defendant. But by sect. 68 of 9 & 10 Vict. c. 95, a demand is recoverable in the county court without serving or suing a part jointly answerable. The debt, therefore, to be sued for in the county court, would have exceeded 20l. [Cresswell, J. How do we know that the debt is so large as you suggest?] The record shews an admission of a debt of 15l. 6s. 8d.; the plea alleges only matter in delay of payment. [Cresswell, J. Does the plea admit the debt?] It does (*a*). [Maule, J. The defendant

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(*b*) 1 Exch. 20; 16 Law Journ. (Exch.), N. S. 173. The application in that case was for twenty shares in the Birmingham, West Bromwich, &c. Junction Railway, the letter of allotment gave ten only, and imposed special terms, to which there had been no allusion in the plaintiff's letter of application.

(*a*) As to this point, see *Goode* v. *Lasbury*, 1 C. M. & R. 254; S. C. per nom. *Gould* v. *Raspberry*, 2 Dowl. P. C. 707. In that case it was said, arguendo, that, "A plea in abatement need not confess and avoid. The defendant is not bound to traverse or confess all the matters alleged. He has at that stage, nothing to do but to shew that the plaintiff may have a better writ; and the judgment is not to be that the plaintiff is to recover or not on the allegations upon the record, but that the writ be quashed, or that the defendant answer over." That is true with respect to a judgment on demurrer; but if in an action of debt, issue be joined upon a plea in abatement, and now says you should have sued me and my partner for 15l. 6s. 8d., and myself alone for 11l. 5s. 8d.] If the defendant had not pleaded in abatement, it is clear the plaintiff must have recovered more than 20l. That plea is not in avoidance of the debt, but in delay of the remedy.

Another objection to this application is this. The 58th section of the 9 & 10 Vict. c. 95, enacts: "That all pleas of personal actions, where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise, may be holden in the county **[630]** court." There is no decision upon this point in the superior courts (*a*); but in the county courts it has been held, that the balance of account for which a plaint will lie in the county court must be a balance struck, and not a balance to be ascertained. Suppose a builder's bill to be reduced by payments below 20l. To recover anything, the plaintiff might be required to prove work done to the amount of several hundreds of pounds. It is otherwise when a balance has been struck; in which case it is not necessary to go beyond proof of the striking of the balance. The title of the act is, "for the more easy recovery of small debts and demands."

Hawkins and Prentice contrà. If the agreement appear, primâ facie, to relate to a matter of the value of 20l., a stamp is necessary. Here, the agreement was an agreement for a year at 2l. a week, though the amount might be reduced by the notice to less than 20l. [Maule, J. Is there any authority for that?] *Shephard* v. *Whible* (8 Carr. & P. 534) shews that it is not necessary that the contract should ultimately operate as an agreement for more than 20l. Here the parties might, if they thought proper, have reduced the amount; but, until that was done, the yearly agreement remained. [Maule, J., referred to *Laythoarp* v. *Bryant* (*c*).]

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that issue is found for the plaintiff, the judgment is quod recuperet. As there is in such a case no verdict finding a debt, this judgment would appear to rest upon an express or implied confession of the debt demanded.

(*a*) Post, 432, 433.

(*c*) 2 New Cases, 735; 3 Scott, 238; 2 Hodges, 25. In that case it was held, that a contract for the sale of an interest in land, signed by the purchaser only, was, as against him, a sufficient note or memorandum of the agreement, to satisfy the requirement of the fourth section of the Statute of Frauds, on the ground that the signature of the vendor was not essential to the completeness of the contract when the action was against the vendee.

The Statute of Frauds, every line of which has been said (first possibly by some practitioner on laying down his fee-book) to be worth a subsidy, is loosely worded; as if the rough draft of the bill had been transferred at once to the statute roll. The fourth section speaks of "any contract or sale of any land, &c." meaning, perhaps, "any contract for the sale." The words "the parties to be charged," were probably used by the framer of the bill, as equivalent to the words, "the parties chargeable," but in *Laythoarp* v. *Bryant*, and in many other cases, the courts, without assigning any reason for so doing, have rejected the words "to be," and have read the words "the party to be charged," as if they had been "the party actually charged in the action." It has even been held that the words "the parties to be charged," in the 17th section, mean, not both parties, but the one party charged in the action.

In *Laythoarp* v. *Bryant*, Tindal, C. J., says (2 New Cases, 745), "But then it is said, unless the defendant signs there is no mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract." It seems here to be intimated that the omission by the vendor, to comply with the requirements of the statute, was the fault, not of the party omitting, but of the party to be prejudiced by the omission, and that the defendant, before he ventured to become a purchaser, ought to have made himself master not only of the Statute of Frauds, but of the conflicting rulings in the courts of law and of equity upon its provisions, and that having done that, he should have shaped his course in strict accordance with these decisions, some of which it may be difficult to reconcile with justice or grammar. It is said that mutuality of agreement is sufficient without mutuality of remedy; but if agreements are to be construed with reference to the apparent or presumed intention of the parties, it seems to be allowable to doubt that it was the intention of the parties that one of them should bind himself whilst the other remained unbound. And see *Walker* v. *Constable*, 2 Esp. N. P. C. 659, 1 Bos. & Pull. 306; *Ferrer* v. *Oren*, 1 Mann. & R. 223.

[631] The letter of 21st April is an agreement. [Maule, J. What is it in answer to? It may be that the terms were proposed by parol, or that the letter referred to had a stamp. You must shew, not merely that the writing may have been one that required a stamp, but that it did require one.] *Webb* v. *Spicer* (18 Law Journ., Q. B., 142) shews that an agreement in writing, if acted upon, need not be signed. The judgment in that case was reversed in error, but upon another ground. [Maule, J. There the writing did purport to be the agreement of the parties.] It is otherwise if it appear to be merely an offer. [Cress-**[632]**-well, J. Suppose parties talk over the terms of an agreement in the morning, and in the afternoon one of them writes: "I agree to the terms we talked over in the morning." Would that be an agreement in writing? Maule, J. The difficulty here is, that the letter of the 21st April, says: "I have received your letter, and, on reconsideration, will give you the same terms, 2l. per week, for the summer season." That might be understood as importing that there was a letter, or as inferring something substituted for the letter, or that the letter is necessarily part of the agreement. You say that that letter should have been stamped. Cresswell, J. Suppose the plaintiff had never served the defendant for the summer season, and she had brought her action for a breach of contract, could she have recovered?] She must have shewn that Hudspeth assented; and that assent might have been by parol or by act done.

The objection to the affidavit is answered by the known practice. [Maule, J., referred to *Moore* v. *Garwood* (19 Law Journ. (Exch.), N. S. 15), and *Drant* v. *Brown* (*b*)[1].] Here, the letters were offered at the trial to prove the agreement. [Maule, J. That was the case also in *Drant* v. *Brown*. It is what always must be done when a written proposal is accepted by parol. It is only when the whole agreement is in writing that a stamp is necessary.]

The plaintiff has only recovered 11l. 5s. 8d. The debt owing by the defendant alone was, it is true, originally more than 20l.; but it had been reduced below 20l. by payments made before action brought. There was, therefore, nothing to prevent the plaintiff's from suing the defendant in the county court for the amount which he has recovered, that being a debt distinct from **[633]** the sum due from the defendant and J. K. jointly. *Walker* v. *Watson* (8 Bingh. 414; 1 Moore & Scott, 674), Chitt. by Archbold, 1401.

Wilde, C. J. As to the plaintiff's first point, I have no doubt that the letter of the 21st April was a mere proposal, requiring some act to shew assent, to consitute an agreement between the parties. It is clear that upon these letters alone no action could have been maintained.

As to the second point, the particulars delivered shew that the action was brought to recover 22l., reduced by payments to something about 12l. This is, therefore, a case in which a verdict has been found for the plaintiff for a sum less than 20l., entitling the plaintiff to have judgment for the sum recovered, and no costs, under the 129th section of the County Courts Act (*b*)[2].

Maule, J. I am of the same opinion. Here there was a proposal on the part of the defendant to pay 30s. per week. After this she offers 40s. a week. If the plaintiff chose to accept those terms, there would be an agreement. So if, without saying anything, he entered into her service, *Drant* v. *Brown* and *Moore* v. *Garwood* shew that a proposal not accepted in writing, does not require a stamp. Here the true construction of the letters is, that this amounted merely to a proposal.

As to the suggestion, it appears that the plaintiff served the defendant alone a certain number of weeks at 2l. per week, and had received as much as reduced **[634]** the claim to about 12l. That was a demand for which the plaintiff might have clearly recovered in the county court.

Cresswell, J., and Talfourd, J., concurred.

Rule discharged as to the nonsuit, absolute as to the suggestion.

(*b*)[1] 3 B. & C. 665; 5 D. & R. 582. And see *Bowen* v. *Fox*, 2 M. & R. 167; *Bethell* v. *Blencowe*, 3 M. & G. 119; 3 Scott, N. R. 568; *Chanter* v. *Dickinson*, 5 M. & G. 253.

(*b*)[2] See *Woodhams* v. *Newman*, 7 C. B. 654; *Beswick* v. *Capper*, ib. 669; *Avards* v. *Rhodes*, 22 Law Journ. (Exch.), N. S. 106. In the last case it is reported that the judge of the county court gave a judgment of nonsuit in a case in which he held, and correctly held, that he had no jurisdiction; but this point does not appear to have been argued or noticed.

Cannan and Grimley, Assignees of Tanner a Bankrupt *v.* Hartley. 1850.

[S. C. 19 L. J. C. P. 323; 14 Jur. 577.]

A. is tenant to B. of rooms, for a term of years. Upon the bankruptcy of B., A. sends the key of the rooms to the official assignee, where it is left with a clerk, who is told that it is the key of the rooms which A. had occupied. A. immediately quits possession, and no further communication takes place. Held, not to amount to a surrender by act or operation of law (*a*)[1].

Assumpsit for six quarters' rent, accruing due to the plaintiffs, as assignees, on the 29th of September, 1849, on a demise of rooms, apartments, fixtures, chattels, and effects, by the bankrupt, for three years from 25th of March, 1847, with a count on an account stated with the plaintiffs as assignees.

[635] Plea, first, non assumpsit; secondly, to the first count, that after the plaintiffs became assignees, and before any part of the money in the first count became due, to wit, on, &c., the defendant surrendered and yielded up to the plaintiffs as assignees the said rooms, apartments, fixtures, chattels, and effects, and the plaintiffs as assignees then accepted (*a*)[2] of such surrender, and took possession of such rooms, &c., and from thence hitherto have had possession thereof; thirdly, to the first count, that after the making of the promise, and before any part of the moneys therein mentioned became due, to wit, on, &c. the defendant was evicted from the rooms, &c., by Erasimus (sic) Wilson, of whom Tanner before he became bankrupt, and the plaintiffs as assignees since his bankruptcy, held the rooms, &c. as tenants thereof, and the **[636]** defendant hath from thence hitherto continued so evicted; and that the said Erasimus Wilson,

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(*a*)[1] A surrender by act and operation of law takes place when the tenant of a particular estate becomes party to an act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues. See the cases collected, Com. Dig. tit Surrender, I.; 20 Vin. Abr. tit. Surrender, F. G. In these cases the presumed surrender is also presumed to have preceded the act to which the tenant is party.

In some recent cases, the courts, more and more unwilling to frustrate the intentions of the parties by a strict adherence to the Statute of Frauds, have gone beyond this, and have held that an act, the direct and the only operation of which is, to extinguish the particular estate, an act done ipsissimo animo sursumreddendi, and differing in nothing from an express verbal surrender except by its informality, may be treated as creating a surrender by act and operation of law—a construction tending to make the exception nearly co-extensive with the enactment, and recalling the times when—as was the fate of the statute De Donis—an act of parliament might be repealed by judicial astuteness. An unqualified statement of this principle occurs in *Lynch* v. *Lynch* (6 Irish Law Rep. 131), where Brady, C. B., says, "A surrender by act and operation of law, I think, may properly be stated to be a surrender effected by the construction put by the courts on the acts of the parties, in order to give to those acts, the effect substantially intended by them."

(*a*)[2] This allegation appears to be unnecessary, since without any assent, either expressed or implied, on the part of the surrenderee, the estate vests in him by the mere act of the surrenderor, until actual dissent. See *Thompson* v. *Leach*, 2 Salk. 618, and the note (*b*) in the sixth edition. *Thompson* v. *Leach* is also reported 3 Lev. 284, Lord Holt, 665, Carthew, 211, 250, 2 Mod. 290, 1 Shower, 296, Freeman, 502, 2 Ventr. 198. In that case it had been at first held in C. P., contrary to the opinion of Ventris, J., that assent on the part of the surrenderee, was necessary for the purpose of vesting the interest in him. And in *Townson* v. *Tickell*, 3 B. & Ald. 31, the Court of King's Bench, not being aware that the judgment in *Thompson* v. *Leach* had been reversed, acted upon the authority of the original overruled decision. Vide 4 Mann. & R. 189, n.

See also Co. Litt. 113 a., ibid. 114 b., ibid. 245 a. b., ibid. 337, n. 294, 2 New Cases, 70, 2 Scott, 128, 2 Swanst. 365, 371, 6 B. & C. 112, 9 D. & R. 136, 2 N. & M. 806, 3 N. & M. 775, n., 5 N. & M. 6, 2 M. & G. 690, 691, 6 M. & G. 456, n., 1 Mylne & K. 195, Freeman by Smirke, 503, n.

at the time he so evicted, had lawful title (*a*) to evict the defendant and the plaintiffs as assignees aforesaid. Verification.

Replication to both the special pleas, de injuriâ.

At the trial before Maule, J. at the London Sittings in last term, the plaintiffs proved a demise by Tanner before his bankruptcy, to the defendant, for three years, from the 25th of March, 1847, at 52l. 10s. per annum, payable quarterly. Tanner became bankrupt on the 10th of March, 1848. The rent was paid by the defendant to the assignees up to the 25th of March, 1848.

In May, 1848, the defendant sent the key of the rooms to the office of the plaintiff Cannan, the official assignee; and it was delivered to a clerk there as the key of the demised premises, and was never returned. On the same day the defendant quitted the premises, placing a tin-plate on the door giving information of his removal to another locality. No communication took place between the plaintiffs and the defendant until a little before Christmas 1849, when payment was demanded of the six quarters' rent now sued for.

In support of the third plea, certain proceedings taken by William James Erasmus Wilson (*b*), on the 4th of October, 1848 against Tanner, to obtain possession of the premises so deserted by Tanner, there being no sufficient distress on the premises, were produced; and it was shewn that at Christmas 1848 one Elam entered under Wilson and paid rent to him.

It was conceded, that upon the first issue the verdict [637] must be for the plaintiff. Upon the second issue it was contended, on the part of the defendant, that there had been a surrender by operation of law; and upon the third issue, that he was discharged by an eviction by Wilson, the landlord paramount.

The learned judge directed a verdict for the plaintiffs upon all the issues, reserving leave to the defendant to move to enter a nonsuit; but it was ultimately agreed that in case the court should be of opinion that there was any evidence of an eviction or of a surrender proper to go to the jury, a verdict should be entered for the defendant.

May 4.—In the same term Edwin James moved for leave to enter a verdict for the defendant upon the two special pleas accordingly. Upon the first point he cited *Dodd and Another* v. *Acklom* (6 M. & G. 672, 7 Scott, N. R. 415), where A. and B., having demised a house to C. at a yearly rent payable quarterly, A.'s wife delivered the key to C.'s wife. C. entered and occupied. Before the first quarter's rent became due, C.'s wife delivered back the key to A., who accepted it. This was held to amount to a surrender by act and operation of law within the exception in the third section of the Statute of Frauds.

There was evidence to go to the jury on the last issue.

Wilde, C. J. There is more doubt upon your second point; but you may take your rule upon both.

Rule nisi.

Byles, Serjt., and J. M. Cobbett, now shewed cause. There was no evidence which could have been properly left to the jury in support of any of the pleas. The sending of the key to Cannan was no surrender of the term; nor would it have amounted to a surrender even [638] if Cannan had been the sole lessee. But one co-lessor cannot accept a surrender; at least he cannot by such acceptance, determine the whole interest of the lessee. Then there was no proof that the clerk to whom the key was delivered, was an agent to accept a surrender.

The present application was founded upon *Dodd and Another* v. *Acklom*, which is at variance with all the cases before mentioned. In *Mollett* v. *Brayne* (Campb. 103) the tenant quitted the premises with the assent of the landlord. This was held by Lord Ellenborough, to be no surrender of the tenant's interest, though he held only from year to year, and no answer to an action for use and occupation; and the court refused to grant a rule nisi for a new trial. So, here, the only act done by the tenant was, that he left the premises; there was no proof that the landlord went in. In

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(*a*) In this plea it is not shewn how Wilson's title to evict arose. The defect would not be cured by a verdict; as a lawful title to evict might have been sufficiently proved by shewing an entry warranted by a forfeiture incurred by the defendant himself.

(*b*) The variance in the name—remaining unamended,—would appear to be fatal.

Doe d. Huddlestone v. *Johnson* (M'Cl. & Young, 141), A., tenant from year to year, after Michaelmas, gave notice to quit at Lady Day. The premises were relet to B. by auction, at which auction A. was a bidder. B. was not let into possession. Held, not a surrender by act and operation of law. [Maule, J. That was a simple attempt to repeal the statute by setting up a surrender by parol. In *Dodd and Another* v. *Acklom*, the facts raised a strong presumption that the landlord had taken possession.] The tenant wished to get rid of the premises, and the landlord accepted the key. [Wilde, C. J. The tenant deprived himself of the power of taking possession.] In *Lyon* v. *Reed* (13 M. & W. 285), the authorities were all carefully reviewed. Great doubt is there expressed as to the decision in *Thomas* v. *Cook* (2 B. & Ald. 119), and the cases founded upon it, including that of *Dodd and Another* v. *Acklom;* from which last case I hope, however, satisfactorily to distinguish the present. That **[639]** case, as to one important point, is more fully reported in 7 Scott, N. R., 415. From that report it appears, that in consequence of the rent due to the superior landlord being considerably in arrear, that person had threatened to take proceedings before a magistrate for the recovery of the possession under 3 & 4 Vict. c. 84, s. 13, and had warned the defendant not to bring his goods there; and that the learned judge had told the jury, that the plaintiff was entitled to recover unless the defendant had made out to their satisfaction, that he was, by the act of the plaintiff, prevented from having a beneficial occupation of the premises (*a*), or unless the agreement had, by the consent of all parties, been put an end to before any rent became due.

In *Lyon* v. *Reed* (13 M. & W. 285) the Court of Exchequer appears to have considered that a demise by the reversioner to a stranger with the assent of the owner of the particular estate, does not amount to a surrender by act and operation of law. In the elaborate judgment pronounced in that case by Parke, B., after referring generally to the old authorities, his lordship says (ib. 307): "But in all these cases it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner, is not sufficient. Brooke, in his Abridgment, tit. Surrender, pl. 48 (*d*)[1], questions the doctrine of Frowike, C. J., who says (*e*): **[640]** 'If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender;' and says he believes it is not law. And the contrary was expressly decided in the case of *Swift* v. *Heath* (Carthew, 110), where it was held (*b*), that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life. And to the same effect are the authorities in Viner's Abridgment (vol. 20, p. 128, translated from 2 Roll. Abr. p. 495), Surrender, F. 3 and 4 (*d*)[2]. . . . Before the Statute of Frauds, the tenant in possession of a corporeal hereditament, might surrender his term by parol; and, therefore, the circumstance of his delivering up his lease to the lessor, might afford strong evidence of a surrender in fact; but certainly could not, on the principle to be gathered from the authorities, amount to a surrender by operation of law, which does not depend upon intention at all." With respect to the first case in which it was suggested that there could be a surrender by a demise made to a stranger with the assent of the lessee, *Stone* v. *Whiting* (2 Stark. N. P. C. 236), it is observed, that although Holroyd, J., intimated an opinion to that effect, there was no decision. After stating the decision in *Thomas* v. *Cook* (ib. 408, 2 B. & Ald. 119), the judgment proceeds thus (13 M. & W. 308): "It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing

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(*a*) This point would naturally have great weight with the jury; but, as it does not appear to have been noticed either during or after the argument, it cannot affect the decision as an authority upon the point on which the judgment proceeded.

(*d*)[1] The placitum runs thus, "Frowike, chief justice: si mon termor agree que jeo fera feoffement a un estranger, ceo est un surrender. Et il dit que cet case est adjudge en nostre livers—Quære ubi; quia credo quod non est lex (21 H. 7, 7)."

(*e*) This was said by Frowike, by way of illustration, in answering a question upon a totally different point, upon which Yaxley, Serjt., had requested the opinion of the court.

(*b*) So decided upon a special verdict.

(*d*)[2] The cases in these particular placita, appear to have turned upon an apparent intention not to surrender.

a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at **[641]** which they arrived. Mr. Justice Bayley, in his judgment, says the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit; an observation which forcibly shews the uncertainty which the doctrine is calculated to create." The cases have again been reviewed in a third edition of Smith's Leading Cases (vol. ii. p. 459), in which the learned editors (*b*)[1] point out the difficulties attending the construction now contended for. The point is still one of importance; for though by 8 & 9 Vict. c. 106, s. 3, a surrender in writing of any interest in any tenements or hereditaments,—not being a copyhold interest, and not being an interest which might have been created without writing, is void, unless made by deed,—the enactment leaves surrenders by act or operation of law, as they stood before. There is not any evidence that the assignees ever entered, as alleged in the plea. The evidence is just the other way; for the official assignee sent to demand the rent. *Nickells* v. *Atherstone* is a mere reiteration of *Thomas* v. *Cook*. Supposing that what took place in this case would have amounted to a surrender in the case of a sole reversioner, here we have two reversioners, Cannan, the official, and Grimley, the trade assignee. It is difficult to say what estate they took; as joint tenants must come in at the same time, and by one and the same title (*c*)[1]. Assuming that these assignees were joint tenants, one alone could not accept a surrender. One joint tenant can do an act which is clearly for the benefit of the joint estate, but he cannot bind his companion by anything detrimental to the estate. [Maule, J. A surrender to one **[642]** joint tenant operates only upon his estate.] Here, the official assignee, the supposed surrenderee, was tenant in common with the trade assignee. In *Right* v. *Cuthell* (*a*)[1] it was held, that a notice to quite signed by two out of three trustees to whom the lessee had assigned the term, was bad, even though given in the name of the three, and afterwards assented to by the third (*b*)[2]. [Maule, J. When a surrender is made to one of two lessors, would the lessor not accepting the surrender, become tenant in common with the lessee?] He would (*c*)[2]; and in that case the rent would have to be apportioned. But the surrender is not so pleaded. The second plea states a surrender not of a moiety, but of the whole.

It was not proved that the landlord had entered in this case. The evidence is the other way; for the official assignee demanded the rent; whereas, in *Dodd and Another* v. *Acklom* there was some evidence that the landlord had entered. *Nickells* v. *Atherstone* is merely a repetition of *Thomas* v. *Cooke*.

Supposing the acts of the parties to be such as would justify the finding of a surrender in the case of a sole lessor, this case is different. There may be some difficulty in stating what the interest of the plaintiffs is. The titles of joint tenant must commence at the same time; but that is not the case with respect to official **[643]** and trade assignees. One joint tenant may do an act for the benefit, but not an act to the detriment of the joint estate. As a surrender to one joint tenant operates only upon his estate, the surrenderee would in such case become tenant in common with the surrenderor; *Rudde* (*or Rud*) v. *Tucker* (*a*)[2]. [Maule, J. That was

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(*b*)[1] Keating and Willes.

(*c*)[1] The estate of the assignees of a bankrupt is a special estate, a creation of the statutes relating to bankrupts. It has not all the incidents either of a common law joint tenancy or of a common law tenancy in common.

(*a*)[1] 5 East, 491, 2 Marshall, 83, 5 Esp. N. P. C. 149. In that case the agreement under which the notice was given, required that it should be under the hand or hands of the lessee, his executors, administrators, or assigns.

(*b*)[2] These trustees were, at law, merely joint tenants, with all the incidents of a joint tenancy. They were not statutory assignees invested with a special character.

(*c*)[2] A. and B., seised in fee, jointly demise to C. for a term. C. surrenders to A., who alone accepts the surrender. The immediate right of possession is now in A. and C., as tenants in common; A being seised of his moiety as tenant in fee in possession, C. being possessed of his moiety as tenant for years under B., who is seised in fee of that moiety, subject to the possessionary interest of C.

(*a*)[2] Cro. El. 737, 802, S. C. per nom. *Tooker's case*, 2 Co. Rep. 62, the names being locally idem sonantia. And see 6 M. & G. 677.

a case of a surrender by one of two joint lessees; here, the surrender is to one of two reversioners.] In *Right d. Fisher* v. *Cuthell* (b)1 it was held, that a notice given by two out of three joint devisees of the lessor was insufficient. It is true that there the proviso in the lease for twenty-one years, giving power to determine it at the end of fourteen years, required the notice by landlord or tenant, or their respective heirs, executors, &c., should be "in writing under his or their respective hand or hands;" but the principle upon which the judgment proceeds is not confined to the particular circumstance of the case. [Maule, J. In the case of a surrender to one of two lessors, will the lessor not accepting the surrender become tenant in common with the lessee?] He would (c). The party **[644]** setting up the act must shew that it was for the benefit of the estate; *Rud* v. *Tucker*. Supposing the surrender to be good, its greatest effect would be, not to extinguish the rent, but to make it apportionable. Here, the plea is, not of a surrender of a moiety, but of a surrender of the whole.

The clerk is not shewn to have had any authority to receive the key. [Wilde, C. J. I suppose that is meant to be inferred from the circumstance of the key being retained. Maule, J. In Co. Litt. 192 a. it is said, "If such a lessee (speaking of a lessee under a lease from two joint tenants) for life should surrender to one of them, it shall enure to them both; for they that have a joint reversion" (a)1.] No doubt that is so if the other consents (b)2. [Maule, J. So again in Co. Litt. 214, "a surrender to one joint tenant shall enure to both."]

With respect to the issue on the alleged eviction, the facts do not support the plea. These facts do not occur till after some part of the rent sued for had become due. The words of the plea, "before any part of the rent became due" are material, and the dates of the transaction disprove that allegation. [James. I admit that this plea can go only to half a year's rent.] The plea is pleaded to the whole demand. [Maule, J. Cannot this issue be found distributively?] The jury were bound to return a verdict affirming or negativing the eviction alleged. They could not have found eviction as to some quarters and no eviction as to others. Sup-**[645]**-pose the case of a plea of release instead of a plea of eviction. [Maule, J. That would be by deed, of which there would be profert.] Then put the case of a plea of accord and satisfaction, which requires no deed. [Maule, J. But it is an entire plea. Some pleas may be taken distributivè, as for instance, the plea of set off (a)2. James admits that the verdict upon this issue must be against him, but says that the facts entitle the defendant to a reduction of damages.] There was no proof that Erasmus Wilson was the superior landlord, and came in by title paramount. The notice was not given to the right party. It was served upon Tanner the bankrupt; but at the time of that service he had ceased to be the owner of the term; it had passed to his assignees. Again, it merely appears that Elam, who was in possession, had been put in by Wilson, and that he had paid rent to Wilson. Even if Wilson was the superior landlord, there was no proof that the plaintiffs came in by him.

(b)1 5 East, 491. And see S. C. 5 Esp. N. P. C. 149, 2 J. P. Smith, 83. In the latter report it is said that the words "under their respective hand or hands," were not in the plaintiff's brief. It is more likely that they were omitted there for brevity or by carelessness, than that they were interpolated in the defendant's brief, and then argued upon as if they had been in both.

In a lease at will, if there be two lessors and one lessee, or one lessor and two lessees, the discontinuance of the will, on the part of any one of the three parties, would put an end to the tenancy. So it would be in the case of a demise at will de anno in annum; the tenancy, though classed among estates for terms of years, being substantially and in truth an interest to continue quamdiu ambabus partibus placuerit—subject to a renunciation of the right to determine the will except at particular periods. And see *Doe d. Whayman* v. *Chaplin*, 3 Taunt. 120.

(c) It would rather seem that the party to whom the surrender was made, and who had thus acquired the immediate right of possession, would become tenant in common with the surrenderor.

(a)1 The authority referred to by Lord Coke is not confined to cases where the lessors are joint-tenants; it extends to all persons making a joint demise for life. "If two men lease land for a term of life, reserving rent to one, both shall have the rent, because the lease is joint by them; and the law is the same, if the tenant surrender to one of them, the other shall enter." T. 5 E. 4, fo. 4, pl. 7.

(b)2 Not only the consent, but even the knowledge, of the co-lessor, appears to be immaterial. Ante, p. 635.

(a)2 A plea of set-off, being in the nature of a cross action, may be taken distributivè with respect to the several matters of set-off. It cannot be taken distributivè with reference to the matters to which it is pleaded. If in an action upon a bill of exchange for 500l. and a promissory note for 200l., the defendant pleads a set-off for 1000l. in bar of the action generally, he cannot, upon proving a demand to the extent of 200l., claim a verdict in respect of the promissory note.

James, in support of rule. The court cannot discharge this rule without overruling the case of *Dodd and Another* v. *Acklom*. Here, as there, the key is delivered to one of the plaintiffs without anything being said by the receiver. [Maule, J. There, the key was accepted simpliciter.] Here, it is left as early as May 1848, at the official office of one of the plaintiffs; it is publicly stated where the defendant is gone, and the key is never sent back. A distinction is sought to be made on the ground that this is not an action for use and occu-**[646]**-pation, but upon an agreement. That does not affect the validity of the surrender. In Coote's Landlord and Tenant (p. 393) the following definition is given of a surrender by act and operation of law: "A surrender in law is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made" (*b*).

The cases relied on for the plaintiff are the same as those cited in *Dodd* v. *Acklom and Another*, with the exception of *Lyon* v. *Reed*; and the authority of *Lyon* v. *Reed* is balanced by the late case of *Nickells* v. *Atherstone* (16 Law Journ. (Q. B.), 271; since reported 10 Q. B. 944). In *Thomas* v. *Cook*, there was the substitution of a new tenant; but that was merely evidence of the acceptance of the surrender, with reference to which acceptance it is immaterial whether there was a substitution of a new tenant or the key was locked away in a **[647]** drawer. So also, the fact as to the surrender being made to one of two lessors, is common to both cases. In *Dodd and Another* v. *Acklom*, it was held that acceptance of a surrender by one of two joint-lessors, operated as an acceptance by both. Maule, J. In that case it was not put on the ground that the surrender to one operated as a surrender to both, but that one acted for both.] Sending for the rent shortly before Christmas could not have the effect of rebutting the inference to be drawn from the conduct of the official assignee in retaining the key.

Wilde, C. J. The rule which has been obtained to enter a verdict for the defendant upon the second and third pleas, must be discharged. There was no evidence to go to the jury on the last plea. With respect to the second plea the facts are very simple. The defendant, upon finding himself in an inconvenient position in consequence of his immediate landlord having run away, is anxious to get rid of the premises. He leaves the key of the house at the office of Cannan the official assignee; but the only evidence of the acceptance of the key by Cannan is, that it was not sent back. (His Lordship then referred to the note in the third edition of Smith's Leading Cases,

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(*b*) This definition appears to be too large. It would include every informal act shewing an intention to depart with the immediate right of possession. Thus, if the tenant were to bring the key and say, "I surrender the premises which I hold of you," the surrender would be void by the Statute of Frauds; but if he laid down the key and had the prudence to be silent, confining himself to some renunciatory gesture sufficient to satisfy the jury of the existence of a sursumredditionary intent, there would be, for the purpose of the cause in which the verdict was found, and to that extent only, a valid surrender by act and operation of law.

It is said (Coote, 395), that where a second lease for years was made to commence on the death of J. S., it was holden to be no surrender of a former term, because J. S. might survive the term; but if J. S. should die within the term, then it would immediately operate as a surrender. The authority for this position is merely a loose note in 4 Leon. 30. Upon principle it would seem that the implied surrender would take effect irrespectively of the event, inasmuch as a recognition of the existence of a power of creating a lease to take effect immediately after the death of J. S., disaffirms the continuing existence of a lease, which may continue after the death of J. S. And see *Ive* v. *Sams*, Cro. El. 521, 522.

vol. ii. 359 b.). Nothing further occurs until Christmas 1849, when a demand of rent is made. The question is, whether there was evidence of a surrender and acceptance (*a*)[1] upon which a verdict for the defendant could **[648]** have been sustained, not whether there was a scintilla of evidence. I am of opinion that there was no evidence of a surrender and acceptance which could have been properly left to the jury, and that this rule must be discharged.

Maule, J. I am of the same opinion. It is not necessary to consider whether the observations of the Court of Exchequer, in *Lyon* v. *Reed*, or those of the Court of Queen's Bench, in *Nickells* v. *Atherstone* upon the law as laid down by this court in *Dodd and Another* v. *Acklom*, are to be adopted. But assuming our decision in that case to have been right, it will not avail the defendant in this case, the circumstances being essentially different. In *Dodd and Another* v. *Acklom*, the defendant had complained of the rent, &c., being in arrear. An interview taking place, the tenant gave back the key, and the landlord accepted it. The jury having found that this amounted to a surrender and acceptance, the court refused to disturb the verdict. In that case the jury has before them the fact that the plaintiff had accepted the key. Here, there is nothing but the fact of the key being brought to a clerk of the official assignee. It is contended, that he was bound to receive anything brought to the office for his master. That may be so; but it does not follow that this was an acceptance by the master. But it is said that the conduct of the official assignee in not returning the key amounted to an acceptance of it. I do not think that the official assignee was bound to seek out the tenant for the purpose of rendering back the key. In *Dodd and Another* v. *Acklom*, it was held that Dodd had authority to act for both. That sufficiently distinguishes that case from the present; and if the jury had found a verdict establishing a surrender and acceptance, such verdict would have been found upon mere **[649]** negations, and not upon evidence of anything done by the parties.

To support the third plea there was no evidence at all.

Cresswell, J. I am of the same opinion. The strongest case for the defendant is that of *Dodd and Another* v. *Acklom*. The observations of my brother Maule on the case clearly distinguishes it from the present (*a*)[2].

Talfourd, J. concurred.

Rule discharged.

(*a*)[1] Some confusion appears to have been created in this case by treating the acceptance of the surrender by the surrenderee, as an ingredient of the surrender itself; the surrender, if valid at all, being necessarily complete antecedently to any agreement or acquiescence on the part of the surrenderee, the effect of whose acceptance of the surrender would be merely to deprive him of the power of subsequently disagreeing to the surrender and of thereby rendering void ab initio that which, until disagreement, had created a complete, though defeasible, merger of the estate of the surrenderor. Vide 4 Mann & Ryl. 190; 2 M. & G. 701, n.; 3 M. & G. 733, n.

(*a*)[2] Another not unimportant difference between *Dodd and Another* v. *Acklom* and the principal case (adverted to in the argument, supra, 639) is, that the former was an action for use and occupation, with a plea of non assumpsit. That action was brought to recover "a reasonable satisfaction for the use and occupation of the tenements held and enjoyed," in respect of a period during which, with the assent of the plaintiff, all occupation by the defendant had ceased. To negative an implied promise of payment resulting from such a state of things, no surrender, either de facto or by act and operation of law, appears to be necessary. Whether the particular estate still had a continuing legal existence or not, it is clear that there was no actual or constructive (*Pinero* v. *Judson*, 6 Bingh. 206, 3 M. & P. 497) possession (*Burn* v. *Phelps*, 1 Stark. N. P. C. 94; *Whitehead* v. *Clifford*, 5 Taunt. 518; *Edge* v. *Strafford*, 1 Crompton & Jervis, 391).

In the principal case, the action was on the demise; the occupation was merely an incident; the question between the parties was, whether the legal existence of the particular estate had been determined by a valid surrender, an acceptance of such surrender having been assumed to be necessary to its validity.

As this distinction was not noticed in the argument or in the judgment in *Dodd and Another* v. *Acklom*, it does not affect the decision in that case as an authority.

In *Creagh* v. *Blood*, 3 Jones & Latouche, 132, Sir Edward Sugden, C., expresses his disapprobation of the inroads which had been made upon the Statute of Frauds,

[650] WRIGHT *v.* WILLCOX. May 25, 1850.

[S. C. 19 L. J. C. P. 333; 14 Jur. 746. Dictum not followed, *R.* v. *Crippen*, [1911] 1 K. B. 157.]

It is in the discretion of the judge, subject to the reviewal of the court, to determine in what stage of the cause evidence may be produced.—In trespass for false imprisonment the defendant pleaded, that the plaintiff had stolen the defendant's chaff; he further pleaded that his chaff had been stolen, and that he had reasonable ground to suspect the plaintiff (*a*). The plaintiff gave evidence, in the first instance, to account for her possession of chaff. The defendant's witnesses proved that the chaff in the plaintiff's possession was similar in quality to that lost by the defendant, and, inter alia, that in both there was linseed. Held, that the judge had rightly exercised his discretion in allowing the plaintiff to call a witness in reply to account for the presence of linseed in the chaff found in the plaintiff's possession.

False imprisonment. Pleas—first, not guilty; secondly, that the plaintiff feloniously stole and carried away twenty bushels of chaff of the defendant; thirdly, that the defendant's chaff was feloniously stolen by some person unknown, and that the defendant had reasonable and probable cause for suspecting, and that he did suspect the plaintiff, with others, of the felony.

At the trial before Wilde, C. J., at the Middlesex Sittings after last term, it appeared that the plaintiff and her sisters occupied a house which had been previously occupied by their father, of whom the defendant rented stables attached to the house. Over the stables was an open loft, in which some corn and chaff had been left in a drawer by the plaintiff's father. The defendant believed that his horses had been robbed of their chaff; and from various circumstances he suspected the plaintiff and her sisters, chaff of a similar quality having been found in the drawer, and one of the plaintiff's having been seen coming out of the stable with chaff in her apron. The defendant sent for a policeman, who, upon the plaintiff and her sisters being charged by the defendant with feloniously stealing his chaff, took them into custody. Upon being brought before a magistrate they were discharged. Two witnesses **[651]** called by the plaintiff stated, that they had sold her chaff similar to that found in the drawer. It was also sworn that chaff of that quality had been seen in this drawer before the time at which it had been suggested by the defendant that he had been robbed of chaff.

The defendant produced witnesses, who pointed out marks shewing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular, that linseed was mixed with the chaff, which was said to be unusual.

In reply, the plaintiff's father was called to prove that several months before he had bought linseed, the invoice of which he produced, and that he sent it, mixed with chaff, to his daughters. It was objected, that this witness should have been called in the first instance. The learned judge, however, received the father's evidence and his invoice; and a verdict was returned for the plaintiff, with 28l. damages.

Corrie now moved for a new trial on three grounds. First, that there was no evidence to support the verdict on the first issue. There was nothing to connect the defendant with the prosecution beyond the identity of name. Secondly, the learned chief-justice misdirected the jury in leaving the charge sheet to them as evidence that the defendant gave the plaintiff into custody. That paper only shewed that the parties made a certain statement to the policeman. The act of the policeman, in taking the defendant into custody in consequence of that statement, is not a giving of the plaintiff into custody by the defendant. Thirdly, the evidence in reply ought not to have been received. In *Browne* v. *Murray* (Ryan & Mood. 254) the plaintiff, after proving the publication of a libel, called a witness to disprove certain **[652]** facts

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with respect to surrenders. In that case his lordship says: "When the statute (of frauds) speaks of surrender by act and operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate which he has."

(*a*) As to this plea, vide post, 655, 658, n.

alleged in a plea of justification. After the defendant had given evidence in support of his plea, the plaintiff proposed to call another witness to disprove other facts alleged by the defendant in his justification (*a*)[1]. This evidence was rejected by Abbott, C. J., who said, "If the plaintiff at the outset, calls any evidence to repel the justification, he should go through all the evidence he proposes to give for that purpose, and shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice, that this course should be adopted: otherwise, there will be no end of evidence on either side, as the defendant would be entitled again to call witnesses to answer those last called by the plaintiff."

In *Jacobs* v. *Tarleton* (11 Q. B. 421), which was an action against the indorser of a bill, the plaintiff made out a primâ facie case by proving the defendant's signature. In support of a plea traversing the indorsement, evidence was given to shew that the plaintiff was too poor to have given value for the bill, and that he had denied that he knew anything of the bill or had authorised the bringing of the action (*c*). Mr. Baron Parke refused to receive evidence in reply, that the plaintiff had possessed the means of discounting the bill, and had in fact discounted it. After time taken, the court held that Mr. Baron Parke was right in rejecting this evidence (*d*), saying, that the plaintiff might either rely upon a primâ facie case, or go into all the evidence he had to confirm that **[653]** primâ facie case; but that he was not entitled to rely, in the first instance, upon a primâ facie case upon that issue, and afterwards, when that primâ facie case was called in question by the defendant, to call other evidence to confirm his primâ facie case; and that it was not proposed to call the witness to contradict any statement made by the defendant's witnesses, but to add a fact tending to support the plaintiff's primâ facie case (*a*)[2]. [Maule, J. If the witness called by the plaintiff to prove an indorsement prove it weakly, and the defendant calls evidence to shew the improbability of the genuineness of the indorsement, the plaintiff cannot call a witness to prove that he saw the defendant sign it. If that were allowed, a plaintiff might call witnesses, and keep back one who it was supposed might, on cross-examination, disclose something which would damage the plaintiff's case.]

[654] Wilde, C. J. The Court is of opinion that no case has been made out for a rule to set aside the verdict on the ground of misdirection. As to the admissibility

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(*a*)[1] In support of which, he had, no doubt, given evidence.

(*c*) From the report of this case in 17 Law Journ. (Q. B.), 194, it appears that there were pleas of fraud and covin, and want of consideration.

(*d*) The learned judge ruled that the plaintiff having made out a primâ facie case by proof of the indorsement, was bound to stand upon that case; that the defendant's evidence did not set up a new case, but was merely in answer to the plaintiff's primâ facie case. 17 L. J. (Q. B.), 195.

(*a*)[2] This case, as reported in 11 Q. B., is rather obscure. The issue raised upon the third plea was, whether the defendant indorsed the bill to the plaintiff. The affirmative might be proved either by evidence of a special indorsement by the defendant to the plaintiff, or by evidence of a blank indorsement by the defendant, coupled with possession by the plaintiff of the bill. If this issue had stood alone on the record, it could not have been contended that any other evidence ought to have been given in the first instance, whatever the nature of the defence, anticipated or unanticipated, might have been. It is difficult to understand why the evidence on this issue should be different where there are other issues upon the record. Nor indeed does it appear from the judgment, that the evidence given in support of the plea or that offered in reply, had the least bearing upon any other issue than that raised upon the third plea. The evidence given by the defendant in *Jacobs* v. *Tarleton*, would, if admissible, be so only as tending to shew that the blank indorsement signed by the defendant, did not operate as an indorsement to the plaintiff. According to the opinion of the court, after deliberation, the plaintiff was bound to produce, in the first instance, all the evidence which might eventually be useful in rebutting evidence which might be adduced to impugn the primâ facie operation of the possession of the instrument bearing the defendant's blank indorsement. Thus, if after proof of a blank indorsement of a bill produced by the plaintiff, it were shewn that the plaintiff had, on a day subsequent to that on which the indorsement had been written, been seen to pick the bill up in the street, he would be properly shut out from shewing that he had previously dropped it,—on the ground that such evidence should have been given in the first instance.

of the evidence in reply, the point is one of considerable importance. Upon that point, and upon that of the verdict being against evidence, you may take a rule.

June 4.—Edwin James, Q. C., and Hawkins, now shewed cause. The evidence in reply was properly received. The expediency of admitting evidence in reply must vary according to circumstances, and the court will not interfere with the course which the judge has, in the exercise of his discretion, thought it right to adopt, unless they can see that injustice has been done. When the plaintiff is apprised by the pleadings of the case meant to be set up by the defendant, and chooses to enter by anticipation upon part of that case, he must produce the whole of the evidence upon what he means to rely. In moving for the rule, *Jacobs* v. *Tarleton* was cited (supra, 652). It is submitted that the decision in that case cannot be supported. *Marston* v. *Allen* (8 M. & W. 494, 1 Dowl. N. S. 442). [Maule, J. In *Jacobs* v. *Tarleton* the indorsement was not disproved by shewing that no consideration had been given. Wilde, C. J. The evidence may have been given for the purpose of shewing that the bill did not pass to the plaintiff by the indorsement proved. *Browne* v. *Murray* (supra, 651), merely shews that where the defence is known, the plaintiff cannot give some evidence to meet that defence, and reserve other evidence having **[655]** the same object, for his reply. So, in *Rees* v. *Smith* (2 Stark. N. P. C. 31), *Delauney* v. *Mitchell* (1 Stark. N. P. C. 439), *Greswolde* v. *Kemp* (Carr. & M. 635), 1 Taylor, Evid. 275 b.]

Corrie and Prentice, in support of the rule. Where the plaintiff at the outset goes into the proof of any issue, he must then produce all the evidence on which he means to rely with reference to that issue; more especially if he has notice of the case to be set up by the defendant. Here, the plea, charging the plaintiff with stealing the chaff (vide post, 658, n.) made it important to shew the ingredients of the chaff said to have been purchased of the father. The evidence in reply went merely to confirm the evidence given in chief; and *Rex* v. *Holditch* (5 Carr. & P. 299) shews that such confirmatory evidence was not admissible. In that case the prisoners were indicted for robbery. The defence set up was an alibi at a considerable distance from the spot where the robbery had been committed. For the prosecution a witness was called in reply to prove that he had seen all the prisoners near the spot. Taunton, J., said: "Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution." [Maule, J. Is there any case in which a new trial has been granted on the ground that evidence, otherwise admissible, has been received at the wrong time?] There is no case in which a new trial has been applied for on that **[656]** ground and refused. *Ashby and Others, Executors*, v. *Bates* (*a*), was an action on a life insurance, where the policy was to be void if a statement that the assured had not been afflicted with rupture, was untrue. The declaration averred that the statement was true. Plea, that the assured had been afflicted with rupture. Coltman, J., allowed the defendant to begin. A verdict for the defendant was set aside on the ground that the plaintiffs ought to have been allowed to begin (*b*). Here, the identity of the chaff was involved in the issue; and

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(*a*) 15 M. & W. 589, 4 Dowl. & L. 33. And see *Booth* v. *Millns*, 15 M. & W. 669, 4 Dowl. & L. 52.

(*b*) In that case, Pollock, C. B., is reported to have said, that "the plaintiffs were bound to give some evidence, however slight, of the truth of the statement; and Alderson, B., is reported to have said, "The plea, in truth, raises an issue which amounts to no more than this: whereas you, the plaintiffs, have alleged that the whole of this statement is true, I, the defendant, put you to prove that part of it in which the assured alleged that he was not, at the time the assurance was effected, so afflicted. But that was an issue, the first assertion of which was made by the plaintiffs. The defendant has contradicted what the plaintiffs affirmed: and the real issue is, whether what they have so affirmed is true. If it be true, it is for the plaintiffs to prove its truth." By this the onus probandi is placed upon priority of assertion, not upon the affirmative or negative quality of the proposition asserted. Thus, if it were necessary to allege in a declaration that A. B. had not committed forgery, and the defendant pleaded that he had, it would lie on the plaintiff to begin by disproving it.

Possibly no great injury was occasioned by the setting aside of the verdict in it was not an afterthought, as the father had come into court with the invoice in his pocket.

[657] WILDE, C. J., after stating that he was not dissatisfied with the verdict, said: I think the evidence in reply was properly received. The objection is not to the admissibility of the evidence, but to the stage of the cause in which it was offered. Were that objection to prevail, there might often be a failure of justice. The time at which evidence is to be received, must be in the discretion of the judge, the exercise of that discretion being subject to the review of the court. In this case I cannot see that the admission of the evidence has led to any injustice. The rule, therefore, will be discharged.

MAULE, J. I also think that the rule should be discharged. I see no reason for granting a new trial on the ground of the verdict being against evidence.

The objection to the reception of the evidence was, that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised, frequently occur. When a party has closed his case, he often asks, and is allowed, to supply a deficiency.

Supposing, however, this was not a matter in the discretion of the judge, I do not think that the evidence should have been excluded. The defendant introduced a mark by which he sought to identify the chaff. Even supposing that the plaintiff had reason to suspect that such evidence might be given, I do not think that she would be bound to waste time by answering by anticipation that which might never be set up.

[658] CRESSWELL, J. If the question had been, whether the judge was bound to receive or bound to reject the evidence, I should have said that he was bound to receive it. When the witnesses for the plaintiff were examined, there was nothing to call their attention to the fact of linseed being mixed with the chaff.

But, however that may be, it was clearly a matter for the exercise of the discretion of the judge. The case is analogous to the practice at nisi prius, of allowing a question to be put on re-examination which does not arise out of the cross-examination.

TALFOURD, J. I think that this was a matter for the discretion of the judge, and I also think that such discretion was soundly exercised. In my opinion, no injustice has been done; and I see no ground for disturbing the verdict.

Rule discharged (*a*).

Ashby v. *Bates*. Not so in *Doe d. Bather* v. *R. Brayne*, 5 C. B. 655. In that case, the lessor of the plaintiff, a stranger in blood, claimed as devisee of W. Brayne. The defendants admitted the seisin of W. B., and the due execution of the will, and that the plaintiff's lessor was, primâ facie, entitled under it, relying upon a second will, revoking the first. The defendants were permitted by Gaselee, Serjt., to begin,—the affirmative of the only matter in dispute lying upon them; and, establishing the second will, they obtained a verdict. This verdict was set aside on the ground that the admission was insufficient, inasmuch as it did not go to the extent of acknowledging that the estate passed by the devise in the first will,—in other words, that the admission was insufficient, because the defendants did not thereby acknowledge that the latter will under which they claimed, was void, and the plaintiff entitled to a verdict. Upon the second trial the plaintiff, having the advantage of the opening and the reply, obtained a verdict from a special jury of the county in which the lessor of the plaintiff was a magistrate. The defendants, impoverished and disheartened did not renew the contest, and their ancestral lands were irretrievably aliened to another family, by an instrument revocable, and found to have been actually revoked,—so found by the only jury to whom the question appears to have been either legally or fairly submitted.

(*a*) In this case the cause of the defendant's failure seems to have been, his taking the benefit of the statute of Anne. If he had confined his defence to the third plea, or even if he had been contented to plead that plea with the addition of the general issue only, the evidence in reply would have been clearly inadmissible. It was not attempted to be shewn that the defendant knew, or had the means of knowing, that the father had sent to his daughters linseed mixed with chaff. This fact therefore could not in the least degree lessen or affect the probability of the plaintiff's felony, as presented to the mind of the defendant. In the result the defendant appears to

[659] THE QUEEN v. THE SHERIFF OF LEICESTERSHIRE, IN THE CAUSE OF ARDEN v. BINGHAM. 1850.

The amount of fine to be imposed on the sheriff for the negligent escape of an execution debtor, will be measured by the amount of injury likely to result to the execution creditor. In a case where the amount of injury sustained was doubtful, the Court directed an application to stay proceedings on an attachment against the sheriff for the escape, to stand over, with liberty to the execution creditor to bring an action for the sole purpose of ascertaining the amount of damage sustained.

Arden having obtained a judgment in this Court against Bingham, issued a capias ad satisfaciendum into the County of Leicester for 2600l. The sheriff, being ruled, returned cepi corpus, and that the defendant, against his will, escaped out of his custody, and that he had not since been able to retake him.

In Hilary Term last, a rule was obtained by Lush, calling upon the sheriff to shew cause why this return should not be quashed, and why an attachment should not issue.

In the same term, cause was shewn against this rule by Hugh Hill and J. B. Karslake, upon an affidavit denying collusion on the part of the sheriff with the judgment debtor. They contended that, since the 5 & 6 Vict. c. 98,—which, by sect. 31, takes away the action of debt given by Westm. 2, & 1 Rich. 2, c. 12,—the remedy for an escape upon final process is an action on the case founded upon the late statute.

Lush, in support of the rule. The return being clearly bad, the Court is bound to quash it. No return then remaining on the files of the Court, the sheriff is in contempt for not obeying the rule of Court, by which he was required to return the writ. [660] An attachment for this contempt follows as a matter of course.

Per Curiam. The rule must be made absolute for quashing the return and issuing an attachment: the attachment to lie in the office during the first six days of Easter Term.

In Easter Term, Channell, Serjt., obtained a rule calling upon Arden to shew cause why proceedings should not be stayed on the rule and on the attachment, upon payment by the late sheriff (from whose custody Bingham had escaped, and who had made the insufficient return) of such sum, or upon the performance of such terms, as the Court should direct, or why it should not be referred to the Master, to ascertain what damage, if any, Arden had sustained by reason of the escape.

Byles, Serjt., and Karslake now shewed cause. The return is clearly insufficient. The Court has already, in effect, decided that it is no return; and they will not relieve the sheriff from the position in which he has chosen to place himself, upon any terms less beneficial to the judgment creditor than the payment of the sum for which the judgment stands, and for which the execution issued, the attachment coming in lieu of the action of debt. *Heppel* v. *King* (a).

Channell, Serjt., and Hugh Hill, contrà. The 5 & 6 Vict. c. 98, s. 31, places the remedy for escapes upon final process upon the same footing as that for escapes upon mesne process. In either case the sheriff is now [661] to be liable only to the extent of the damage actually sustained; and it would be unreasonable to fix the sheriff with an amount of damages exceeding those which plaintiff could have recovered by action, and more than what he has actually sustained.

WILDE, C. J. The fine to be imposed on the sheriff, for his contempt in not obeying the process of the Court, ought to be such as will place the execution creditor as nearly as possible in the same position in which he would have stood if the sheriff had performed his duty in accordance with the late statute, which limits the remedy of the execution creditor against the sheriff to the damage actually sustained. As the materials before the Court do not furnish us with the means of ascertaining the amount of the damage incurred, the rule should be enlarged, for the purpose of enabling the

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have lost his verdict upon the third issue by the effect of evidence admissible only on the second. This is one of the numerous incongruities introduced by relaxing the law as to double pleading, and at the same time retaining those rules as to pleading and evidence which were framed with reference to an absolute singleness of issue.

(a) 7 T. R. 370, and see *Hawkins* v. *Plomer*, 2 W. Bla. 1048; *Fowlds* v. *Mackintosh*, 1 H. Bla. 233; *Stevenson* v. *Cameron*, 8 T. R. 28; 2 Wms. Saund. 61.

judgment creditor to bring an action against the sheriff, in which the only question to be raised will be the amount of damage sustained.

Rule accordingly (*a*)[1].

THE BANK OF AUSTRALASIA *v.* HARDING. 1850.

[S. C. 19 L. J. C. P. 345; 14 Jur. 1094. See *Godard* v. *Gray*, 1870, L. R. 6 Q. B. 150; *Copin* v. *Adamson*, 1874-75, L. R. 9 Ex. 350; 1 Ex. D. 17; *In re Trufort*, 1887, 36 Ch. D. 615; *Risden Iron and Locomotive Works* v. *Furness*, [1906] 1 K. B. 57. See also *Bank of Australasia* v. *Nias*, 1851, 16 Q. B. 717.]

The members, resident in England, of a company formed for the purpose of carrying on business in a place out of England, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on accordingly.—A statute authorising an unincorporated company to sue and to be sued in the name of its chairman, constitutes the chairman, when so suing or so sued, an agent for the members of the company in the affairs of the company.—The members of a company formed for the purpose of carrying on business in a colony, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceedings.—Where a statute subjects the property of members for the time being of an unincorporated company, to execution upon a judgment obtained against their chairman, reserving in other respects the liabilities of parties, the remedies given against the property are in cumulation, and a member may be proceeded against by action.—A judgment in a colonial court is no estoppel; nor is it pleadable in bar in an action brought in England for the same cause.

Assumpsit. The first count of the declaration stated, that whereas, before and at the several times thereafter, in that count mentioned, several persons had formed themselves into a company, esta-**[662]**-blished at Sydney, in parts beyond the seas, to wit, in Her Majesty's Colony of New South Wales, under the name, style, and firm of the Bank of Australia, for the purpose of carrying on at Sydney aforesaid the trade and business of bankers (*a*)[2], to wit, for the purposes of discount and issuing notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit account for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other measures and things as were usually done and performed relating to or connected with the ordinary business of banking, and the said company were before and at the several times thereafter in that count mentioned, so carrying on at Sydney aforesaid the said trade and business of bankers: And whereas after the said formation and establishment of the said company, and whilst the same was carrying on the said trade and business, and before the bringing of such action as is therein mentioned, to wit, on the 28th day of August, 1833, a certain Act of the Governor and Legislative Council of New South Wales was made and passed relating to and concerning the said company, to wit, an act, intituled "An Act to enable the proprietors of a certain banking **[663]** establishment or company carried on in the town of Sydney in the colony of New South Wales, under the name, style, and firm of the Bank of Australia, to sue and be sued in the name of the chairman of the said bank or company for the time being, and for the purposes therein mentioned," which act was and is in the words and of the tenor following, that is to say: "Whereas several persons formed themselves in a company or society established at Sydney, under the name, style, or firm of the Bank of Australia, as well for the purposes of discount and issuing of notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit accounts; for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other matters and things as are usually done and performed relating to or connected with the ordinary business of banking: And

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(*a*)[1] And see *Evans* v. *Manero or Maners*, 7 M. & W. 463, 9 Dowl. P. C. 256.

(*a*)[2] Vide 6 M. & G. 671.

whereas the said bank is now carried on in Sydney, and is under the care and management and superintendence of eleven directors, one of whom is chairman of the said Bank: And whereas difficulties may arise in recovering debts due to the said bank or company, and in maintaining actions or proceedings for damages done to their property, and also in prosecuting persons who may steal or embezzle the bills, notes, bonds, mortgages, moneys, goods, chattels, or effects of the said bank: And whereas it would be convenient and just that persons having demands against the said bank should be entitled to sue some member thereof in place and stead of the whole: But as these purposes cannot be effected without the aid and authority of the Legislature, Be it therefore enacted, by his Excellency the Governor of New South Wales, with the advice of the Legislative Council, that from and after the passing of this act, all actions and suits and all proceedings at law or in equity, to be com-**[664]**-menced and instituted, and prosecuted or carried on by or on behalf of the said bank; or when the said bank is or shall be in any way concerned, against any person or persons, body or bodies politic or corporate, or whether a member or members of the said bank, or otherwise, shall and may be lawfully commenced, instituted, and prosecuted or carried on in the name of the person who shall be chairman of the said bank at the time any such action, suit, or proceeding shall be commenced or instituted as the nominal plaintiff, complainant, or petitioner for and on behalf of the said bank, and that all actions, suits, or proceedings aforesaid to be commenced, instituted, or prosecuted against the said bank, shall be commenced, &c., against the chairman for the time being of the said bank, as the nominal defendant for and on behalf of the said bank, and that all prosecutions to be brought, instituted, or carried on, by or on behalf of the said bank for fraud upon or against the said bank, or for embezzlement, robbery, or stealing the bills, notes, bonds, moneys, goods, chattels, effects or property of the said bank, or for any other offence against the said bank, shall or may be so brought or instituted and carried on in the name of such chairman for the time being of the said bank; and in all indictments and informations it shall be lawful to state the property of the said bank to be the property of such chairman for the time being of such bank; and any offence committed with intent to injure or defraud the said bank shall and lawfully may, in any prosecution for the same, be stated or laid to have been committed with intent to injure or defraud such chairman for the time being of such bank; and any offender or offenders may thereupon be lawfully convicted of any such offence; and in all other allegations or indictments, informations or other proceedings, it shall and may be lawful and sufficient from and after the passing of this **[665]** act to state the name of such chairman; and the death, resignation, or removal, or other act of such chairman, shall not abate any such action, suit, or prosecution, but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may be or become chairman of the said bank for the time being.

"And (sect. 2) that a memorial of the name of the chairman of the said bank, in the form or to the effect for that purpose set forth in the schedule hereunto annexed, signed by the said chairman and by a majority of the directors of the said bank, shall be recorded upon oath in the Supreme Court of New South Wales within thirty days after the passing of this act; and when and as often as any director of the said bank shall be newly elected chairman thereof, a memorial of the name of such newly-elected chairman, in the same form or to the same effect as the above-mentioned memorial, signed by such newly-elected chairman and a majority of persons who shall be directors of the said bank at the time of the election of such new chairman, shall in like manner be recorded upon oath in the said Supreme Court within thirty days next after such chairman shall be elected.

"Provided always (sect. 3), and be it further enacted, that until such memorial as hereinbefore first mentioned, be recorded in the manner herein directed, no action, suit, or other proceeding shall be brought by the said bank in the name of the chairman of the said bank as aforesaid, under the authority of this act."

Provided always (sect. 4), that the chairman being the plaintiff, complainant, petitioner, or defendant in any such action, suit, petition, or other proceeding as aforesaid, on behalf of the said bank, shall not prevent or **[666]** affect the competency of any such chairman so as to prevent him from being a witness in such action, &c., in the same manner as might have been if his name had not been made use of as such plaintiff, &c.

Provided always (sect. 5), that execution upon any decree or judgment in any such action, suit, &c., obtained against the chairman for the time being of the said bank, whether he be plaintiff or defendant therein, may be issued against, and levied upon, the goods and chattels, lands, and tenements of any member or members whatsoever of the said bank for the time being, in like manner and not otherwise than as if such decree or judgment had been obtained against such member or members personally. Provided always, that every such chairman in whose name every such action, &c., shall be commenced, prosecuted, carried on, or defended, and every such member or members against whose goods and chattels, lands and tenements, execution upon any judgment or decree shall be issued or levied as aforesaid, shall always be reimbursed and paid out of the funds of the said bank, all such damages, dues, expenses, costs, and charges as by the event of any such proceeding such chairman or member or members shall or may be put unto or become chargeable with; and all such remedies shall be allowed as between the several members of the said bank for the time being, as if this act had not been passed.

And (sect. 6) that the provisions in this act contained shall extend and be construed, deemed, and taken to extend to the said bank, at all times during the continuance of the same, whether the said bank be now or hereafter composed of some, all, or any of the persons who were the original or are the present members thereof, or of all or some of those persons; together **[667]** with some other person or persons, or shall be composed altogether of persons who were not originally nor are the members of the same.

Provided always (sect. 7), that nothing herein contained shall extend or be deemed, &c., to extend to incorporate the members of or proprietors of the said bank, or to relieve or discharge them or any of them from any responsibility, duties, contracts, or obligations whatsoever which by law they now are, or at any time hereafter shall be, subject or liable to either between the said bank and others, or between the individual members of the said bank, or any of them and others, or among themselves, or in any other manner whatsoever, except so far as the same are affected by the provisions of this act, and the true intent and meaning of the same.

And (sect. 8) that all bonds, mortgages, warrants of attorney, and other securities not being assignable in the law, which have been, or which shall or may at any time hereafter be, taken in the name of any person as chairman of the said bank for and on account of the said bank, shall and may be put in suit and be sued upon at law or in equity, in the name of the chairman in whose name the same may have been taken, or in the name of any person who shall or may succeed to that office, and be the chairman of the said bank at the time such proceeding or proceedings shall be instituted, notwithstanding the name of any such succeeding chairman be not inserted in such bond, &c. as an obligee, &c. of the sum or sums of money therein mentioned, and the death, resignation, removal, or other act of any such chairman of the said bank for the time being in whose name any such bond, &c. shall so be put in suit, shall not abate any action, &c. had thereon; **[668]** but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may succeed to that office, and be or become the chairman of the said bank for the time being; and the legal estate in all lands and tenements belonging or mortgaged to the said bank and all legal rights and capacities, shall become vested in such new chairman as aforesaid to all intents and purposes, immediately upon the recording of the memorial of the name of such new chairman in the said Supreme Court, and so on toties quoties whensoever any new appointment or election of a chairman for the time being of the said bank shall take place, and such new memorial thereof shall be inrolled as aforesaid.

And (sect. 9) that in any action to be brought by any chairman of, &c. by virtue of this act, the plaintiff therein shall not be nonsuit, nor shall a verdict be given against the plaintiff, for want of proof of the record of such memorial or memorials as hereinbefore mentioned; but in case the defendant in any such action shall make it appear on such trial that no such memorial or memorials have been recorded, then a nonsuit shall be entered in such action.

Provided always (sect. 10) that nothing in this act contained shall be deemed to affect, or apply to, any right, title, or interest of His Majesty, his heirs, and successors, or of any body or bodies politic or corporate, or of any other person or persons excepting such as are mentioned therein, or of those claiming by or under him or them.

And (sect. 11) that this act shall not commence or take effect until the same shall have received the royal approbation, and the notification of such approbation shall have been made by his Excellency the Governor in the New South Wales Government *Gazette*.

[669] And (sect. 12) that when and as soon as this act shall have received the royal approbation, and notification of such approbation shall have been made as aforesaid by his Excellency the Governor, in the New South Wales Government *Gazette*, this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by the Judges of the Supreme Court of New South Wales, and by all other judges, justices, and others, within the colony of New South Wales and its dependencies, without being specially pleaded.

Averment: That afterwards, and before the bringing of such action as hereinafter mentioned, to wit, on the 28th day of August, 1833, the said act received the royal approbation, and that the notification of such approbation was then made by the then Governor of New South Wales in the New South Wales Government *Gazette*; and that thereupon the said act then became, and was, and from thence continually had been, and still was, the law of and in the said colony applicable to the said company, and part and parcel of the law of the said colony; and that after the said act had become, and whilst the same was such law and parcel of the law of the said colony as aforesaid, and before and at the respective times of the bringing of such action and of the recovery of such judgment as thereinafter respectively mentioned, one Thomas Chaplin Breillat was the chairman of the said company, and the defendant before and at the respective times last aforesaid, and also before and at the times of the making of such promises by the said company, as thereafter in that count mentioned, was and from thence respectively, had been, and still was, a member of the said company; and that whilst the said Thomas Chaplin Breillat was the chairman of the said company as aforesaid, and whilst the defendant was a member of the said company as aforesaid, to wit, on **[670]** the 7th day of December, A.D. 1844, they the plaintiffs caused the said Thomas Chaplin Breillat, as such chairman of the said company, to be summoned, according to the course and practice of the Supreme Court of New South Wales, to appear as the nominal defendant for and on behalf of the said company, in the said Court, pursuant to the provisions of the said act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said Thomas Chaplin Breillat having duly appeared in the said court, according to the course and practice of the said court, to such summons, the plaintiffs did thereupon then declare in the said action against the said Thomas Chaplin Breillat, as the chairman of the said company, and as the nominal defendant for and on the behalf of the said company, by virtue of the said act; and that such proceedings were thereupon further had in the said Supreme Court of New South Wales, in the said action, that afterwards, and whilst the said Thomas Chaplin Breillat continued to be and was the chairman of the said company, and whilst the defendant continued to be and was a member of the said company, to wit, on the 8th day of September, A.D. 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said Thomas Chaplin Breillat, as the chairman of the said company, as aforesaid, as well a certain sum of 175,703l. 18s. 7d., for the damages which the plaintiffs had sustained by and on account of the non-performance of certain premises before that time made by the said company to the plaintiffs, as also the sum of 2404l. 2s. 0d. for their costs and charges by the same court then adjudged to the plaintiffs, with their assent; which damages, costs, and charges in the whole amount to 178,108l. 0s. 7d.; whereof the said Thomas Chaplin Breillat, as the chairman of the said **[671]** company, and as such nominal defendant as aforesaid, was convicted; and that the said promises were made, and the said plaintiffs' causes of action in respect thereof arose within the jurisdiction of the same court, and that the same court, during all the time whilst the said action was pending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was, and was duly holden, within the jurisdiction thereof, in parts beyond the sea, to wit, at Sydney aforesaid, and that the said judgment was given by the said Supreme Court at a place within the jurisdiction of the same court, to wit, at Sydney aforesaid, to wit, by the Chief Justice and other the Justices of the said Supreme Court, to wit, by Alfred Stephen, Esq., Chief Justice, and John Nodes Dickinson, Esq., and William A'Beckett, Esq., Justices of the same court. And further that the said judgment still remains in full force and effect, and not in any wise satisfied, reversed, or annulled; and that no execution hath as yet been obtained of, or upon the said judgment; and that the damages, costs, and charges aforesaid, in form aforesaid adjudged to the plaintiffs, are of great value—to wit, of the value of 178,108l. 0s. 7d. By means of which several premises the defendant as and being such member of the said company as aforesaid, then became, as such member of the said company, liable to pay to the plaintiffs the last-mentioned sum of money, when he, the defendant, should be thereunto afterwards requested; and, being so liable, and the last-mentioned sum of money then being and remaining wholly due and unpaid, he, the defendant, then—to wit, on the day and year last aforesaid—in consideration of the premises, promised the plaintiffs to pay them the last-mentioned sum of money upon request. Breach, in non-payment.

The second count stated, that whereas before the **[672]** 30th day of October, 1843, in parts beyond the sea, to wit, at Sydney, in Her Majesty's colony of New South Wales, the defendant made his promissory note in writing, bearing date the day and year last aforesaid, and thereby promised to pay the plaintiffs, on demand, 154,000l., with interest for the same, to wit, interest at the rate of 8 per cent. per annum from the date thereof, such rate of interest then being the usual and customary rate of interest in that behalf, and the highest legal rate of interest, in the said colony; and then delivered the same to the plaintiff. Breach, in non-payment.

The declaration also contained a count for money lent, and a count upon an account stated.

Fourth plea—to the first count of the declaration—That the defendant was not a native of the said colony, or born at any place within the jurisdiction of the said Supreme Court, but, on the contrary thereof, was born out of the said colony, and out of the jurisdiction of the said Supreme Court, to wit, in England; and that the defendant was not before or at the respective times of the bringing of the said action, and the recovery of the said judgment, as in the first count mentioned, or at any time since, resident or domiciled in the said colony, or at any place within the jurisdiction of the said Supreme Court, and was not, in any manner, during the time last aforesaid, or any part thereof, bound by, or subject to the laws of the said colony; and that, although the said judgment was in fact recovered by the plaintiffs in the said Supreme Court as in the said first count of this declaration mentioned, he, the defendant, was not at any time summoned by any summons, or served with any process, issuing out of the said Supreme Court, at the suit of the plaintiffs for the causes of action upon which the said judgment was so recovered; nor had he, the defendant, any notice, or knowledge of any such summons, **[673]** or process, or of the proceedings in the said action; nor did he, the defendant, appear, nor had he any opportunity of appearing, in the said court to answer the plaintiffs in the said action. Verification.

Tenth plea,—to the second, third, and fourth counts—That the plaintiffs ought not to be admitted or received to say that the defendant promised as in those counts, or any of them, alleged; because he says that the several promises in those counts respectively mentioned, were made by the defendant as a member of the bank or company in the said first count mentioned, and that the plaintiffs' said several causes of action in respect of the said several premises respectively, accrued to the plaintiffs from the defendant as such member of the said bank or company as aforesaid, and not otherwise; and that before and at the respective times of the making of the several last-mentioned promises by the defendant as such member of the said bank or company as aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned, the said bank or company was established and carried on in parts beyond the seas, to wit, at Sydney, in Her Majesty's colony of New South Wales, under and by virtue of the act in the said first count mentioned, which act, before and at the several times of the making of the last-mentioned promises by the defendant as such member of the said bank or company as last aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned was, and from thence respectively had been, and still was, part and parcel of the law of the said colony, applicable to the said bank or company; and that, before and at the respective times of the making of the respective promises by the defendant as such member of the said bank or company as last aforesaid, and of the bringing of such action and the recovering of **[674]** such judgment as hereinafter respectively mentioned, by the law of the colony, a judgment recovered in the Supreme

Court of the said colony by any person or persons, or any body or bodies politic or corporate, having any demands upon the said bank or company, against the chairman of the said bank or company for the time being, as the nominal defendant for and on behalf of the said bank or company, pursuant to the provisions of the said act, from thence respectively had been, and still was, an absolute and fixed bar and preclusion to and against any other action or suit for the same demand against any individual member of the said bank or company: and that, after the making of the said last-mentioned promise as aforesaid by the defendant as such member as aforesaid, and before and at the respective times of the bringing of such action and the recovery of the said judgment as hereinafter respectively mentioned, one Thomas Chaplin Breillat was the chairman of the said bank or company liable to be sued as the nominal defendant for and on behalf of the said bank or company by virtue of the said act; and that, after the making of the several last-mentioned promises by the defendant as such member of the said bank or company as aforesaid, and before the commencement of this suit,—to wit, on the 7th day of September, 1844,—the plaintiffs caused the said Thomas Chaplin Breillat, as such chairman of the said bank or company as aforesaid, to be summoned according to the course and practice of the Supreme Court of New South Wales, to appear as the nominal defendant for and on behalf of the said bank or company in the said court, pursuant to the provisions of the said act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said Thomas Chaplin Breillat, having duly appeared in the said court, according to the course and practice of the said [675] court, to the summons, the plaintiffs did thereupon then declare against the said Thomas Chaplin Breillat as the chairman of the said bank or company, and as the nominal defendant for and on behalf of the said bank or company by virtue of the said act: and that such proceedings were thereupon further had in the said Supreme Court in the said action, that afterwards, and whilst the said Thomas Chaplin Breillat continued to be, and was, chairman of the said bank or company, and before the commencement of this suit, to wit, on the 8th September, 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said Thomas Chaplin Breillat as such chairman of the said bank or company as aforesaid, as well a certain sum of 175,703l. 18s. 7d., for the damages which the plaintiffs had sustained on occasion of the non-performance of certain promises before that time made by the said bank or company to the plaintiffs, as also the sum of 2404l. 2s. 0d. for their costs and charges by the said Supreme Court then adjudged to the plaintiffs with their assent; which damages, costs, and charges in the whole amount to 178,108l. 0s. 7d.; whereof the said Thomas Chaplin Breillat, as such nominal defendant as aforesaid, was convicted; as by the proceedings of the court, reference being thereunto had, will amongst other things more fully and at large appear; and that the last-mentioned promises were made, and the plaintiffs' causes of action in respect thereof arose, within the jurisdiction of the said Supreme Court of New South Wales; and that the said court, during all the time whilst the said action was depending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was duly holden within the jurisdiction thereof, in parts beyond the seas, to wit, at Sydney, in the said colony of New South Wales; and that the said judgment was given by the said court at a place [676] within the jurisdiction of the said court, to wit, at Sydney aforesaid, to wit, by the Chief Justice, and other the Justices, &c. of the court, to wit, &c., by, &c.; which judgment still remains, and is in full force and effect, and not in any wise reversed, vacated, or made void; and that the several promises and causes of action in the said second, third, and last counts of this action respectively mentioned, are the same identical promises and causes of action for, upon, and in respect of which the plaintiffs brought the said action and recovered the said judgment in the said Supreme Court of New South Wales, against the said Thomas Chaplin Breillat, as the chairman of the said bank or company, and as such nominal defendant as aforesaid; and that, by the law of the colony, the judgment so recovered against the said Thomas Chaplin Breillat, as the chairman of the said bank or company, and as such nominal defendant for and on behalf of the said bank or company, as in that plea is mentioned, was final and conclusive in the said colony against the said Thomas Chaplin Breillat as such nominal defendant as aforesaid, and was an absolute and final bar and preclusion to and against any action or suit against the defendant as a member of the said bank or company, for or in respect of the said promises and causes of action in the said second, third, and last counts respectively mentioned, or any of them. Verification: wherefore the defendant prays judgment, if the plaintiffs ought to be admitted or received, against the judgment so recovered by them as aforesaid, to say that the defendant promised as in the said second, third, and last counts, or in any of them, is alleged.

Upon the fourth plea, the issue taken was, that the defendant was at the several times of the bringing of the said action and of the recovery of the said judgment, bound by, and subject to, the laws of the said **[677]** colony, to wit, as and being at the several times last aforesaid a member of the said bank or company.

To the tenth plea the plaintiffs demurred, shewing for cause of demurrer, that the said plea does not allege or disclose any matter of estoppel, and ought not to be pleaded by way of estoppel, and is improperly commenced and concluded as a plea of estoppel, and has not a proper formal commencement or conclusion, and does not pray a proper judgment; and also for that the said last plea is ambiguous, and has a double aspect, in this, to wit, that it proposes to shew that the said causes of action are merged in the judgment in that plea mentioned, and also assumes to set up such judgment as an estoppel to the plaintiff's recovery in respect of the promise as to which the said plea is pleaded; and also for that the said plea ought to have been pleaded as an ordinary plea in bar, inasmuch as the supposed defence therein contained, purposes to be, that the causes of action as to which the said plea is pleaded, were merged in the said judgment; and for that it does not appear how or why the said judgment should be an absolute and final bar and preclusion to and against any action or suit by the plaintiffs against the defendant, as a member of the said bank; and that if the said plea discloses any matter of defence at all, such matter of defence is improperly pleaded, and has not the legal operation and effect attempted to be given to it by the said plea; and for that the said plea is inconsistent and repugnant, inasmuch as it avers that the plaintiffs ought not to be admitted or received to say that the defendant promised as in the said second, third, and last counts or any of them mentioned, whilst the said plea in the body of it conclusively shews that the defendant, as a member of the said Bank of Australia, did so promise, and that judgment was recovered upon **[678]** and in respect of such promises of the defendant, and the non-performance thereof (*a*).

Channell, Serjt. (with whom were Gaselee, Serjt., Hugh Hill, and Welch) for the plaintiffs. As the defendant has stated that he means to object to the declaration, it will be convenient to begin with the first count, to which the objection applies. That count sets out a judgment recovered in the Supreme Court of New South Wales against a party sued as nominal defendant on behalf of the bank of which he was chairman. Of **[679]** that bank the defendant was a member as well at the time when

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(*a*) In 1845, the Bank of Australia, then being in pecuniary difficulties, applied to the Bank of Australasia for assistance. Upon the negotiation of the loan, an agreement was entered into by the directors of the Bank of Australia with the Bank of Australasia, which contained stipulations, some of which the directors of the Bank of Australia had no authority to enter into. Various sums were advanced by the Bank of Australasia to the Bank of Australia in pursuance of the agreement, and, on the 30th of October, 1843, a balance of 154,000l. was struck. For this amount and interest a promissory note was signed by the chairman of the Bank of Australia, pursuant to a resolution of the directors, "for value received, for and on behalf of the Bank of Australia." The shareholders of the Bank of Australia denied the liability of the bank to pay this note, on the ground that the directors had exceeded their powers. An action was brought on this note against Breillat, the then chairman of the Bank of Australia, in the Supreme Court of New South Wales, in which action a verdict was found for the defendant, under the direction of Dickenson and A'Beckett, JJ., against the opinion of Alfred Stephen, C. J. Upon appeal against the judgment pronounced upon this verdict, it was held by the Privy Council that the directors of the Bank of Australia had the power of managing partners in an ordinary banking partnership, and that amongst such powers was the power of borrowing money for the purpose of discharging the existing liabilities of the bank until the assets should be realised, and that the circumstance of the agreement for the loan being accompanied with stipulations, some of which were ultra vires, did not discharge the Bank of Australia from liability to repay the loan. *Bank of Australasia* v. *Breillat, Chairman of the Bank of Australia* (upon an appeal from the colonial judgment), 8 Moore, Privy Council Cases, 152).

the cause of action arose, as also when the action was brought, and when the judgment was recovered in the colonial court. The present action is therefore free from the various difficulties which might have arisen if, at one of those periods, the defendant had not been, or had ceased to be, a member of the bank. The judgment in reality is a judgment against "the defendant and others." A judgment in a foreign or in a colonial court, though certainly not conclusive, is primâ facie to be considered to be good. The onus of impeaching it lies on the defendant. It will perhaps be contended, that in the colony the defendant could not have been sued as a member of the bank, and that the plaintiffs would have been bound to have recourse to the provisions of the colonial act; and, it may be urged, that, if the defendant could not have been sued individually in the colony, he cannot be sued individually here. It will also probably be said, that the defendant is only liable to be proceeded against under the provisions of the colonial act, and that his sole liability is, to execution in New South Wales. The first objection proceeds on the assumption that the provisions of the colonial act tally with those of the British Joint Stock Bank Act (7 G. 4, c. 46); and cases will be referred to in which it has been held, that, under the English act, the remedy of a creditor is against the public officer of the company, and not against individual members. But in this respect there is a material difference between the provisions of the two acts. Now, the case of *Steward* v. *Greaves* (10 M. & W. 711) was decided expressly upon the 10th section of the Joint Stock Bank Act, by which act the Bank of England waived its exclusive privilege upon a specific condition. That section provides "that it shall be lawful for the plaintiff to cause **[680]** execution upon any judgment, decree, or order obtained by him in any such action or suit, to be issued against the property and effects of the company; and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment against the person, property, and effects of any shareholder; or, in default of obtaining satisfaction of such judgment, &c., from any shareholder, against the person, property and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose: Provided always, that no person having ceased to be a shareholder of the company shall be liable for the payment of any debt for which any such judgment, &c., shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same, or for which judgment shall have been obtained after the expiration of three years from the time when he shall have ceased to be a shareholder of such company; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed."

These were the provisions relied upon by Parke, B. in the judgment delivered by him in *Chapman* v. *Milvain* (14 Jurist, 251, since reported 19 Law Journ., Exch., 228, 5 Exch. 61). But the colonial act contains no such provisions. In *Chapman* v. *Milvain* it was held that the public officer must be made the plaintiff. But, in *Blewitt* v. *Gordon* (*b*), it was held that the words "shall and lawfully may sue the public officer as the nominal **[681]** defendant," did not deprive the plaintiffs of their common-law right of suing members of the company. That case has never been overruled. The 7th section (supra, 667) of the colonial act expressly reserves the ordinary liabilities of the shareholders. Looking at this act, it is evident that it was intended to give to the creditors of the bank a cumulative remedy. The powers given by the 7th section of the colonial act are not to be found in the English Bank Act. [Maule, J. Does not the question come upon the exception?] This is not a judgment against the defendant solely. The Supreme Court of New South Wales has no jurisdiction beyond the limits of the colony. If the creditor can enforce his judgment only by execution, he is without remedy against a shareholder who neither resides in the colony nor has property there. It is submitted, that, even in the colony, a creditor is not bound to sue the officer of the bank, but may bring his action against any member with respect to whom it can be shewn that he was a contracting party. Here, the defendant, by pleading to the action, admits that he is within the jurisdiction of the court in which he is impleaded. The reason why a party is allowed to

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(*b*) 1 Dowl. N. S., 815. And see *Beech* v. *Eyre*, 5 M. & G. 421, 6 Scott, N. R. 327.

sue here on a foreign judgment is, that such judgment is evidence of a debt, and the onus of impeaching it lies on the other side; *Mason* v. *Nicholls* (14 M. & W. 118), which is since the 7 & 8 Vict. c. 96 (*c*); *Hanmer* v. *White* (12 M. & W. 519).

[682] Upon the demurrer to the fourth plea, the question is, whether, assuming the declaration to be good, that plea affords a sufficient answer. To what extent does the plea establish the non-residence within the colony? It excludes the defendant's being resident at the time the action against Breillat was brought on which the judgment was given. Consistently with this allegation the defendant may have been resident in the colony until shortly before the bringing of that action (*a*). It is submitted that the plea should have negatived the residence in the colony at any time before action brought. At all events, it should have stated that the defendant had no property within the colony. The plea alleges that the defendant had not at any time notice or knowledge of the summons, the process, or the proceedings. This allegation must be understood as merely denying actual notice or knowledge; whereas, supposing notice to be necessary, notice to an agent, although it should never have been communicated to the defendant, would have been sufficient; *Vallée* v. *Dumergeon* (18 Law Journ., N. S. (Exch.), 378, since reported 4 Exch. 290). So, notice left at the last known place of abode within the colony might, for anything which appears here, be sufficient: *Becquet and Others* v. *MacCarthy* (2 B. & Ad. 951); *Cowan* v. *Broadwood* (1 M. & G. 882, 2 Scott, N. R. 128); *Reynolds* v. *Fenton* (3 C. B. 187).

With respect to the replication to the fourth plea, it is a sufficient answer to the fourth plea, assuming that the fourth plea can be supported. It sets out foreign law, which is to be dealt with here as matter of fact. **[683]** [Maule, J. Whether the law of a foreign country is binding or not in a particular case, is matter of law here and elsewhere.]

The tenth plea is bad in form and in substance. The plea attempts to set up an estoppel, but it prays that the plaintiffs may be precluded from asserting what the defendant admits to be true, namely, that the defendant promised as alleged in the declaration. If the plea is to be regarded as a plea of judgment recovered, not only are the commencement and the conclusion informal, but the plea is bad in substance, as not shewing any merger of which our courts can take notice: *The General Steam Navigation Company* v. *Guillou* (11 M. & W. 387); *Smith* v. *Nicolls* (5 New Cases, 208).

Willes, contrà. The first count of the declaration is bad. No foundation is laid for the promise which the defendant is alleged to have made, except the colonial judgment obtained under the provisions of the colonial act. Now, that act gives the judgment-creditor a remedy against the property of persons who were members of the bank for the time being, i.e. at the time of the award of execution, but nothing further. It is said that the colonial act gives a cumulative remedy; but no ground is shewn for that assertion. Supposing, however, the remedy to be so far cumulative that the plaintiffs might have either sued the defendant upon the original cause of action, or brought their action against the chairman, they have made their election. Professor Story says (Conflict of Laws, 267), "Suppose a contract by the law of our country to involve no personal obligation—as was supposed to be the law of France in a particular case which came in judgment (*d*)—but merely to confer a **[684]** right to proceed in rem, such a contract would be held everywhere to involve no personal

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(*c*) The 9th section of this statute is similar to the 9th section of 7 Geo. 4, c. 46 (ante, p. 680), with this additional article, "And also, subject to the provisions hereinafter contained, upon the profits and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceedings; and that it shall be lawful for the plaintiff to cause execution upon any judgment obtained by him in any such action or suit against the company, to be issued against the property and effects of the company."

(*a*) There appears to be an ambiguity about the words "or at any time since," which may mean either "since the bringing of the action, and since the recovery of the judgment," or since the latter period only; in which case the defendant might within the terms of the plea, have been resident within the colony from the commencement of the action to the recovery of the judgment, exclusivè.

(*d*) *Melan* v. *Fitzjames*, 1 B. & P. 138: overruled in *Imlay* v. *Ellefson*, 2 East, 453, 455. And see *Pedder* v. *MacMaster*, 8 T. R. 609; *Mure* v. *Kaye*, 4 Taunt. 34, 40; 3 Mann. & R. 40, n.

contract whatsoever." So, here, the right to sue the chairman being conferred by statute, the recoveror of a judgment against the chairman can enforce the judgment so obtained, only by the mode pointed out by the statute.

In the fourth plea the defendant insists that he is not responsible for the acts or defaults of an agent appointed, not by himself, but by the act of a legislature to which he was a stranger, and by whose acts he was not bound. It is contrary to natural justice to proceed against a party who is not within the jurisdiction of the court in which proceedings are commenced and carried on, and who has no notice of such proceedings: *Reynolds* v. *Fenton* (ante, vol. iii. 187); *Becquet* v. *MacCarthy* (2 B. & Ad. 951); *Buchanan* v. *Rucker* (1 Campb. 63); *Ferguson* v. *Mason* (11 A. & E. 170); Story's Conflict of Laws, sect. 546, 547, &c.

The tenth plea is a good plea in bar in substance; and the supposed informality in the prayer of judgment is not material. The plea shews, that, by the colonial enactment, the judgment recovered against the chairman was final and conclusive. In *Smith* v. *Nicolls* (5 New Cases, 208), the plea was held bad for the want of such an allegation: *General Steam Navigation Company* v. *Guillou* (11 M. & W. 877); Story's Conflict of Laws, sect. 509, 510, 522, 603, 604, 605, &c.

Channell, Serjt., in reply. The cases upon the Bank Act do not apply. The colonial act, ss. 5, 7 (supra, 666, 667), gives a right to reimbursement and contribution. By taking a share in the bank, the defendant constituted [685] the persons by whom the affairs of the bank were conducted, his agents in everything connected with the affairs of the bank.

The tenth plea admits the liability of the defendant upon the original contract; and, although a colonial judgment works a merger in the colony, it is otherwise in the courts of this country, where no foreign or colonial judgment is treated as matter of record: *Smith* v. *Nicolls*; *Robertson* v. *Sir William John Struth* (5 Q. B. 941).

WILDE, C. J. It appears to me that the declaration is sufficient, and that both the fourth and the tenth pleas are bad.

The objection to the declaration is to the first count. That count states that the defendant was a member of a banking company acting under a colonial statute; a statute which may be assumed to have been obtained at the request of the parties. It provides, that one member holding a principal office in the company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment.

The first objection taken to the count is, that the remedy given by the colonial act upon the judgment, is not against the person of the shareholder, but is [686] limited to execution against the goods of those who are partners at the time the execution issues. I think this is not so; but that the effect of the colonial act is to extend the effect of the judgment. The first count of the declaration shews, that, under the colonial act, all previous rights and liabilities of the parties were reserved. These are sufficient to bind the defendant.

The fourth plea states that the defendant had not at any time notice or knowledge of any summons or process, or of the proceedings in the action in the colonial court. Suppose he had no notice. The first count declares that the defendant was dealing with the public upon the terms of the colonial act, and that he assented to the chairman's being considered, for all purposes connected with the suit, as his representative. For these reasons I think the fourth plea bad, and that it therefore becomes unnecessary to consider the objections which have been raised to the replication to that plea.

The tenth plea denies the right of the plaintiffs to sue upon the original causes of action, on the ground that these causes of action were merged in the judgment obtained against the chairman. Where a security of a higher nature is taken for a demand of a lower nature, the latter is merged in the former; and therefore, in the colony of New South Wales, where the judgment recovered against the chairman, is a security of a higher nature than the debt upon which it was founded, a merger no doubt took place. This merger was, however, confined to the district in which the judgment recovered, being there conclusive, was a security of a higher nature than the debt upon which it was founded. But in England the colonial judgment, which stands upon the same footing as a foreign judgment, is not a security of a higher nature than the prior simple con-**[687]**-tract debt (*a*). The principle of merger, therefore, does not apply. Any doubt upon that subject is recovered by the case of *Houlditch* v. *The Marquess of Donegal* (8 Bligh (N. S.), 301), in which the House of Lords decided that a foreign judgment is not conclusive, but is merely primâ facie evidence, reversing a contrary decision in the court of Chancery in Ireland.

I think, therefore, that the plaintiffs are entitled to judgment.

MAULE, J. During part of the argument I was not present; and, as the rest of the court are clear that the plaintiffs are entitled to judgment on the whole record, I shall not depart from them. With respect to the sufficiency of the first count and the badness of the fourth plea, I fully concur with what has fallen from the Lord Chief Justice. With respect to the tenth plea, I am not so clear.

CRESSWELL, J. I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions. Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony, he could not have made himself party to the action, or in any manner personally interfered in the proceedings.

[688] The 5th section of the act extends the remedy by execution to new shareholders who, but for this enactment, would not have been liable upon contracts to which they were not originally parties. Then comes the 7th section, which reserves all liabilities the parties would otherwise have been under. The object of the act was to create an additional remedy. It contains no exemption from liability. I think, therefore, that the first count of the declaration is good, and that the fourth plea shews no sufficient answer to it.

The tenth plea, which is pleaded to the subsequent counts framed on that cause of action upon which the judgment declared upon in the first count was founded, does not affect the contracts declared upon in those counts; it relates only to the manner of proceeding for the purpose of enforcing payment. It may be true, that, in the colony, no further proceeding could be taken. There, the debt had become matter of record, but it is not so in the English courts. Here, the right to sue upon the original causes of action remains, there being in our courts no merger of those causes of action in a higher remedy. I think, therefore, that the tenth plea is also bad.

TALFOURD, J. I am of the same opinion. As to the first question, it appears to me that the first count discloses a good cause of action. The object of the colonial law was, not to take away any remedies which the creditor of the bank would otherwise have had, but to give additional and peculiar remedies.

The second question is, whether the fourth plea presents any answer to the cause of action set forth in the first count. That plea states that the defendant was never resident in New South Wales, and had no notice of the proceedings. The answer to that is, that the defendant was a member of a partnership carrying on **[689]** business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.

The case of *Smith* v. *Nicolls* (7 Scott, 147, 5 New Cases, 208) is conclusive against the tenth plea. It would be absurd to hold that a colonial judgment was in this country merely matter of inducement to a promise, and yet that it operated as a bar to an action on the causes of action upon which that judgment was founded.

Judgment for the plaintiffs (*b*).

(*a*) No action of debt as on matter of record, would have lain here upon the colonial judgment. The remedy would have been either by action of debt quasi ex contractu, in which a defendant might formerly have waged his law, or by action of assumpsit.

(*b*) And see *Rastrick* v. *The Derbyshire, &c., Railway Company*, 9 Exch. 149.

BUTTIGIEG v. BOOKER AND ANOTHER. June 1, 1850.

[S. C. 19 L. J. C. P. 330.]

To an action by the payee against the acceptors of two bills of exchange, the defendants pleaded,—that the bills were accepted by them and one B., and not by them alone; that, before the bills became due, and before the delivery thereof to the plaintiff, they were and continually from the time of their acceptance had been in the hands of the drawers for value, and had not been during all that time delivered over to the plaintiff by the drawers, and so continued from the times of their becoming due until the making of the agreement after mentioned; that, whilst the bills were so in the hands of the drawers, and before the delivery thereof to the plaintiff, it was agreed between the drawers and the defendants and B., that, in consideration of the defendants and B. paying the drawers 500l. in settlement of their accounts, the drawers engaged to accept their (the defendants' and B.'s) dividend of 2s. 9d. in the pound on (amongst others) the bills in question, and which the drawers bound themselves to deliver to the defendants and B. within one month, receiving the said dividend on each acceptance as it should be delivered up,—the defendants and B. being at liberty to pay the said composition on the said bills at any time within one month, and to tender the same at a certain place; that a penalty of 500l. was to be paid on default by either side; that the 500l. were paid by the defendants and B. to the drawers in settlement of the said accounts, and the composition duly tendered; that the drawers refused to accept the dividends tendered, and failed to deliver up the acceptances, but afterwards, in fraud and violation of the agreement, delivered the bills declared on to the plaintiff; and that the plaintiff took, and held the bills with notice of the premises:—Held, that, assuming the plea to contain a defence to the action,—which the court inclined to think it did not,—it was well put in issue by the general replication de injuriâ—To a similar plea, alleging the agreement to have been made between the plaintiffs, through the drawers as their agents, and the defendants and B., and averring the payment of the 500l. and the tender of the dividend to the drawers, with notice to the plaintiff,—but not alleging that the agreement to take the dividend was accepted by the plaintiff in satisfaction or substitution of the contract on the bills,—the plaintiff replied "that it was not agreed by and between the plaintiff, by and through the drawers as their agents, and the defendants, in manner and form as in the plea alleged:"—Held, that the plea was bad in substance.—Whether the replication was good, quære.

This was an action of assumpsit. The first count of the declaration stated that certain persons using the [690] name and style of M'Dowell & Sons, to wit, on the 3rd of July, 1847, in parts beyond the seas, made their bill of exchange, directed to the defendants, and thereby required the defendants to pay to the plaintiff 250l. sixty days after sight, and then delivered the same to the plaintiff; that the defendants afterwards saw and accepted the said bill, &c., and that sixty days, &c. had elapsed before the commencement of the suit, &c.

There was a second count upon a similar bill for 225l. 11s. 6d., and also counts for money paid and for money due upon an account stated.

The defendants pleaded,—eighthly, to the first and second counts respectively, that the two bills in those counts respectively mentioned were accepted by the defendants and one William Lane Booker, and not by the defendants alone; and that, at the time they respectively became due, and before the delivery thereof to the plaintiff as thereinafter mentioned, the said two bills were and had been continually from the time of their acceptance in the hands of the said M'Dowell & Sons for value, and had not been during all that time delivered over to the plaintiff by M'Dowell & Sons, and so continued from the times of their becoming due until the time of making the agreement thereinafter mentioned; that, whilst the said bills were so in the hands of M'Dowell and Sons for value, and before [691] the said delivery thereof, it was agreed by and between M'Dowell & Sons and the defendants and W. L. Booker, that, in consideration of the defendants and W. L. Booker paying to M'Dowell & Sons 500l. in settlement of their (the said M'Dowell & Sons' and the defendants' and W. L. Booker's) differences of account, they, M'Dowell & Sons, thereby agreed to accept their, the defendants' and W. L. Booker's, dividend of 2s. 9d. in the pound on the following bills accepted by the defendants and W. L. Booker, and which M'Dowell & Sons bound themselves to deliver to the defendants and W. L. Booker within one month of the date of that agreement, receiving the said dividend on each acceptance as it should be delivered up, that is to say, [here followed an enumeration of the acceptances of the defendants and W. L. Booker in favour of several persons, amongst which was an item of "G. Buttigieg, 475l. 11s. 6d.," the amount of the two bills declared on], it being clearly understood between the said M'Dowell & Sons and the defendants and W. L. Booker, that the defendants and W. L. Booker were to be at liberty to pay the said composition of 2s. 9d. in the pound on the said acceptances, at any time within one month, and to tender the same at, &c., where such settlement should take place accordingly, the said M'Dowell & Sons holding them, the defendants and W. L. Booker, harmless from any further liability on the said acceptances; but, in default of the fulfilment of that agreement within the time specified, on either side, the defaulter to be subject to a penalty of 500l., as liquidated damages: that, the said agreement being so made, and whilst M'Dowell & Sons were the holders of the said bills, the defendants and W. L. Booker did pay to M'Dowell & Sons, and M'Dowell & Sons accepted from the defendants and W. L. Booker the said sum of 500l. in settlement of the said differences of **[692]** account; and that they, the defendants and W. L. Booker, further were ready and willing, within one month from the date of the agreement, to pay the said composition on the said acceptances, and did, within one month tender the same to the said M'Dowell & Sons, at, &c.; and that they, the defendants and W. L. Booker, had, from the time of making the agreement hitherto, always been ready and willing to perform the said agreement in all things,—of all which the said M'Dowell & Sons then had notice: that M'Dowell & Sons refused to accept the said dividend so tendered, and failed to deliver up the acceptances to the defendants and W. L. Booker, on the tender being made: that the said two acceptances in the first two counts respectively mentioned were the same as the acceptances of the defendants in the agreement mentioned in favour of G. Buttigieg for 475l. 11s. 6d., and upon which the said dividend was tendered as aforesaid: that afterwards, and after the agreement, M'Dowell & Sons delivered the said bills over to the plaintiff, in fraud and violation of the agreement, and which was the delivery in the said first and second counts respectively mentioned; and that the plaintiff took the said bills with notice of the said premises, and, with such notice, from thence continually had held and still held the same,—verification.

To this plea the plaintiff replied de injuriâ; and the defendants demurred specially to the replication, on the ground that the general replication de injuriâ is inapplicable to a plea in accord and satisfaction. Joinder.

The defendants further pleaded, ninthly, to the first and second counts, that the bills in those counts respectively mentioned were accepted by the defendants and W. L. Booker; and that, after the acceptance of the bills, and after they became due, it was agreed between the plaintiff, by and through M'Dowell & Sons, as his agents, **[693]** and the defendants and W. L. Booker [setting out an agreement to the same effect as that stated in the eighth plea, except that the plaintiff, instead of M'Dowell & Sons, bound himself to accept the dividend of 2s. 9d. in the pound, and to deliver up the acceptances]: that the defendants and W. L. Booker paid, and M'Dowell & Sons accepted and received, the 500l., according to the agreement, and the defendants and W. L. Booker tendered the dividend at, &c., according to the agreement,—of all which the plaintiff had notice: and that the plaintiff refused to accept the dividends, and failed to deliver up the acceptances, &c.,—verification.

To this plea the plaintiff replied, that it was not agreed by and between the plaintiff, by and through the said M'Dowell & Sons, as his agents, and the defendants, in manner and form as in the ninth plea alleged.

Special demurrer, and joinder.

Wordsworth, in support of the demurrers. The replication de injuriâ is inapplicable to the eighth plea, which is a plea in accord and satisfaction. Where the plea amounts to matter of discharge, and not of excuse, de injuriâ is not the proper replication: *Jones* v. *Senior* (4 M. & W. 123, 6 Dowl. P. C. 701). [Cresswell, J. How is this a plea in discharge?] It sets up an agreement whereby the defendants are discharged from their implied promise to pay the amount of the bills to the plaintiff. [Cresswell, J. Rather, the defence suggested, is that the defendants never did promise at all.] At all events, the plea is an argumentative denial of the promise alleged in the declaration. In 2 Wms. Saund. 295 a., n. (*d*), it is said: "This replication is not to be allowed where the plea is in denial, and not in excuse; as, where it amounts to the **[694]** general issue, or where, in assumpsit or debt, the plea amounts to a denial, either direct or argumentative, of the contract, or the breach of it, on which the action is founded,"—citing *Solly* v. *Neish* (2 C. M. & R. 355, 4 Dowl. P. C. 228). [Maule, J. The new rules of pleading give rise to a difficulty in cases of this sort: the plea of non assumpsit is not allowed; and those matters must be specially set out which prevent the inference arising from the drawing and delivery of the bill, from holding good in the particular case. If, therefore, the plaintiff is precluded from putting all these matters in issue, and is confined to a traverse of some one material allegation in the declaration, he is placed at great disadvantage.] Then, the replication to the ninth plea is also bad, inasmuch as it puts in issue two material questions, not only traversing the fact of the agreement, but also that it was made with M'Dowell & Sons as agents of the plaintiff. The traverse is also too narrow, denying only the agreement between the plaintiff and the defendants, whereas the plea alleges an agreement between the plaintiff and the defendants and W. L. Booker,—Stephen on Pleading, 5th edit. pp. 279, 280.

Warren, contrà. The agreement set out in the eighth plea affords no defence against the plaintiff's right to recover on the bills. In *Mitchell* v. *Craig* (10 M. & W. 367, 2 Dowl. N. S. 252), to a declaration against the acceptor of a bill of exchange for 16l. 12s., drawn by F. & G., and indorsed by them to the plaintiff, the defendant pleaded,—first, that, after the bill became due, F. & G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7l. 2s., which, together with the price of a horse which the defendant had sold to F. & G., and the price of which it was **[695]** agreed between them should be set off and allowed against the defendant's acceptance, F. & G. accepted in satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due,—secondly, that, before the bill came into the possession of the plaintiff, it was indorsed in blank by F. & G. to C. & Co., and that, after it became due, it being then in the hands of C. & Co., F. & G. gave C. & Co. another bill, accepted by them, for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. & G. at maturity; that, after the second bill was so given, the defendant paid to F. & G. 7l. 2s., &c. (as in the first plea); and that, at the time of the giving of the second bill by F. & G. as aforesaid, and at the time of the said settlement between the defendant and F. & G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due. To each of these pleas the plaintiff replied, "that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact,—concluding to the country. It was held, on special demurrer, that the replication was bad, as being an informal de injuriâ; and that the pleas were bad in substance, because they did not shew that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill declared on. The replication de injuriâ is the proper replication, assuming the plea to be good. If it amounts to any defence at all, the eighth plea sets up an excuse for the non-performance of the contract in the first and second counts respectively alleged,—that excuse being, that some-**[696]**-thing like a fraud has been committed upon the defendants. There are many cases to shew, that, where fraud is of the essence of the plea, de injuriâ is the proper replication to put it in issue. Thus, in *Tolhurst* v. *Notley* (11 Q. B. 406), Lord Denman says: "The rule is, that, wherever fraud is of the essence of the defence, de injuriâ may be replied. Now, here, if the fraud be not of the essence of the defence (and whether it be so or not I do not say), the defendant has so pleaded as to induce the plaintiff to suppose that fraud is relied upon. I therefore think the case is not taken out of the rule." See also *Bennett* v *Bull* (1 Exch. 593), *Humphreys* v. *O'Connell* (7 M. & W. 370, 9 Dowl. P. C. 213), and *Herbert* v. *Sayer* (5 Q. B. 965, 2 D. & L. 49, 1 Dav. & M. 723). There is no ground for saying that the plea contains an argumentative denial of the contract alleged in the declaration; *Robinson* v. *Little* (9 Q. B. 602, 6 D. & L. 246). For the same reasons, the ninth plea is bad, and the replication thereto good.

Wordsworth, in reply. The ninth plea, at all events is a good answer. [Talfourd, J.

Does it amount to anything more than a statement of a collateral agreement? There is no allegation that one agreement was accepted in satisfaction of or substitution for the other.]

MAULE, J. I am of opinion that the replication de injuriâ to the eighth plea is good. The plea sets up a transaction between the defendants and M'Dowell & Sons, shewing, if it constitutes any defence at all, that notwithstanding the contract between the defendants and the plaintiff existed in point of fact, yet that in law there was no valid and subsisting contract. Whether **[697]** such a defence is matter in excuse or in discharge, has been often considered, with reference to the admissibility of the replication de injuriâ. The effect of the cases of *Humphreys* v. *O'Connell* (7 M. & W. 370, 9 Dowl. P. C. 213), and *Bennett* v. *Bull* (1 Exch. 593), as also of *Scott* v. *Chappelow* (4 M. & G. 336, 5 Scott, N. R. 148, 2 Dowl. N. S. 78), in this court is to shew, that, inasmuch as the defendant must now state specially several matters which before the new rules he might have given in evidence under non assumpsit, the general replication de injuriâ must be allowed; for that it was not the intention of those rules to deprive the plaintiff of the power of putting the defendant to the proof of all the matters which constitute the defence alleged in his plea. The meaning of the declaration in the present case is, that a contract arose from the acceptance and delivery of the bill. That might formerly have been traversed by non assumpsit. The new rules, however, have rendered it necessary to state specially the several matters constituting the same defence. I think, therefore, that the replication de injuriâ should be allowed. With respect to the replication to the ninth plea, there may be a question whether the objection is not well founded. The case put in Stephen on Pleading, 280, resembles this, though there is here an allegation of modo et formâ. But, it is unnecessary to decide that here, inasmuch as the plea is bad. It sets up an agreement between the plaintiff and the defendants, that the plaintiff will not sue on the bills, but will accept a composition of 2s. 9d. in the pound, and that either party making default shall forfeit 500l. I think the plea shews no substantial defence to the action; for, it may be that the plaintiff elected to pay the 500l. **[698]** penalty, and therefore the plaintiff is entitled to judgment on the ninth plea.

The rest of the court concurring,

Judgment for the plaintiff.

Wordsworth asked leave to amend, by taking issue on the replication to the eighth plea.

MAULE, J. The defendant should have taken that course before. De injuriâ would have raised every question upon the merits of the case. I am strongly inclined to think that the plea is bad.

The rest of the court concurring,

Amendment refused.

ORCHARD *v.* RACKSTRAW. April 23, 1850.

[S. C. 19 L. J. C. P. 303; 14 Jur. 605.]

A livery-stable keeper has no lien either for the keep of a horse standing at livery, or for money paid by him, at the request of the owner, for the attendance of a veterinary surgeon upon the horse.

Trover, for a horse. Pleas, not guilty, and not possessed.

At the trial before Maule, J., at the first sitting at Westminster in the present term, it appeared that the horse in question had been standing at livery at the defendant's stables, and while there the defendant had, at the plaintiff's request, employed a veterinary surgeon to blister the horse for splints; and that, on the horse being demanded by the plaintiff, the defendant claimed a lien to the extent of 26l. 13s.; which sum was made up of his charge for the standing of the horse and the hire of a chaise, and 30s. for the payment to the veterinary surgeon for blistering him.

The learned judge told the jury that the defendant was not entitled to claim a lien upon the horse, either in respect of the charge for its keep, or of the surgeon's charge for blistering; and accordingly a verdict was **[699]** found for the plaintiff, damages 31l. 10s., the value of the horse.

Bramwell now moved for a new trial, on the ground of misdirection. It may at once be conceded that the defendant could claim no lien for the standing of the horse, —*Judson* v. *Etheridge* (3 Tyrwh. 954); though an innkeeper has,—the case of an *Hostler* (Yelv. 66); the only question, therefore, will be, whether he had not a lien for the 30s., the surgeon's charge for the blistering. The general rule of law is, that, wherever anything is done by one to the chattel of another (with his consent) to augment its value, he thereby requires a lien upon it. [Cresswell, J. Suppose the horse is shod whilst standing at livery, could the livery-stable keeper refuse to allow the owner to use him without first paying the farrier's charge?] In *Scarfe* v. *Morgan* (4 M. & W. 270), where a claim of lien was set up for a charge for covering a mare, Parke, B., in giving judgment, said: "The principle seems to be well laid down in *Bevan* v. *Waters* (M. & M. 235), by Lord Chief-Justice Best, that, where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases. This, then, being the principle, let us see whether this case falls within it: and we think it does. The object **[700]** is, that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may by his skill and labour, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument." It was a mistake to say that the defendant altogether lost his lien because the horse had originally come into his possession in his character of a livery-stable keeper.

Wilde, C. J. I think the ruling of my Brother Maule was perfectly right. The horse in question was placed at livery at the defendant's stables. Whatever may have been its origin, the meaning of that contract is now very well understood, viz. that the horse shall be at all times at the use and command of the owner, without any claim of lien on the part of the livery-stable keeper for the keep. Here, however, it is said, that, inasmuch as the defendant had employed a veterinary surgeon, at the plaintiff's request, to exercise his professional skill upon the horse, he at all events had a lien for the surgeon's charge; for, that the defendant being liable to and having actually paid the veterinary surgeon's charge, it was the same as if the work had been done by the defendant himself. Suppose the veterinary surgeon had treated the horse unskilfully, and damaged it, who would have been responsible to the owner, the livery-stable keeper or the surgeon? Clearly not the former. The veterinary surgeon had no lien for his bill, the livery-stable keeper none for the keep of the horse.

Cresswell, J. I am of the same opinion. The defendant had no lien for his demand for the keep of the horse, and the veterinary surgeon had none for his attendance; and there is no rule of law giving a livery-**[701]**-stable keeper a lien for money expended upon a horse standing at livery at the request of the owner. The case, therefore, does not fall within the rule of law which confers a lien upon one who expends his money or his labour upon a chattel of another.

The rest of the court concurring,

Rule refused.

Pettman v. Keble. June 4, 1850.

[S. C. 19 L. J. C. P. 325; 15 Jur. 38.]

The plaintiff, at the request of the defendant, ordered goods of W. & R., telling them the purpose for which they were wanted. Before the order was given the plaintiff asked W. & R. for a list of prices, and, having obtained it, shewed it to the defendant, who, seeing that the price was such that the order could not possibly have been understood, asked the plaintiff if he thought W. & R. knew what was wanted; whereupon the plaintiff said, "Oh yes. If anything is wrong, of course you will see me all right." To which the defendant answered, "Yes, I will bear you harmless."—In consequence of some misunderstanding, arising in part probably from a verbal inaccuracy in the letters conveying the order, the goods supplied were useless to the defendant, and were returned to the sellers, who (the intrinsic value of the goods being only about 3l.) expended in labour about 42l. to make them correspond with the intention of the defendant, but, in so doing, reduced their substance so as to render them useless for his purpose.—The defendant, after considerable delay, persisting in his refusal to take the goods, W. & R. sued the plaintiff, and he (as the jury found, with the implied authority of the defendant) compromised the action by the payment to them of 22l. 10s., and afterwards brought an action for money paid against the defendant, to recover that sum:—Held, by Wilde, C. J., Maule, J., and Talfourd, J., that the action lay.—Held, by Cresswell, J., that the plaintiff should have defended the action brought against him by W. & R., and that there was no implied authority from the defendant to compromise it.

Debt, for money paid for the use of the defendant, at his (implied) request, and upon an account stated. Plea: Never indebted.

The plaintiff, a smith at Margate, demanded 22l. 10s., being the amount he had expended in compromising an action which had been brought against him by Winter & Rich, iron-merchants, in London.

[702] At the trial before Wilde, C. J., at the sittings in London after last term, it appeared that the defendant, a printer, directed the plaintiff, an illiterate boat-smith, to procure iron plates for pressing paper in a printer's press. The plaintiff wrote and sent the following letter to Winter & Rich, having previously shewn it to the defendant:—

"Margate, May 21, 1848.

"Please to send price of planed plates, about one-eighth thick, and 26 by 21 in. They are for putting between glazed *bords* in pressing sheets of paper in a press in a printing-office. If you *du* not keep them, please to *assertain* where you can get them and send price of each and *i* will send word the number I want."

To this letter the following answer was returned:—

"Southwark, May 22, 1848.

"The price for the plates you require will be from 12s. to 13s. per cwt. Will have to be made for you. Could have them in a week. Waiting your commands," &c.

Plaintiff shewed this answer to the defendant, who said: "On the faith of this letter, I will get you to order me twelve plates. Do you think they know what you want?" The plaintiff said: "Oh, yes. If any thing is wrong, of course you will see me all right." The defendant answered: "Yes, I will bear you harmless."

On the 20th May plaintiff wrote to Winter & Rich, requesting them to send twelve plates, stating dimensions, and adding: "They want to be *plain* on both sides."

On the 4th June, the plaintiff, in answering a letter containing some inquiries respecting the dimensions of the plates, said: "These plates must be *plain*, for they are to be put between glazed *bords* for a printing-press."

Some plates were sent by Winter & Rich, but they **[703]** were not planed plates, and were totally unfit for the purpose to which they were to have been applied. The defendant refused to receive the plates, and again told the plaintiff that he would indemnify him, and promised to write to Winter & Rich, which, however, he omitted to do until August.

Planed plates are an article well known in the trade, and bear much higher prices than those mentioned in Winter & Rich's letter.

On the 10th June, plaintiff wrote to Winter & Rich:—"What you cent me of no *youse* to me, *i* stated in my letters the sizes and *i* wanted them plained on each side and what purpose they was for."

The plaintiff returned the plates to Winter & Rich, who, without further order, sent them back planed. Being still unfit for the defendant's purpose, he refused to receive them. On the 23rd of August the defendant wrote to Winter & Rich, complaining of the inconvenience he had been put to, and stating that he had returned the plates to the plaintiff. On the 25th of August, Winter & Rich wrote to the plaintiff that they had acted upon his instructions, and that they should not take back the plates. Further correspondence took place between the plaintiff and Winter & Rich, in which the latter stated that they had lost the plaintiff's letter of the 21st May.

In April, 1849, Winter & Rich brought an action against the plaintiff for 2l. 18s. 4d., the original price of the plates, and 42l. for cutting and planing them. After plea pleaded, the defendant conferred with the plaintiff and his attorney respecting the action; soon after which the plaintiff compromised the action, by paying Winter & Rich 22l. 10s., and returning them the plates.

On the part of the defendant, it was contended,—first, that the contract between him and the plaintiff was one of sale, and not of agency; secondly, that assuming it to [704] have been a contract of agency, the plaintiff had not followed the authority given to him by the defendant, which was, to procure "planed plates," an article well known in the trade, and that, if through his ignorance or mistake Winter & Rich had any right of action against him, it was not a matter against which the defendant had contracted to indemnify him; thirdly, that Winter & Rich could not, under the circumstances, have recovered against the plaintiff, and consequently the payment made by him to compromise the action at their suit was a payment made in his own wrong.

His Lordship left it to the jury to say,—first, whether the transaction was one of principal and agent, or of buyer and seller; secondly, whether the plaintiff made the payment to settle the action brought against him by Winter & Rich, with the authority of the defendant.

The jury found that it was a transaction of principal and agent, and not of vendor and purchaser; and that the plaintiff had authority from the defendant to make the payment in question; and accordingly they returned a verdict for the plaintiff for the amount claimed, leave being reserved to the defendant to move to enter the verdict for him if the Court should be of opinion that, upon the facts proved, the action would not lie.

Hugh Hill, on a former day in this term, obtained a rule nisi accordingly.

Byles, Serjt. (with whom was Bramwell), now shewed cause. The evidence clearly establishes the agency of the plaintiff, and that the payment made by him to settle the action brought by Winter & Rich was made under the sanction and authority of the defendant. Winter & Rich might, at their election, have sued either Pettman the agent or Keble the principal, as [705] soon as they discovered him. They elected to sue the agent; and he having by the act of the defendant been placed in a situation to be compelled to make the payment he did, would, according to the authority of *Lewis* v. *Campbell*, ante, vol. viii. p. 541, have been entitled to recover the amount from the defendant, even if there had not been the express promise to indemnify. [Maule, J. The plaintiff paid the money to settle an action brought by the vendors against him. Was he liable? And, if so, was his liability incurred at the request of the defendant? In *Lewis* v. *Campbell*, there was an express (?) request to pay the money. Here, there was no request. But, if Winter & Rich could sue the plaintiff simply in consequence of his having procured the order of the defendant, then he may recover back the money he has paid.] The plaintiff did procure the order of the defendant. It is said he did not follow the instructions he received. Assuming that there was a slight inaccuracy in the order conveyed by the plaintiff to Winter & Rich, which would have justified the defendant in repudiating the contract if he had elected to do so promptly, he lost that right by his own laches. The plaintiff was clearly entitled to be indemnified if he acted with reasonable diligence; which upon the facts it is submitted he did.

Hugh Hill and Barrow, in support of the rule. The plaintiff was not under any legal liability to make this payment to Winter & Rich; and, if he was, he did not incur that liability, or make the payment, at the request or with the concurrence of the defendant. The letter of the 21st of May, 1848, asking the prices of "planed plates," no doubt was sent with the defendant's concurrence. The answer was shewn to him; and, on the faith of that answer, he requested the plaintiff to order the plates. Accordingly, the order was given in [706] a letter of the 30th, in which the plaintiff tells Winter & Rich that the plates "want to be plain on both sides." Taking that with reference to the letter of the 21st, the order should not have been misunderstood. Again, on the 4th of June, in answer to some inquiry made by Winter & Rich, the plaintiff writes,—"These plates must be *plain*, for they are to be put between glazed *bords* for a printing-press." What pretence is there for saying that Winter & Rich had any right to charge the plaintiff with anything? much more, with any part of the 42l. for the planing which rendered the plates (by their reduction) useless? In *Jones* v. *Bright* (5 Bingh. 533, 3 M. & P. 155), where the plaintiff recovered in an action on the case in the nature of deceit for a breach of an implied warranty on the sale of copper sheathing, Best, C. J., in delivering the judgment of the Court, said, "I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable,—that it is fit for some purpose. This was established in *Laing* v. *Fidgeon* (6 Taunt. 108, 4 Campb. 169). If he sells for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some dicta to the contrary." And that view is confirmed in *Brown* v. *Edgington* (2 M. & G. 279, 2 Scott, N. R. 496). [Maule, J. Assuming that Winter & Rich had no just cause of action against the plaintiff, there being nothing in the circumstances inconsistent with the exercise of due diligence on his part, was it not the defendant's business to defend him? and does he not, by abstaining from interfering, authorize the plaintiff to make the best defence he could?] He did not make the best defence. [Talfourd, J. He probably did that which, under all **[707]** the circumstances, was the most prudent thing that could be done. And the jury have found that the payment was made with the defendant's authority.] The present defendant was under no obligation to defend an action which the plaintiff had brought upon himself by not accurately pursuing his instructions. [Maule, J. The indemnity extends to actions wrongly brought against the party, as well as rightly. The agent was entitled to be indemnified, although Winter & Rich had no cause of action.] At all events, the action for money paid will not lie, there being no express request. The plaintiff's only remedy, if he has any (which is denied), is, by an action for the breach of the indemnity. This point was left undecided in *Lewis* v *Campbell.*

WILDE, C. J. This case presents some difficulties. The plaintiff, an illiterate person, was requested by the defendant to order for him an article of which he seems to have had little or no knowledge. He writes a letter to Winter & Rich, iron-merchants, and shews it to the defendant, in which he inquires the price of "planed plates." When the answer comes, he takes it to the defendant, who says, "On the faith of this letter, I will get you to order me twelve plates. Do you think they know what you want?" upon which the plaintiff answers, "Oh, yes." But having evidently a slight misgiving, he adds, "If anything is wrong, of course you will see me all right;" to which the defendant answers, "Yes, I will bear you harmless." The plaintiff then gives the order; but, unfortunately, in doing so, he uses a different expression: for, in one letter, he writes, "They want to be plain on both sides," and in another he says, "These plates must be plain, for they are to be put between glazed bords for a printing-press." If Winter & Rich had been ordinarily dealing in the particular (highly manufactured) articles, they probably **[708]** would have made more inquiry; but, the order coming as it did from a common boat-smith, they did not expect that anything very special was required. I do not dispute the principle laid down in *Jones* v. *Bright* and that class of cases. But here, the only negligence imputable to the plaintiff is, the inaccuracy of spelling in his letters of the 20th of May and 4th of June. In other respects, he has acted strictly in accordance with the orders of the defendant. The plates are delivered in an improper state. The plaintiff is requested to return them; and the defendant undertakes to write to Winter & Rich. He, however, waits from June till August. In the mean time, Winter & Rich get the plates planed, thereby incurring additional expense. I do not see that the plaintiff has been guilty of such negligence as to forfeit his claim. The main ground of defence here is, that Winter & Rich so conducted themselves that they could have no claim against the plaintiff, and consequently that the payment made by him to them to settle their action was a payment in his own wrong. My impression is, that, if he had defended that action, he would have failed. But, however that may be, it is enough to say that he has acted throughout with reasonable caution. He bargains for indemnity; but the defendant, when the difficulty arises, declines to give any direction, but merely repudiates the plates. The plaintiff takes competent advice, and settles the action. I think under the circumstances the plaintiff exercised his best judgment, and acted with reasonable caution, and therefore that there is no ground for disturbing the verdict.

MAULE, J. I also think this rule should be discharged. I think there was evidence on which the jury might properly find for the plaintiff on the count for money paid to the defendant's use at his request. It **[709]** appears that the plaintiff was employed by the defendant to order certain plates from Winter & Rich. The plates were ordered, and were sent to the defendant, but, being found unsuitable, were returned to Winter & Rich, with an intimation from the plaintiff that they had not sent "planed" plates as ordered. Winter & Rich (without any ground, I think,) took that letter as an order to do certain work on the plates, and accordingly caused them to be "planed," and returned them to the plaintiff, with a charge of 42l. for the operation which rendered them useless for the purpose for which the defendant required them, and afterwards sued the plaintiff for the amount. I think the plaintiff was entitled to be borne harmless against anything which he might properly pay in consequence of his situation of agent, without any default on his part. I cannot, I must confess, see that the plaintiff has been guilty of any default. There was nothing in his letter to justify Winter & Rich in tending the article they did. The defendant, knowing all the circumstances, twice promises to bear the plaintiff harmless. An action having been brought by Winter & Rich, the defendant is informed of it, but does not choose to interfere; and in consequence, the plaintiff, in the bonâ fide exercise of his best discretion, and acting upon the best advice he could get, settles the matter by paying Winter & Rich 22l. 10s., and returning them the worthless goods; and he now brings his action to recover back that sum as money paid to the defendant's use. It appears to me that the liability the defendant was under to indemnify the plaintiff, extends to protecting him against the expenses and the trouble and annoyance of an action arising out of his agency in the matter, though that action was one to which he had a good defence. I think the defendant (Keble) ought to have taken upon himself the defence of that action; and that his failure to do so invested the [710] plaintiff with an implied authority to act to the best of his judgment, and, if necessary, to pay the money he did pay. There was, I think, abundant evidence whence the jury might infer that the plaintiff in the course he adopted with reference to Winter & Rich's action, acted under authority from the defendant to do the best he could, and that the case falls within the principle of *Lewis* v. *Campbell*. Such authority is to be implied as much where a payment is made under a moral necessity in consequence of its being a prudent thing to do, as where the payment is made under legal compulsion. If so, the case falls clearly within the reason of *Lewis* v. *Campbell*, and the verdict may be sustained.

CRESSWELL, J. I think it very likely that justice will be best answered by discharging this rule; and I am not sorry that my Lord and my Brother Maule have arrived at that conclusion, though, as at present advised, I am unable to do so, inasmuch as I cannot assent to the soundness of the principle on which their decision proceeds. No doubt, the plaintiff, in the first instance, conducted himself faithfully in giving the order for the goods; and I think Winter & Rich had sufficient information as to the description of plates that were wanted. The first letter well described them; and the second was not a perfect order without referring to the first. It seems to me, therefore, that Winter & Rich had no cause of action against the plaintiff, and that, if defence had been made, their action must have failed. But, though the defendant's undertaking to indemnify the plaintiff might have extended to the indemnifying him against the consequences of a defence to an action brought against him for anything done by him as agent, which failed, it seems to me that, there being no right of action, we are not at liberty in a court of law to assume that the verdict in [711] that action would have been against the now plaintiff. Nor do I think the defendant, by his promise to indemnify, made the plaintiff his agent to compromise an action in which there was a reasonable probability that the defence would have been successful.

TALFOURD, J. I agree with my Lord and my Brother Maule that this rule should be discharged. I do not think it necessary to say whether or not Winter & Rich under the circumstances had a good ground of action against the now plaintiff. I think there was evidence that the compromise was made with the authority of the defendant, express or implied. Looking at the whole transaction from beginning to end, I think the jury were well warranted in coming to the conclusion they did. And I think it cannot be doubted, that, under all the circumstances, it was a very wise and discreet compromise. It is by no means certain that the defence would have been successful. I therefore think there is no ground for disturbing the verdict.

Rule discharged.

WICKENS, *Demandant;* WINDUS, Tenant; SIR JOHN SHELLEY AND WIFE, Vouchees. May 28, 1850.

In the exemplification of a recovery, the name of the tenant was inserted in the place of that of the demandant, and vice versâ:—Held, that the defect,—which was apparent on the production of the deed to lead the uses,—was cured by the 8th section of the 3 & 4 W. 4, c. 74.

Brown moved to amend a recovery by substituting in the exemplification the name of the demandant for that of the tenant, and vice versâ. In the exemplification, which was produced in court, and which was dated Hilary Term, 7 G. 4, the parties were described as "William Plummer Wickens, demandant, James **[712]** Stephen Windus, tenant, Sir John Shelley, and Dame Frances, his wife, vouchees." The deed to lead the uses, which was also produced, shewed that Windus should have been the demandant, and Wickens the tenant. There was also an affidavit explaining how the mistake arose, and stating that the title had been objected to on the ground of the variance. [Jervis, C. J. What necessity can there be for an amendment? Is not this precisely a case provided for by the 8th section of the 3 & 4 W. 4, c. 74, which enacts, "that, if it shall be apparent from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission?"] That clause was intended to meet a case of misdescription or misnomer. This is not a case of misnomer. [Maule, J. Is there not an error in the name of the tenant?] No. The names of both demandant and tenant are correctly stated, but erroneously placed. The 9th section saves the jurisdiction of the court to amend in all cases not provided for by the act. [Maule, J. If the court has power to make the amendment asked for, it is in respect of its being a mistake in the names of the parties, and therefore of necessity the error is remedied by the 8th section. In **[713]** *Lockington, Conusor; Shipley and Wife, Conusees* (1 Scott, 263, 1 N. C. 355); where in the indentures of a fine lands were described erroneously as situate in a parish different from that mentioned in the deed to lead the uses, the court refused to allow it to be amended,—holding the defect to be cured by the 7th section of the act; and in *Evans, Vouchee* (2 Scott, N. R. 83), the court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being consequently cured by the 8th section. And Tindal, C. J., in a subsequent case,—*In re Twisden's Recovery* (4 N. C. 253, 5 Scott, 638), says, that, "Where the error can be rectified by a comparison of the papers in the cause, the court will not amend; but, where the difficulty arises out of a latent fact, I think it falls within the 9th section of the act, and that the amendment may be made."] In *Totton, Dem., Vincent, Def.* (7 Scott, 835, 5 N. C. 626), the court permitted a fine to be amended by introducing the name of an adjacent parish, the deed to lead the uses containing the words, "or any other adjoining parish," the land appearing to have been intended to pass, and possession having gone accordingly. [Maule J. Even in that case, the court seem to have thought the amendment unnecessary. Where upon production of the deed to lead the uses the error or misdescription is apparent, an amendment is unnecessary: the statute provides for it. But, where the production of the deed will not cure the defect, the amendment may still be made under s. 9.]

JERVIS, C. J. I think this is the case of an error in the names of the parties. The deed sufficiently shews **[714]** how it was intended that the parties should be described. The defect, therefore, is remedied by the 8th section of the statute, and no amendment is necessary.

The rest of the court concurring,

Rule refused.

DOE D. BAKER *v.* COOMBES. April 18, 1850.

[S. C. 19 L. J. C. P. 306. Referred to, *Worssam* v. *Vanderbrande*, 1868, 17 W. R. 54.]

A., more than twenty years ago, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the incroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, A.'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done in the absence of A. The lord and his steward then retired, and nothing more was done:—Held, that the acts so done by the lord did not amount to a dispossession of A., and a resumption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time.

This was an action of ejectment brought by the defendant, the lord of the manor of Pitfold, in the county of Surrey, to recover the possession of an acre of land, part of the waste of the manor, with a hut erected thereon, which had been many years occupied by the defendant.

The cause was tried before Wilde, C. J., at the last Spring Assizes for Surrey. The evidence was as follows:—

The land in question, which was situate on a spot called Melcomb Bottom, forming part of the waste of the manor of Pitfold, in the county of Surrey, was inclosed, and the hut erected by the defendant, without the permission of the lord of the manor, considerably more than twenty years before the commencement of the action. In the year 1835, this incroachment having been presented at the lord's court, Mr. Pritchard, the then lord of the manor, accompanied by one Woods, the steward, went to the premises, and, finding the defendant's wife and **[715]** family there, he entered, and stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done without any objection being made on the part of Coombes, who was not then on the spot. Pritchard and the steward then retired.

His Lordship being of opinion that this was not such a taking of possession by Pritchard as to entitle the lessor of the plaintiff, who claimed under him, to maintain ejectment, directed the jury to find for the defendant, which they accordingly did.

Montagu Chambers, for the lessor of the plaintiff, now moved for a new trial, on the ground of misdirection. The question is, whether that which was done by Pritchard in the year 1835 did not amount to such a taking possession of the land and hut by him as lord of the manor, as to determine the previous tenancy at will as between him and Coombes. [Williams, J. What evidence was there of a tenancy at will?] A tenancy at will is to be inferred where a man continues in possession of land with the acquiescence of the lord, and without evidence of any other relation between them; and such tenancy will be assumed to continue until the contrary appears. If that be so, the possession of the defendant here dates only from the year 1835. Since the 3 & 4 W. 4, c. 27, s. 10 (*a*), it is true, a mere entry is not enough to determine the tenant's possession. But here something more was done. The lord entered, and took possession as of his own property, without any dissent on the part of the tenant. He thereby acquired such a possession as would have **[716]** enabled him to maintain trespass. [Talfourd, J. Did he turn the defendant and his family out?] No; but he exercised acts of ownership. The distinction is taken in Co. Litt. 55 b.:—"There is an express ouster and an implied ouster; an express, as, when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as, if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will, whereunto a common is appendant,—if the lessor put in his beasts to use the common,—this is a determination of the will. The lessor may

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(*a*) "No person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon."

by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof." Assuming this to have been a tenancy at sufferance, the acts done by Pritchard in 1835 would be a determination of that tenancy; and a new tenancy commenced at that period. [Talfourd, J. You would assimilate this to the case of *Doe d. Bennett* v. *Turner* (*a*). Wil-**[717]** liams, J. You must make out an original tenancy at will, and a new tenancy at will; and there is no pretence for either.] That which was done by Pritchard in 1835 was done for the express purpose of preventing any title growing against him.

Wilde, C. J. I think this case admits of no doubt. The question turns upon that which took place in the year 1835. Up to that time there clearly was no tenancy at will. It appeared, that, at the time the inclosure was originally made, Coombes applied to the lord for leave to make it, and that it was refused, and the inclosure was made and the hut afterwards built without leave. His possession therefore was adverse; and, unless the acts done in 1835 deprive the defendant of the benefit of the statute of limitations, this ejectment cannot be maintained. What, then, was done upon that occasion? Pritchard went with his steward to the cottage, the defendant not being there, and, removing a stone from the wall, and displacing a portion of the fence, stated that he took possession. The defendant's wife and family were not removed from the premises, or desired to remove. Unfortunately for the lord, he did not do enough to secure his rights. The defendant is not to be prejudiced by what was thus done in his absence. I left it to the jury to say whether the lord had done enough to acquire possession. They found that he had not; and in truth there was nothing to leave to them. The acts done by Pritchard clearly amounted to no more than an entry, which since the late statute is not enough to bar the tenant's right unless accompanied by circumstances which would restore the possession of the land to the lord. The tenant was **[718]** not removed, nor was anything done to disturb him in his possession. He might have brought trespass. His possession having commenced adversely more than twenty years ago, and nothing having occurred to interrupt or put an end to it, this ejectment is clearly too late.

Cresswell, J. I am of the same opinion. It seems to me that Pritchard, the lord, when he intended to resume possession of the land in question in 1835, from a feeling of kindness to the incroacher, abstained from doing enough to secure his rights. It is clear that he was out of possession, and that there was no tenancy at will before the year 1835. The defendant was there as a trespasser. The 10th and 11th sections of the 3 and 4 W. 4, c. 27, must be looked at together. The latter throws light upon the former: it enacts that "no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action." That section treats the making an entry as something more than merely being on the land, and claiming it. The 10th section seems to require something more than the merely formally going upon the land. The making an entry amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord. We are bound by the plain words of the statute.

Williams, J. I am of the same opinion. It is quite clear that the lord was not in possession of the land and the hut in question in the year 1835, and that no tenancy at will ever existed.

Talfourd, J. It is with great regret that I feel myself compelled to come to the same conclusion. The kindness and forbearance of the lord have unfortunately **[719]** furnished the tenant with the weapons to resist his right.

Rule refused.

(*a*) 7 M. & W. 226. There, A., in 1817, let B. into possession of lands as tenant at will; and, in 1827, A. entered upon the lands without B.'s consent, and cut and carried away stone therefrom: and it was held, that this entry amounted to a determination of the tenancy at will, and that B. thenceforth became tenant at sufferance, until, by agreement, express or implied, a new tenancy was created between the parties; and, therefore, that, unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by the statute 3 & 4 W. 4, c. 27, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, i.e., in the year 1818.

KIMPTON v. WILLEY. April 30, 1850.

[S. C. 1 L. M. & P. 280; 19 L. J. C. P. 269; 14 Jur. 762. Applied, *Richards* v. *Marten*, 1874, 23 W. R. 93. Discussed, *Adkin* v. *Friend*, 1878, 38 L. T. 394.]

A., having a cause of action against B. for 19l. 0s. 8d. for money lent between the years 1846 and 1849; and also a cause of action against him on a separate account, for goods sold and delivered, work and labour, and money paid, between the years 1845 and 1849, amounting to 19l. 19s., after deducting a payment on account of 8l. 5s. 3d., levied two plaints in respect of them in the county-court:—Held, that this was not a splitting or dividing of "a cause of action," within the meaning of the 63rd section of the 9 & 10 Vict. c. 95.—Held, also, that the judge of the county-court had jurisdiction to inquire whether B. had consented to A.'s claim being so reduced, and that that fact need not be stated in the particulars of demand—Semble, that prohibition lies to the county-court even after execution levied.

Lush, on a former day in this term, obtained a rule nisi for a prohibition to the judge of the Herefordshire County Court, prohibiting him from proceeding further on the judgments obtained by the plaintiff in two plaints in that court.

The particulars of demand in the first of these cases, plaint C. 142, were as follows:—

1846.	April 20.	Cash	£10	0	0
1849.	April 7.	Cash	5	0	0
1849.	July 14.	Cash	2	0	0
		Interest	2	0	8
			£19	0	8

The particulars in plaint C. 143 were as follows:—

1845.	Nov. 25.	Journey to Baron Dimsdale	£2	2	0
		Chaise hire	0	10	6
1846.	May 18.	Taking Inventory	5	5	0
		Writing and copying	0	10	6
	July 14.	Two quarters of oats	2	14	6
[720] 1849.	April 7.	Oats	4	8	0
		Tares	1	10	0
	May	Oats	1	7	0
	July 12.	Journey	2	2	0
		Expenses	0	10	6
		Very many attendances	6	16	0
			£27	16	0
		Received from William Pinnock	8	5	3
			£19	10	9
		Commission	0	8	0
		Receipt stamp	0	0	3
			£19	19	0

The affidavit of the defendant and his attorney, upon which the rule was moved, stated, that both plaints came on to be heard before the judge of the county-court on the 20th of March, 1850, plaint C. 143, being first called on; that the defendant's attorney objected that the judge had no jurisdiction, because (as disclosed by the particulars) the demand exceeded 20l., though reduced below that sum by a credit for 8l. 5s. 3d. given without the defendant's consent; and that the judge overruled the objection, heard the case, and gave judgment for the plaintiff for 17l. 9s., and costs 5l. 1s; that plaint C. 142 was then called on, when the defendant's attorney objected that the judge had no jurisdiction, because the subject-matter of that and the preceding plaint together constituted but one cause of action, exceeding 20l., and that it was not competent to the plaintiff to split them; and that this objection also was overruled by the judge, who, after hearing the case, gave judgment for the plaintiff for 17l., costs 4l. 8s. 6d.

[721] Hawkins now shewed cause. Execution having been executed in this case, the application for a prohibition is too late; there remains nothing upon which it could operate: *Hall* v. *Norwood* (1 Sid. 166); *Re Poe* (5 B. & Ad. 681); *Robinson* v. *Lenaghan* (2 Exch. 333). [Williams, J. In the Articuli Cleri, 2 Inst. 602, in the answer to Art. 2, it is said that "the king's courts that may award prohibitions, being informed, either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before." Wilde, C. J., referred to Com. Dig. Prohibition (D.), and to *Roberts* v. *Humby* (3 M. & W. 120).]

Then, as to the merits, there was no splitting of a cause of action here, within the case of *Grimbly* v. *Aykroyd* (1 Exch. 479). When the first plaint was heard, it did not appear that the plaintiff had any further claim against the defendant. In *Neale* v. *Ellis* (1 D. & L. 163), the Brighton Court of Requests Act (3 Vict. c. x. s. 24) provided that it should not be lawful for any plaintiff to divide any cause of action into two or more suits for the purpose of bringing the same within the jurisdiction of the court, but that any plaintiff having a cause of action above the value of 15l., might sue for 15l., and abandon the excess: and it was held, that a plaintiff having demands for the price of a horse, for goods sold and delivered, and for rent, against the defendant, was entitled, after having sued for and recovered 15l. in respect of the horse by plaint in the county court, to maintain his action in the superior court for the residue of his claim; for that the three causes of action were distinct, and there had been no division of **[722]** them for the purpose of bringing them within the jurisdiction of the inferior court, or any abandonment of the excess over the 15l. recovered in that court. Here, the items in the two plaints are in no way connected with each other. In *The King* v. *The Sheriff of Herefordshire* (1 B. & Ad. 672), A. became indebted to B. in a sum not exceeding 40s. for the carriage of a parcel of goods, and a month afterwards incurred another debt to B. not exceeding 40s. for the carriage of a second parcel. For these respective debts, A. brought two actions in the county court; and it was held that the causes of action were distinct, and that A. was entitled to sue separately for each demand; and an application for a prohibition was refused, Lord Tenterden saying,—"I am of opinion that this case does not come within the rule of law which prohibits the splitting of a cause of action into several portions for the purpose of commencing suits for each in an inferior court; to be so, the cause of action must be one and entire. But, in this case, the two items of 1l. 4s. each are perfectly distinct debts, the one having no connection with the other. When the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the county court; and his having incurred another and distinct debt with the plaintiff afterwards, should not, I think, have the effect of depriving the plaintiff of his remedy in the county court for the first debt. And if he may still have that remedy for the first debt, he has it of course for the second also." [Williams, J. As applied to this act, that is hardly reconcileable with *Grimbly* v. *Aykroyd.*] It may be, that, where the items are continuous and of the same description, the demand cannot be split; but this is not a case of that sort; the demands here are separate and distinct. In *Wickham* v. **[723]** *Lee* (12 Q. B. 521), it was held that it is not a dividing of the cause of action, within the 9 & 10 Vict. c. 95, s. 63, to levy one plaint for rent of premises, and another (under the 4 G. 2, c. 28, s. 1) to recover double value for holding the same premises after the expiration of a notice to quit. [Maule, J. In Jagoe's County Court Practice, 52, I find an Irish case upon this subject, which is thus stated,—"Splitting demands, prohibited by the Irish statutes (*b*) in nearly the same words as in this section, has been a subject of judicial consideration in a case on appeal before Bushe, C. J., at the Dundalk Summer Assizes, 1833:—The plaintiff below brought a civil bill for use and occupation, to recover one gale of rent. There were two gales due at the time, which together amounted to a sum exceeding the jurisdiction, but separately were within it. The plaintiff below obtained a decree, against which the defendant appealed. For the appellant it was contended that the case came within the prohibitory words of the statute, as the two gales might clearly have been included in one declaration, and that

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(*b*) Court of Conscience Acts.

it was vexatious to divide the claim. For the respondent it was argued, that the true test was, not whether the claim might be joined in the same declaration; and that a debt might by mutual arrangement be divided into several aliquot parts, and a promissory note taken for each part, which was frequently done for the purpose of making the summary remedy by civil bill attach, to recover each separately, which could not be the case while the demand was entire and undivided. Bushe, C. J., referred to the case of *Cairns* v. *Whelan* (Hudson & Brooke, 552), as bearing upon the question, and was at first inclined to consider the decree erroneous: but Mr. Hannan, Amicus Curiæ, having referred **[724]** him to the case of *The King* v. *The Sheriff of Herefordshire* (1 B. & Ad. 672), the chief justice on the next day stated that that case was so much in point as to put an end to any further difficulty, and affirmed the decree."] The mere statement of the defendant that the subject-matters of the two plaints form but one cause of action, is not enough to oust the jurisdiction of the county court. There must be some evidence to which the judge may apply his discretion. *Vines* v. *Arnold* (ante, vol. viii. p 632), *Woodhams* v. *Newman* (ante, vol. vii. 654), and *Beswick* v. *Capper* (ante, vol. vii. p. 669), were also cited.

Lush, in support of his rule. The particulars of demand shew that the plaintiff's claim in respect of plaint C. 143, was for 27l. 16s., and that there was a set-off reducing it to 19l. 19s. [Maule, J. Consistently with what appears on the affidavit, the 19l. 19s. might have been ascertained as a liquidated balance.] The matter being primâ facie beyond the jurisdiction of the county court, it is for the plaintiff to shew facts to bring the case within it. In *Cole* v. *Knight* (New County Court Cases, 164), where the plaintiff, having an original claim against the defendant for more than 20l., gave credit for certain sums as payments on account, some of which were in fact moneys lent to him by the defendant, others, moneys received by him to the defendant's use, and others, moneys the produce of goods of the defendant which the plaintiff had sold, and the proceeds of which he had appropriated; and the plaintiff by this, and by abandoning the remainder, reduced his claim below 20l., and brought a plaint in the county court,—this court awarded a prohibition. Although the judge must exercise his discretion at the time as to whether or not the case is within his jurisdiction, his **[725]** decision is not conclusive, but may be reviewed on a motion for a prohibition: *Thompson* v. *Ingham* (14 Q. B. 710). The subject-matter of the two plaints here constituted one "cause of action," as that is explained in the judgment of the Court of Exchequer in *Grimbly* v. *Aykroyd*. If the whole formed one cause of action in that sense, the jurisdiction clearly is exceeded. The case of *The King* v. *The Sheriff of Herefordshire* is distinctly overruled by *Grimbly* v. *Aykroyd*, and by the test suggested by Erle, J., in *Wickham* v. *Lee*. It is clear that all these demands might have been included in one count.

Wilde, C. J. This case has undergone some considerable discussion, the court being anxious not to run counter to any of the authorities. In the result, however, it does not occur to me that it presents any very serious difficulty. This is an application for a prohibition, on the ground that the county court has exceeded its jurisdiction. Let us see how the matter is presented before us. The affidavits upon which the rule was moved, state that two plaints were entered in the county court against the defendant, at the suit of the plaintiff,—the one for 19l. 0s. 8d. for money lent and interest,—the other for 19l. 19s., being the balance of an account for work and labour and goods sold, amounting originally to 27l. 16s.; and that these two sums added together exceed the amount for which the county court has jurisdiction. The affidavits then go on to allege, that both plaints were heard on the same day; that, when the first was called on, the defendant's attorney objected to the hearing thereof, on the ground that the judge had no jurisdiction, inasmuch as the particulars of demand disclosed a cause of action exceeding 20l., which could not be reduced by the set-off (also **[726]** disclosed by the particulars), so as to bring it within the jurisdiction, in the absence of an adjustment or ascertainment of the balance by the assent of both parties; and that the judge over-ruled the objection, heard the case, and made an order upon the defendant to pay 17l. 9s. for debt, and 5l. 1s. for costs. The affidavit further states that the other plaint was then called on, when the defendant's attorney objected, that, as the plaintiff's claim in the whole amounted to 39l. in respect of one entire cause of action, it was not competent to him to split it for the purpose of bringing two actions in the county court; and that the judge notwithstanding proceeded to hear the plaint, and made an order on the defendant to pay the sum demanded (19l. 0s. 8d.), and costs.

The defendant himself, by affidavit, negatives that there was any settlement of accounts between himself and the plaintiff, or any agreement that the set-off should be allowed. So far, therefore, as regards the first plaint, this is a case in which the county court has given judgment for the plaintiff for 17l. 9s. There is not a word in the affidavits as to how that amount is made up. It is not stated that it was reduced by a set-off. Beyond all doubt, it is the duty of a party who comes to this court to ask for a prohibition to lay before it proper grounds for inducing it to come to the conclusion that there has been an excess of jurisdiction on the part of the inferior tribunal. How does that appear here? The affidavits merely state, that, on the plaint being called on, the defendant's attorney objected to the hearing, but that the judge, notwithstanding that objection, heard and disposed of the plaint. Was it the duty of the judge to yield to an objection thus presented to him? How could he anticipate what the case would be? It might have been shewn that the sum sought to be recovered was an agreed balance. The objection is not, that, at the conclusion of the case, an excess of **[727]** jurisdiction appeared. The case, then, stands thus:—There was a plaint in which the plaintiff claimed 19l. 19s., and a judgment given for the plaintiff for 17l. 9s. and costs, without anything to shew that the judge in any way exceeded his jurisdiction. The only objection disclosed by the affidavits was one that was perfectly unfounded, and very properly over-ruled by the judge. The present case is wholly beside that of *Beswick* v. *Capper.* There, it appeared that the plaintiff was allowed in the county court to prove a demand of 227l. 2s. 8d., and to reduce the amount by a set-off of 186l. 16s. 9d., and then to abandon so much of the balance as exceeded 20l., and so to take a verdict for 20l. It, therefore, appeared affirmatively to the court in that case that the judge of the county court had gone into matters much beyond his jurisdiction. Here, however, there is no one fact to lead the court to the conclusion that there has been any excess of jurisdiction, and, consequently, so far as regards the plaint which was first heard in the county court, no ground for a prohibition.

As to the other plaint also, I am of opinion that the plaintiff has failed to make out a case for the interposition of this court. That part of the case stands upon a different footing. The plaintiff claimed 19l. 0s. 8d. for money lent. The objection was, that that demand, though presented as a separate and distinct demand, was, in truth, only part of a larger demand which exceeded the amount to which the jurisdiction of the county court is limited. Suppose the prohibition were to go, what would be its effect? What would the plaintiff recover on that account, if he sued in the superior court? Why, 19l. 0s. 8d. only. Why should he not proceed for that in the county court? The case is precisely one that is provided for by the statute. If a plaintiff, suing in a county court, proves a demand **[728]** exceeding the limits of the county court's jurisdiction, he will be nonsuited unless he will consent to abandon the excess; and the fact of his having done so must be recorded on the face of the judgment. Nothing of that kind was done here. At the time this plaint was heard, the demand thereby sought to be recovered was the only demand which the plaintiff had against the defendant; for, he had already recovered a judgment of the same court for the other part of his demand, and 19l. 0s. 8d. was all he could be entitled then to recover in any court. But, independently of that, this is a demand for money lent. The other was for work and labour, goods sold and delivered, and for commission. It is insisted that the whole formed but one entire debt. What evidence was there of that? It did not appear that the parties had ever treated it as one entire demand; and the items do not necessarily shew that it formed one account. Both grounds, for a prohibition, therefore, fail, and the rule must be discharged.

Maule, J. I am of the same opinion. The Lord Chief Justice has gone so fully into the reasons on which the judgment of the court is founded, that it is enough for me to say that I entirely concur in the view he has taken. With respect to the case of *Thompson* v. *Ingham*, the record conclusively shewed that the title to the land came in issue in the county court. Here, nothing appears to shew that a question of a larger sum than 20l. was in issue. If it had appeared that a larger sum than 20l. was in issue, and that the county court had decided on a controverted question whether that was so or not, if he had no jurisdiction to entertain a claim exceeding 20l., we should have been bound to treat it as a case of excess of jurisdiction. I do not, however, think that that is so. If the party, having a demand for more than 20l., chooses to claim no more, **[729]** he may recover that sum, electing to abandon the rest. There is, therefore, a manifest difference with respect to the jurisdiction of the county court, between the implied prohibition as to debts exceeding 20l. and the prohibitory clause as to matters of title. That materially distinguishes the case of *Thompson* v. *Ingham* from the present case.

Williams, J. I am of the same opinion. A prohibition ought not to go unless it clearly appears that the judge of the inferior court has acted without jurisdiction. The burthen of making that out is cast upon the party making the application. I am not satisfied, upon the affidavits, that the subject-matter of the two claims here constituted "one cause of action," within any reasonable interpretation of the 63rd section of the act. With regard to the point made as to the set-off, all that the affidavits disclose is, that there was a premature objection urged on the part of the defendant at the trial, which the judge very properly over-ruled.

Talfourd, J. I am of the same opinion. As to the main question, the case seems to me to differ materially from that of *Grimbly* v. *Aykroyd*. There is nothing here giving a common character to the two sets of items, as there was in that case, except that the whole might have been included in one declaration. In *Grimbly* v. *Aykroyd* there was one entire system of dealing, the demand arising all out of one state of things. This rule, therefore, may well be discharged without at all interfering with the authority of that case.

Rule discharged, with costs.

[730] Williams and Another v. Gray and Normansell. June 7, 1850.

[S. C. 19 L. J. C. P. 382.]

Under an interpleader order a bond in the penal sum of 200l. was given by C. and D., as sureties for B. who claimed certain goods seized under a fi. fa. at the suit of A., conditioned to be void,—"if upon the trial of an issue it should be found that the goods in the order mentioned were, or any of them were, at the time of the seizure, the property of B.,"—"or, if B. should proceed to try the said issue in due time according to the terms of the said order, or according to the course and practice of the said court, according to the said order, or any further order of any judge to be made in that behalf,"—"or, if B. should pay or cause to be paid to A. the sum of 200l., or so much thereof as should be the value of the said goods, or such part of the same as might be found not to be the property of B."—In an action upon the bond, against the sureties, the declaration, after setting out the condition, stated that the issue came on to be tried at a certain sitting, and that the jury were, with the consent of A. and B., discharged from giving any verdict thereon; and that afterwards a further order was made, whereby it was ordered that B. should proceed to the trial of the issue at a certain other sitting, and that, in default thereof, his claim should be barred; and alleged for breach, that B. did not at the last-mentioned sittings, or at any other time after the making of the last-mentioned order, proceed to try, or try the issue, &c., nor pay A. the 200l., or any part thereof.—The defendant C. pleaded that, after the making of the first order, and before the making of the second order, B. did, in pursuance and performance of the condition of the bond, proceed to try the issue, according to the course and practice of the court and the order, and that the jury were discharged from giving a verdict by the consent of A. and B., without any default on the part of, and without the consent of, C. and D., or either of them.—The defendant D. demurred generally to the declaration.—Held, that the declaration disclosed a sufficient breach, the meaning of the condition being that B. should actually cause the issue to be tried, and not being performed by the first proceeding to trial.—Held also, that the plea was bad, as raising an issue which was immaterial.

This was an action of debt on bond. The declaration stated that the defendants, theretofore, to wit, on the 17th of February, 1849, by their certain writing obligatory, sealed with their respective seals, and then shewn to the court, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of 200l., to be paid to the plaintiffs, which said writing obligatory was and is subject to a certain condition thereunder **[731]** written, whereby, after reciting that the Sheriff of Middlesex, under and by virtue of a certain writ of fi. fa., issued out of Her Majesty's Court of Common

Pleas at Westminster, in an action wherein the now plaintiffs were plaintiffs, and one Jane Annie Morton was defendant, caused the same to be levied upon certain goods and chattels in and about a certain house and premises at Camden Hill Villas, Kensington, in the said county; and that, the said goods and chattels being claimed by one Richard Greville Slade, the said sheriff, pursuant to the statutes in that behalf, had caused an application to be made to the said court for an interpleader order; and that Sir C. Cresswell, Knt., then being one of the justices of the said court, on the 14th of February, 1849, made an order in the said action, whereby, upon hearing the attorneys or agents for the said sheriff, and for the plaintiffs and the said R. G. Slade, it was ordered, that, upon payment of the sum of 200l. into court by the said R. G. Slade within a week from the date thereof, or upon his giving within the same time security to the satisfaction of one of the masters of the said court for the payment of the said amount, by the said R. G. Slade, according to the directions of any rule of court or judge's order to be made therein, and upon payment to the said sheriff, of the possession moneys from the date of the said order, the said sheriff should withdraw from the possession of the said goods and chattels; and whereby it was further ordered that the now plaintiffs and the said R. G. Slade should proceed to the trial of an issue in the said court, in which the said R. G. Slade should be plaintiff, and the now plaintiffs should be defendants; and that the question to be tried should be, whether, at the time of the said seizure the goods in the schedule to a certain bill of sale, dated the 3rd of November, 1848, were the property of the said R. G. **[732]** Slade; and whereby it was further ordered that such issue should be prepared and delivered by the said R. G. Slade within a fortnight from the date of the said order, and be returned by the now plaintiffs within a fortnight, and should be tried at the sittings of nisi prius held after Easter Term, then next in, and for the county of Middlesex; and by which said condition, after further reciting that the said R. G. Slade had proposed the now defendants as security for the same sum of 200l. pursuant to the said order, and that H. M., Esq. one of the masters of the said court, had approved thereof,—it was conditioned, that, if upon the trial of the said issue it should be found that the said goods and chattels in the said order mentioned were, or any of them were, at the time of the said seizure, the property of the said R. G. Slade, or if the said R. G. Slade should proceed to try the said issue in due time according to the terms of the said order, or according to the course and practice of the said court, according to the said order or any further order of any judge to be made in that behalf, or if the said R. G. Slade should well and truly pay, or cause to be paid, to the now plaintiffs the sum of 200l., or so much thereof as should be the value of the said goods and chattels, or such part of the same respectively as might be found not to be the property of the said R. G. Slade, then the said writing obligatory was to be void and of no force, otherwise to stand and remain in full force, vigour, and effect, as by the said writing obligatory and the said condition would more fully appear: Averment, that, after the making of the said writing obligatory, to wit, on the 21st of March, 1849, the said issue so as aforesaid ordered to be tried, was prepared and delivered by the said R. G. Slade to the now plaintiffs, and was by them then returned to the said R. G. Slade, pursuant to the said order of the said Sir C. Cresswell: That the said **[733]** issue was ready to be tried at the sittings at nisi prius held after Easter Term next after the making of the said order, to wit, 1849, in and for the said county, but the same according to the course and practice of the said court was not tried, and the same was then, according to the course and practice of the said court, made a remanet until the sittings of nisi prius to be held after Trinity Term in that year, in and for the said county; and the said issue afterwards, to wit, on the 9th of May, 1849, came to be tried at the said last-mentioned sittings, and which sittings were then held before the Right Hon. Sir Thomas Wilde, Knt., then being the Chief Justice of the said court at Westminster, in the said county; and the jurors of the jury who were then and there chosen and sworn to try the said issue, were by the said Chief Justice, with the consent of the now plaintiffs and the said R. G. Slade, then and there discharged from giving, and did not give, any verdict thereon: That, afterwards, to wit, on the 30th of January, 1850, a further order was duly made in the said action, and in the matter of the said interpleader issue, by Sir T. N. Talfourd, Knt., being one of the said justices of the said court, by which order the said Sir T. N. Talfourd, did order that the said R. G. Slade should proceed to the trial of the said issue at the sittings of nisi prius to be held in and for the said county of Middlesex after Hilary

Term, 1850; and that, in default thereof, the said R. G. Slade's claim to the said goods and chattels should be barred: That, although afterwards, and before the commencement of this suit, to wit, on the 1st of February, in the year last aforesaid, the sittings of nisi prius to be holden in and for the said county of Middlesex after the said last-mentioned term, were duly holden at Westminster, in and for the county of Middlesex, before the said Chief Justice, yet the said R. G. Slade did not nor would **[734]** at the said last-mentioned sittings, or at any time after the making of the said last-mentioned order, proceed to try, or try, the said issue, according to the course and practice of the said court, according to the said last-mentioned order, or at all; and the same, by his default in that behalf, was not then, or at any other time, tried. That the said R. G. Slade did not nor would at any time well and truly pay or cause to be paid to the now plaintiffs the sum of 200l., or any part thereof,—that sum during all the time aforesaid being the value of the said goods and chattels, the same being the goods in the schedule to the said bill of sale, and the same or any part thereof not being at the time of the said seizure the property of the said R. G. Slade; contrary to the said conditions of the said writing obligatory; and whereby the said writing obligatory had become forfeited; and thereby an action had accrued to the now plaintiffs, to demand and have of the defendants the sum of 200l., being the sum, &c. above demanded.

The defendant Normansell pleaded, that, after the making of the said writing obligatory, and before the making of the said order made by the said Hon. Sir T. N. Talfourd, that is to say, at the said sittings of nisi prius for the county of Middlesex held after Trinity Term, 1849, in the declaration mentioned, to wit, on the 19th of June, 1849, the said R. G. Slade did, in pursuance and performance of the said condition of the said writing obligatory, proceed to try the said issue, which, proceeding to try, was in due time according to the course and practice of the said court, according to the said order of the said Sir C. Cresswell, on which occasion the jurors of the jury chosen and sworn to try the said issue were then discharged from giving any verdict, as in the declaration mentioned, at the instance and by the consent of the now plaintiffs and the said R. G. Slade, without any default on the part of the **[735]** defendants or either of them or the said R. G. Slade, and without the consent of the defendants or either of them, although all the evidence, as well on the part of the said R. G. Slade as on the part of the now plaintiffs, was laid before the said jurors,—verification.

The defendant Gray, after craving oyer of the deed, and setting out the condition (as in the declaration), demurred generally to the declaration.

The plaintiff demurred specially to the plea of the defendant Normansell, the main ground of demurrer being, that it tendered an immaterial issue.

G. Denman, for the plaintiffs. The declaration is good, and the plea no answer. The substantial question is, what is the true construction of the condition of the bond. The condition is, that, if, upon the trial of the issue directed by the order of Cresswell, J., it should be found that the goods and chattels in the order mentioned, were, or any of them were, at the time of the seizure under the writ, the property of Slade,—or if Slade should proceed to try the said issue in due time according to the terms of the order, or according to the course and practice of the court, according to the said order or any further order of any judge to be made in that behalf,—or, if Slade should pay the plaintiffs 200l., &c., the bond to be void, &c. Upon the fair construction of these words, it is submitted, the defendants have been guilty of a clear breach. It cannot be that each of these alternatives creates a separate condition; for, if that were so, the second would have no meaning that would afford any security at all to the plaintiffs. "Or" will in all cases be read "and," where otherwise the plain and manifest intention of the parties would be frustrated: *Green* v. *Wood* (7 Q. B. 178). Assuming that there are three separate conditions, upon the first it is clear **[736]** the bond is in force; as to the third, the declaration avers non-payment of the 200l.: the only question remaining is, whether the defendants have complied with the second condition, "if the said R. G. Slade should proceed to try the issue in due time, according to the order and the practice of the court." The plea of the defendant Normansell raises an immaterial issue: the condition is for something more than merely "proceeding to try" the issue. [Wilde, C. J. You contend it means "proceed and try?"] Precisely so. It was intended to secure a verdict of a jury. If so, the plea is clearly bad. Slade was, by the order of Talfourd, J., bound to try the issue at the sittings after last Hilary Term: and he did not do so. The plea, in effect, seeks to set up a sort of defence arising out of a giving of time to the principal. A parol agreement, however, to give time to the principal on a bond, is no defence to an action against a surety: see *Davy* v. *Prendergrass* (5 B. & Ald. 187) and the cases cited in Burge on Suretyship, pp. 212, 213.

Willes, contrà. The undertaking to "proceed to try" is satisfied by the party's endeavouring to try. This court so held in *Rizzi* v. *Foletti* (ante, vol. v. p. 852). [Maule, J. That proceeded upon the ground of the construction of the statute 14 G. 2, c. 17, s. 1.] The same construction must be put upon all instruments. [Maule, J. Proceeding to try here must mean doing all the party can to get to trial. The first branch of the condition Slade has not complied with, because he has not obtained a verdict: he has equally made default as to the second, because he has not proceeded according to my Brother Talfourd's order; and he has made default as to the third, because he has not paid the money. Therefore, **[737]** the bond is not void.] The not proceeding to try according to the order of Talfourd, J., was not a breach of the condition; for, the condition had been performed before the date of that order. The case does not fall within the principle of *Davey* v. *Prendergrass*, but rather within the exceptions in Com. Dig. Condition (L. 4) and (L. 6), where it is said,—"The non-performance of a condition may be excused by the default of the feoffee or obligee; as, if the feoffor or obligor makes a legal tender of the money to the feoffee or obligee at the day and place appointed, and he refuses to accept it." "So, the performance of a condition shall be excused by the obstruction of the obligee: as, if a condition be, to build a house, and he, or another by his order, hinders his coming upon the land, or say that it shall not be built, or interrupts the performance. So, if a condition be that the lessee shall leave a house in good plight, and fire out of the chimney of the lessor next to it consumes it. So, if there be a recognizance to the King for appearance, and the party is imprisoned by A. and B., who act by lawful authority of the King." Here, the plaintiff consented to the discharge of the jury. [Maule, J. What is material here is, the consenting and agreeing: that is an agreeing by parol to discharge the party from a bond!] An act in pais by the obligee may discharge a bond: of this many instances are given by Chief Baron Comyns. [Maule, J. If the condition here means that Slade was to perform the second part, he was bound to proceed to try, notwithstanding the former consent of the plaintiffs to discharge the jury.]

Denman was heard in reply.

Wilde, C. J. This bond, like every other written instrument, must be construed with reference to the in-**[738]**-tention apparent on the face of it, so far as the words will admit of it. Here I think it is sufficiently apparent what the parties meant, viz. to bring to a judicial decision a certain claim. The first branch of the condition is, that the bond shall be void, "if upon the trial of the issue directed by the order of Cresswell, J., it should be found that the goods and chattels in the order mentioned were, or any of them were, at the time of the seizure under the fi. fa., the property of Slade,"—plainly shewing the object of the bond to be, to have a judicial inquiry as to a particular fact. It then proceeds,—"or, if the said R. G. Slade should proceed to try the said issue in due time according to the terms of the said order, or according to the course and practice of the court," &c. That palpably shews the intention of the parties that a trial should actually take place; and care is taken to guard against a failure in that respect. No doubt there might arise circumstances which might operate a dispensation; but nothing is shewn to have taken place which could have prevented Slade's causing the issue to be tried. The terms of the order of my brother Talfourd are, "that Slade should proceed to the trial of the said issue at the sittings of nisi prius to be held in and for the county of Middlesex after Hilary Term, 1850, and that, in default thereof, his claim to the said goods and chattels should be barred." There seems to me to be no reasonable doubt as to the words or meaning of the condition. I think there has been a failure on the part of Slade to perform the condition, in not proceeding to try, that is, causing the issue to be tried, and that he was not prevented from so doing by the circumstances of the jury having been discharged. The declaration therefore is good, and is not answered by the plea.

Maule, J. I also think the plaintiffs are entitled to **[739]** the judgment of the court. It appears upon the record that Slade has failed to do that which the bond was given to compel him to do. The bond was given under an interpleader order, as a condition upon which the goods were handed over to the claimant,—among other things, to secure the proceeding to a trial of the issue. The obligation was to be void if Slade should do any one of three things,—first, if he should prove upon the trial of the issue that the goods and chattels in the order mentioned were, or any of them were, at the time of the seizure, his property. That he certainly did not do. In the third place, the bond was to be void if Slade should well and truly pay or cause to be paid to the plaintiffs 200l., or so much thereof as should be the value of the goods and chattels or such part thereof respectively as might be found not to be his property. That he has not done. The second branch of the condition (which it is said has been performed) is, that the bond should be void, "if Slade should proceed to try the said issue in due time according to the terms of the said order, or according to the course and practice of the court, according to the said order, or any further order of any judge to be made in that behalf." Now, the obvious meaning of that is, that the obligor should proceed to the trial of the issue according to all the orders which should from time to time regulate the proceedings. He was to proceed according to each of these things at the time when each was applicable. That he failed to do, inasmuch as after the agreement to withdraw a juror there was an order of my Brother Talfourd directing him to proceed to trial at a particular sitting; and this he omitted to do. It is unnecessary to consider the case of *Darcy* v. *Prendergrass*. Discarding all considerations of that kind, this plea affords no defence. The matter relied on here is, an agreement that the obligor shall proceed to try the issue, according **[740]** to the course and practice of the court. The consent to withdraw a juror did not relieve him from proceeding to trial at a subsequent time. The parties contemplated a proceeding to trial after a postponement by consent, as well as before. There is, therefore, a general failure to perform any part of the condition.

Cresswell, J. I am entirely of the same opinion. The words "according to the said order, or any further order of any judge to be made in that behalf," were evidently inserted to meet the case of a failure to try on the first attempt.

Talfourd, J. I am of the same opinion. The alternative words in the condition are merely descriptive of the various modes in which Slade might perform the condition of the bond. Not having performed either alternative, the bond is clearly forfeited.

Judgment for the plaintiffs.

Ex parte Mary Anne Thomas. May 30, 1850.

Under the Joint-Stock Companies Winding-up Act, 1848, the master made an order for placing an executrix on the list of contributories in respect of shares in the undertaking held by her testator, and directing her to pay 1469l. 15s. 7d. out of the assets of the testator, if she had so much in her hands to be administered. This order having been registered as a charge against the executrix, as well as against the testator,—an application to the court to alter or vacate the entry was refused.

The affairs of the North of England Joint-Stock Banking Company being in course of winding up under the Joint-Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45, Mary Anne Thomas was brought before the master as executrix of one John Ness, and on the 24th February last the master made **[741]** an order by which she was placed on the list of contributories, as such executrix, in respect of forty-eight shares in the undertaking, held by Ness, and was ordered to pay a sum of 1469l. 15s. 7d. out of the assets of her testator, if she had so much in her hands to be administered. On the 7th of May, a notice was served upon her, that the official managers had registered the order so made by the master, in the registry of judgments. Search was accordingly made in the office, and the order was found to be registered as a charge against her, and also against John Ness.

Willes, on behalf of Mrs. Thomas, moved for a rule calling upon the official managers to shew cause why the entry on the register should not be vacated or amended, inasmuch as they had no right to register the order as a charge apparently against her estate. [Maule, J. Suppose John Ness had died possessed of chattels real, would not this entry have been proper?] It is submitted it would not. The proceedings would have been under the 1 & 2 Vict. c. 110. In 2 Wms. Saund. 9 c. n. (3 B. & Ad. 655), it is said, "If a scire facias be brought on the judgment against the executor, he may give in evidence, under a plea of plene administravit, the payment of other debts before action brought, which exhausted all the assets; and it is not necessary for him to allege in his plea that there was no docket: *Hall* v. *Tapper*

(3 B. & Ad. 655). And, where a judgment has not been docketed according to the statute, the circumstance that actual notice of it has been received by the executor or administrator, will not entitle it to any priority or preference in administration. The statute does not require a judgment against the executor to be docketed: **[742]** *Gaunt* v. *Taylor* (3 M. & G. 886, 3 Scott, N. R. 700). By the statute 2 Vict. c. 11, s. 1, no judgment shall be hereafter docketed under the statute 4 & 5 W. & M. c. 20. But by the 1 & 2 Vict. c. 110, s. 19, and 2 Vict. c. 11, ss. 2, 4, judgments shall be registered in the modes prescribed by those statutes. It may be questioned whether these enactments will not be attended with a serious consequence (perhaps overlooked by the legislature) with reference to the subject now under discussion; for, it may be contended that the effect of them is, that a judgment recovered subsequently to the passing of the acts will be entitled to precedence, as at common law, in the administration of assets by an executor or administrator notwithstanding it is neither registered as prescribed by the statutes of Victoria, nor docketed as required by the statute of 4 & 5 W. & M. c. 20; because it is no longer possible to docket the judgment under the statute of W. & M.; and the only penalty imposed by the statutes of Victoria for neglecting to register it is, that it shall not affect any land, tenements, and hereditaments. The statutes omit to enact (as they ought to have done, in order to conform with the statute of W. & M.) that a judgment not registered shall not have any precedence against executors or administrators in the administration of their testator's or intestate's effects."

MAULE, J.(*b*). This order is registered, in order to get a chance of precedence against other claimants. The order binds the assets: and there is no prohibition in the act against registering it. This notion of seeking to vacate the registry is a thing quite out of the contemplation of the legislature.

The rest of the court concurring,

Rule refused.

[743] PHILLIPS AND OTHERS *v.* SURRIDGE. June 5, 1850.

It is not necessary, in pleading a deed of arrangement under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), ss. 224, 225, to set out the names of the creditors who have executed the deed, or the dates or amounts of their debts. Nor is it necessary to set out all the trusts, conditions, and provisions contained in the deed.—Where the execution of a deed is alleged in a pleading to have taken place upon two different days, the court will reject that which from other averments in the plea appears to be an erroneous date. In such a case, an allegation that "the defendant was a trader, and indebted to divers persons in divers sums, and was unable to pay the same in full," and thereupon executed the deed of arrangement, is (on general demurrer at least,) a sufficient allegation that he had suspended payment.—And semble that the execution of the deed was in itself a "suspension of payment," within the meaning of ss. 211 and 225.—Held, that such a plea was properly pleaded as a release, and to the further maintenance of the action.

Assumpsit on a bill of exchange for 45l. 16s. 2d., at four months' date, drawn by the plaintiffs upon and accepted by the defendant; with counts for goods sold and delivered, work and materials, and money found due upon an account stated.

The defendant pleaded,—first, to the first count, and to the residue of the declaration so far as it related to the sum of 45l. 16s. 2d., parcel of the moneys and causes of action in the said residue mentioned,—to the further maintenance of the action,—that the bill in the first count mentioned was accepted by the defendant, and taken by the plaintiffs, before the making of the indenture thereinafter mentioned, for and on account of the said sum of 45l. 16s. 2d., parcel, &c., and that the said sum, parcel, &c., and the amount of the said bill, are the same sum; that, before and at the time of making the deed thereinafter mentioned, and for six months and upwards next immediately before the suspension of payment thereinafter mentioned, the defendant was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the statute thereinafter mentioned: that, before and at the time of making the **[744]** said indenture, he was indebted to the parties of the second part to the

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(*b*) Wilde, C. J. was absent.

deed thereinafter mentioned, and to divers other persons, in divers sums, and was and would be unable to pay the same in full, and the defendant, before the time of making the said indenture, to wit, after the passing and coming into operation of the statute thereinafter mentioned, to wit, on the 25th of October, 1849, as such trader, [suspended payment, and thereby, by deed of arrangement*] made after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and after the 11th of October, 1849, to wit, on the 7th of November in the year aforesaid,—which indenture, sealed with the seal of the defendant, and sealed as thereinafter was mentioned, the defendant brought into court,—and made between the defendant of the first part, John Skitt, James Willes, and Joanna Priddy of the second part, and the several other persons whose names and seals should be thereunto subscribed and affixed by themselves or their agents (being creditors of the defendant) of the third part,—after reciting (inter alia) that the defendant was possessed of certain property (specified in the schedule), and that he had agreed to assign all his estate, &c., to the said parties of the second part, the said defendant did bargain, &c., unto the said John Skitt, James Willes, and Joanna Priddy, their executors, &c., all his leasehold hereditaments, with the appurtenances, and the goodwill of the trade or business of a beer-shop keeper then carried on by the defendant, and his stock in trade, &c., and all his personal estate, &c., to hold the same to the said John Skitt, James Willes, and Joanna Priddy, subject to certain charges and the covenants and agreements therein mentioned, upon trust (subject to certain provisions and stipulations therein mentioned) to pay certain charges and incumbrances, and pay and retain certain costs, &c., and upon further **[745]** trust to apply the residue of the trust moneys which should remain after satisfying the trusts and purposes aforesaid, from time to time when and as received, towards payment of the several debts and sums of money then due from the defendant to the several persons parties thereto of the second and third parts, without any preference, and rateably, with interest, until the whole of the said debts should be fully paid, or the said trust moneys should be exhausted; and, in case there should be any surplus, upon trust to pay the same unto the defendant, his executors, &c., for his or their own benefit: and the defendant covenanted with the said John Skitt, James Willes, and Joanna Priddy, that the defendant, from time to time, upon every reasonable request or notice to him by the trustees or trustee for the time being, would assist in carrying on the said business, in making up his accounts, and in the settling of any disputes which might arise concerning any of his debts, and also in ascertaining and getting in the same: and, by the said deed, in consideration of the assignment therein made, and other the premises therein aforesaid, the several persons parties thereto of the second and third parts, did for themselves severally, and for their several executors, &c., but not the one for the other or others, covenant, promise, and agree with and to the defendant, that, in case the defendant should in all respects perform the covenants and agreements thereinbefore contained, and on his part to be done and performed, they, the said creditors, parties thereto of the second and third parts, nor their executors, &c., should not in any manner whatsoever sue, arrest, implead, or prosecute him, the said defendant, his executors or administrators, or issue any execution against his or their goods, &c., for, or upon, or on account of, any debt or money then due or owing unto them, or any of them; and, in case any of the said creditors, parties to the said **[746]** deed, their executors, &c., should sue, arrest, implead, or prosecute him, the defendant, his executors, &c., for any such debt or sum, that then the said deed should be a sufficient release and discharge to all intents and purposes, at law and in equity, to and for the defendant, his executors and administrators, and he and they should be and were thereby acquitted, released, and discharged against them, the said creditors, parties thereto of the second and third parts, and every of them, their executors, &c., who should sue, arrest, imprison, implead, or prosecute the defendant, his executors or administrators, contrary to the true intent and meaning of the said deed, and as such should and might be pleaded by him, the defendant, his executors or administrators: that the said deed contained certain other provisions, &c., therein set forth; that, before the commencement of this suit, to wit, on the said 7th of November, 1849, to wit, at the time of the making of the said deed, the same was sealed by the defendant, and divers, to wit, one hundred, of the creditors of the defendant, by themselves, signed the said deed, and subscribed their names and affixed their seals thereto, and divers, to wit, one hundred, others of the said creditors, by their agents respectively, signed the said deed, and subscribed their names and affixed their seals thereto: that the said deed was a deed of arrangement between the defendant and his creditors, within the meaning of the provisions of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed; and that the said creditors by whom and on behalf of whom the said deed was signed as aforesaid, were more than six sevenths, to wit, nine tenths, in number and value of the creditors of the defendant within the meaning of the said provisions of the said act whose debts amounted within the meaning of the said provisions to the sum of 10l. and upwards, accounting every creditor as a creditor in **[747]** value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the creditors by whom and on behalf of whom their names were subscribed and seals affixed, were more than six sevenths in number and value of the creditors of the defendant within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of 10l. and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the plaintiffs were at the time of making the said deed creditors of the defendant in respect of the said causes of action in the introductory part of this plea mentioned, within the meaning of the said provisions of the said act: and that, before and at the said time of making the said deed, the amount in the introductory part of the plea mentioned was a debt then due from the defendant to the plaintiffs within the meaning of the said deed; and that, after the said suspension of payment, and after the said deed had been so signed, and the names of such majority as aforesaid of creditors had been so subscribed and seals so affixed, to wit, on the 2nd of January, 1850, and before the presentation of the petition hereinafter mentioned, the plaintiffs had notice from the defendant of the said suspension of payment, and of the said deed of arrangement, and were then requested by the defendant to sign and execute the same, and the plaintiffs then might and could (if they would) have signed and executed the same as parties of the second part; and that the bill in the first count mentioned was held by the plaintiff at the **[748]** time of the making of the said deed, and thence to the commencement of this suit, and at the time of giving them the said notice, and requesting them to sign and execute as aforesaid; and that for six months next immediately preceding his said suspension of payment, the defendant carried on business, to wit, as such trader, within the district of the court of Bankruptcy in London; and that, after he had suspended payment as aforesaid, and after the making, signing, and subscribing names and affixing seals to the said deed as aforesaid, he, the defendant, to wit, on the 8th of January, 1850, in pursuance of the said act, presented his petition to the said court of Bankruptcy in London, praying the said court to grant to him, the defendant, an order or certificate certifying that the said deed of arrangement had been duly signed by or on behalf of six sevenths in number and value of the creditors of the defendant whose debts amounted to 10l. and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him: That, afterwards, to wit, on the 24th of January, in the year aforesaid, application was made by the defendant to the said court for an order or certificate, in pursuance of the said prayer of the said petition, and that the plaintiffs, more than fourteen days before the making of the said application, had notice from the defendant that the petition had been presented, and of the said intended application, and of the time when the same would be and was made; and that thereupon, on and after the said application to the said court, and within three months from the time at which the plaintiff had notice from the defendant of his said suspension of payment, and of such deed of arrangement, to wit, on, &c., the **[749]** said court, in pursuance of the said petition, and of the said act, and then having jurisdiction in and over the matters of the said application, did make and give to the defendant a certificate, whereby the said court did certify that the said deed of arrangement had been duly signed by or on behalf of six sevenths in number and value of the creditors of the defendant, whose debts amounted, within the meaning of the said provisions, to 10l. and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and all other such available securities or liens from the defendant, appeared to be the balance due to him. The plea then, after a general averment of performance by the defendant of the covenants on his part, proceeded to aver, that the said parties of the second part on and at all times after the making of the said deed assented to the same, and acted as such trustees; that thereby and thereupon the said deed became and was as effectual and obligatory upon the plaintiffs as if they had duly signed the same; that the said deed and certificate still remained in full force; and that, by reason of the matter aforesaid, and of suing the defendant in this action, the said defendant, theretofore, and after the commencement of this action, to wit, on, &c., became and was released and discharged from the said causes of action in the introductory part of the plea mentioned, and from the plaintiffs' right to sue for the same,—verification.

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* These words were omitted.

To this plea the plaintiffs demurred specially, assigning for causes, amongst others, —that the plea is uncertain and insufficient, in that it states that the defendant was indebted to the parties of the second part to the deed therein mentioned, and to divers other persons, in divers sums respectively, without mentioning or giving their Christian or surnames, or stating how many they were, or offering any excuse whatever for such omis-**[750]**-sions, and without stating or mentioning the amount of the respective sums in which the defendant was so indebted,—that the plea is uncertain and insufficient, in that it states that the said deed contained certain other provisos, declarations, and agreements in the said deed set forth, and it is nowhere stated in the said plea what those provisos, declarations, or agreements, or any of them, are, and that the same should have been fully set forth in the plea, that the plaintiffs might have an opportunity of traversing or pleading to them,—that the plea is further uncertain and insufficient, in that it is nowhere stated in the said plea what were the respective Christian and surnames of the creditors who executed the said deed themselves, or of the other creditors who executed the said deed by their agents, and also in that the Christian and surnames of such agents ought to have been set forth in the plea, or an excuse alleged; that the plea is also insufficient, for, that the deed ought to have been set forth in the plea, or pleaded according to its legal effect,—that it should have been a plea in bar of the action generally, and not to the further maintenance,—and that it is argumentative, and sets out conclusions of law.

The defendant joined in demurrer.

Channell, Serjt. (with whom was Unthank), in support of the demurrer. The deed relied on in the plea is sought to be brought within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts "that any deed or memorandum of arrangement, now or hereafter entered into between any such trader and his creditors, and signed by, or on behalf of, six sevenths in number and value of those creditors whose debts amount to 10l. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, **[751]** and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be, or liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy; provided, always, that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section enacts "that no such deed or memorandum of agreement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement unless such trader shall, within such time, obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid: and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." Section 226 enacts, "that, when the trustees or inspector under any such **[752]** deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that six sevenths in number and value of the creditors whose debts amount to 10l. and upwards, have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing; and such certificate shall be filed with the registrar of the court, and shall thereupon be primâ facie evidence in all courts of law and equity that such deed or memorandum of arrangement has been so signed." And the 227th section enacts "that every such certificate as last aforesaid, shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account, or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always, that any omission, insertion, or incorrectness in such account, which shall not have been made through such culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement." [Wilde, C. J. Is there any clause in the act making the deed pleadable in bar?] None. This is a case where it is sought to bind a party by a deed which he has not executed; the court will, therefore, look at it with strictness. The creditors are only bound by a deed framed and executed with a due regard to the provisions of the act. The plaintiffs are **[753]** entitled to have all the facts accurately and affirmatively stated. As this could only be binding on the plaintiffs in the event of a certain proportion in number and value of the creditors executing it, the defendant was bound to state the names of the several creditors by whom it was signed, and the amounts of their respective debts. The general rule of pleading applicable to this case is thus stated in Stephen on Pleading, 5th edit. p. 338, rule 4,—"The pleadings must specify the names of persons,"—"The rule relates to persons not parties to the suit, of whom mention is made in the pleading. The names of such persons, viz. the Christian name and surname, or name of dignity, must in general be given, but, if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name" (*a*). It is true the deed shews who are the parties who have executed it: but the plaintiffs are entitled to know who the several persons are to whom the defendant is indebted, and the amount of their respective debts, in order to see that the parties who have executed the deed are in reality the proportion in number and amount required by the statute to give force and validity to the arrangement. [Maule, J. There is an averment that the persons who executed the deed are in truth six sevenths in number and amount of the creditors.] True: but this point arises on special demurrer; and the plaintiffs have a right to have all the names set out, to give him the means of making inquiry. A distinction is taken between setting out a deed or other written instrument by description, and stating a transaction be-**[754]**-tween the parties on which the action turns. This is pointed out in *Levy* v. *Webb* and *Gatty* v. *Field* (9 Q. B. 431), where Lord Denman, in delivering the opinion of the court upon this point, says,—"The question reserved for consideration in the first of these cases turned upon the insertion of initials only, instead of the full Christian names; in the second, on the omission of Christian names, and substitution of 'Mr.' And we are of opinion, that, when such omission or substitution is made, not in the description of some written instrument, but in the statement of a transaction between the parties on which the action turns, it is good ground of special demurrer. We must presume that every person has a Christian name; and it ought to be stated, or reason assigned

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(*a*) *Buckley* v. *Rice Thomas*, Plowd. 128 a.; *Rowe* v. *Roach*, 1 M. & Selw. 304; *Ball* v. *Gordon*, 9 M. & W. 345; *Tigar* v. *Gordon*, 9 M. & W. 347.

for the omission." [Talfourd, J. The last case upon the subject is, *Kinnersley* v. *Knott* (ante, vol. vii. p. 180). Maule, J. This rather comes within the 6th division of rule vii. in Stephen (5th edit., p. 392),—"a general mode of pleading is allowed where great prolixity is thereby avoided."] In that case, the plea should have so alleged. The next objection is, that it is not positively alleged in the plea that the defendant made the indenture. [Maule, J. Certain words are omitted in copying the demurrer-books, which seems to leave the matter entirely at large. But, is not that cured by the subsequent allegations?] It is pointed out as ground of special demurrer. If the plea does state that the defendant made the deed, then it is open to a further objection, viz. that it is repugnant and insensible, inasmuch as two dates are mentioned. Then, the provisions of the deed are not well stated: there is a primary trust which ought to have been set out. [Maule, J. It does not follow that they are charges to which the assignees are subject. Wilde, C. J. There is nothing in the **[755]** act to prescribe what shall be the precise form of the deed. The six sevenths are to decide it. Can it be material to set out all the trusts? See the inconvenience, the prolixity it would lead to. There might be trusts to carry on the trade, and a variety of other things.] The plea goes on to say, that "the said deed contained certain other provisos, &c., therein set forth." These might be material with reference to the defendant's covenants, and ought to have been set out. The deed does not operate as an absolute release of the debt, but only conditional on the performance of the defendant's covenants. Whether or not the defendant has performed his covenants, may depend very much on the trusts which are not set out. The plaintiffs, therefore, have a right to have them placed on the record. If this deed operated as a release, when did it become so? [Maule, J. At once.] The plaintiffs do not covenant not to sue. This matter was very much considered in the Exchequer Chamber, in a case of *Ford* v. *Beech* (11 Q. B. 852). [Maule, J. And in a more recent case in this court, of *Gibbons* v. *Vouillon* (ante, vol. viii. p. 483). The effect of the deed and of the statute is, that the deed enures as a release, provided the defendant has performed all his covenants, and complied with all the conditions. It is a sort of penalty,—a forfeiture of the debt.] If so, this ought to have been pleaded in bar, and not to the further maintenance of the action. [Maule, J. The deed enures as a release at the election of the debtor: and is therefore properly pleadable in bar of the further maintenance of the action.] There is no averment of any suspension of payment by the defendant in point of fact, but merely that the defendant was indebted to certain persons in divers sums, which he was unable to pay in **[756]** full. In the absence of a suspension in fact, the court of Bankruptcy had no jurisdiction.

Aspland (with whom was Byles, Serjt.), contrà. The plea in question is substantially a good plea under the 224th and 225th sections of the statute. By the first of those sections, the deed is made binding upon the plaintiffs notwithstanding its non-execution by them, provided the defendant has performed all that it was incumbent on him to perform. The plea sufficiently shews that there was a suspension of payment by the defendant, and that the plaintiffs had notice of it. [Wilde, C. J. The plea states that the plaintiffs had notice from the defendant of the said suspension of payment. If there is no previous mention of suspension of payment, must we not reject the whole?] The plea, in the previous part, states that the defendant was insolvent, and unable to pay his debts. [Wilde, C. J. The word "suspension" has a very distinct meaning. The statute speaks of the fact.] It is to be observed that this is not pointed out as ground of special demurrer. The question, therefore, is, whether this general allegation is not sufficient. Besides, it is clearly involved in the allegation of notice. Further, the court of Bankruptcy has acted: and this court will assume that that court has done its duty in this respect. The question as to the release has been already disposed of by the court. Then, as to the matters of form. It is said there is a repugnancy, inasmuch as the deed is stated to have been made on two different days. As to the day first mentioned, however, it is insensible, and the court will reject it. And in a subsequent part of the plea there is a distinct averment that the deed was made on the 7th of November, 1849. In Stephen on Pleading, p. 404, it is laid down, that "No greater particularity is required than the nature of the thing **[757]** pleaded will conveniently admit of. Thus, though generally in an action for injury to goods, the quantity of the goods must be stated, yet, if they cannot under the circumstances of the case be conveniently ascertained by number, weight, or measure, such certainty will not be required. Accordingly, in trespass for breaking the plaintiff's close with beasts, and eating his peas, a declaration not shewing the quantity of peas has been held sufficient, 'because nobody can measure the peas that beasts can eat.' So, in an action on the case for setting a house on fire, per quod the plaintiff, amongst divers other goods, ornatus pro equis amisit; after verdict for the plaintiff, it was objected that this was uncertain: but the objection was disallowed by the court. And in this case Windham, J., said, that, if he had mentioned only diversa bona, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt; and added, that, to avoid prolixity, the law will sometimes allow such a declaration." It might be difficult in many cases for a man to know with certainty the number of his creditors,—as, for instance, in the case of indorsees of bills of exchange. In *Norman* v. *Thompson* (4 Exch. 755), a plea of composition averred that the defendant offered and agreed with the plaintiff and divers of the said other creditors (the plea having previously stated that the defendant was indebted to the plaintiff and divers other persons) "to pay to them respectively, and that the plaintiff and the said last-mentioned other creditors agreed together to accept, a certain composition for the payment of the defendant's debts,"—was held sufficient. "Precedent and practice ought to have great weight in the consideration of all points arising upon the propriety of forms, and in all legal instruments." Per Lord Eldon **[758]** in *Smith* v. *Doe d. the Earl of Jersey* (cited 11 Price, 193). Under this act, there is a special reason why the general averment should be held sufficient. The 226th section requires the trustee or inspector, or two creditors, to certify that the deed has been signed by six sevenths in number and value of the creditors whose debts amount to 10l. and upwards. [Cresswell, J. And s. 237 requires an account of the debts of the trader to be appended to the certificate, together with the names, residences, and occupations of his creditors.] That section gives the creditors ample means of ascertaining that which it is contended should have appeared on the face of this plea. Perfect information could not be furnished by the plea: some of the creditors execute by power of attorney, which would not be in the custody or power of the defendant: *Hibbert* v. *Knight* (12 Jurist, 162). The plea alleges that the deed was subscribed by divers, to wit, two hundred of the defendant's creditors: the videlicet may be rejected,—*Nash* v. *Brown* (ante, vol. vi. p. 584, 6 D. & L. 329); and then the plea shews the impracticability of setting out all the names. [Cresswell, J. The numbers are not material.] A date may be assumed to be material upon demurrer, when, if truly stated, it would support the pleading,—*Ryalls* v. *Bramall* (5 D. & L. 753). [Wilde, C. J. In that case you would be put to proof of the precise number.] The plaintiffs are under no hardship; for, if they had taken the right course, they might have discontinued without costs: *Wollen* v. *Smith* (9 Ad. & E. 505).

Channell, Serjt., in reply. It is important that the plaintiffs should find upon the face of the plea a distinct and positive allegation of an actual suspension of pay-**[759]**-ment. [Wilde, C. J. Was not the execution of the deed a sufficient suspension? See s. 211. Is it not enough that certain facts are alleged which distinctly amount to a suspension?] It may be so. But the question here is, whether the defendant was not bound to take upon himself to aver a suspension in point of fact, to give a foundation to the whole proceeding,—not what evidence would support an allegation of suspension.

Wilde, C. J. It seems to me that the plea in this case, though not perfectly correct in all its parts, may still be sustained. Its validity depends upon the construction of the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which provides that a deed which has been executed by a certain number of persons under given circumstances, shall, as against a person in the position of these plaintiffs, have the same force and validity as if it had been executed by him. The question is, whether the deed has been executed in such a manner as to make it available against the plaintiffs as if they had actually signed it. The first objection to the plea is, that the several creditors who executed it are referred to, but their names are not set out, and therefore the plea does not give the plaintiffs the means of ascertaining whether or not the conditions of the act are complied with by the signature of the deed by six sevenths in number and value of the creditors. Now, the rule of pleading is clear, that, where undue prolixity will arise from the setting out of names, dates, and amounts, they may be dealt with in a general form. This part of the statute relates to arrangements entered into with creditors of an insolvent trader; and it may reasonably be inferred in such cases that the creditors would be numerous. It may, I think, be generally predicated in such cases that it would be inconvenient and unnecessary [760] to set out the names of all the creditors and the amount of their respective debts, more especially as the statute which gives the parties the means of ascertaining by whom the deed has been executed, and the amount of their respective debts, viz. by the certificate of the trustee or inspector, under s. 226, and the account annexed thereto, verified by the oath of the trader, as provided by s. 227. It seems to me, therefore, that this is a case in which the allegation the absence of which is complained of would lead to unnecessary prolixity, without any additional convenience or security to the plaintiffs, and consequently that it falls within the general rule referred to.

The next objection is, that the plea is informal and uncertain, with regard to the execution of the deed. No doubt there is a mistake in the copying of that part of the plea: we must, therefore, look to the rest of it, to see if the execution of the deed is sufficiently averred. If it appears that a deed of assignment was duly executed by the defendant, and that it was signed by six sevenths in number and value of the creditors, that I apprehend satisfies so much of the statutes as relates to the execution of the deed. The statute requires (s. 225) that the creditor who is sought to be affected by it shall have notice of the suspension of payment and of the execution of the deed. If the trader is desirous that the deed should operate against creditors who do not execute within the time (three months) prescribed by s. 225, he may apply to the court for an order or certificate that the deed has been duly signed by the proper number of creditors. But, to warrant that application, he must give fourteen days' notice thereof to all the creditors, otherwise they are not bound by it. The plea alleges that the deed was signed by the requisite number of creditors, and a certificate thereof obtained after due notice to the plaintiffs. It appears [761] to me that all the conditions of the statute requisite to make the deed effectual against the plaintiffs have been performed. But it is said that this must depend upon whether or not the court had jurisdiction; and that it could have no jurisdiction unless the defendant (the trader) had been resident within the particular district for six months prior to the suspension of payment. The question is, what is a suspension of payment? The act is divided into several heads. The general scope and object of this part of it I find to be, to further arrangements between traders and their creditors where the former are unable to pay their debts. The general scope and object of the act being thus clear and distinct, I am unable to suggest any good reason why the legislature should not have thought such a case as this a fit one for their interference, as well as the case of an actual and total suspension of payment. The language of the 225th section is equally applicable to the case of a person in the condition of being unable to pay his debts, as to that of an absolute suspension of payment, where there has been no renewal of payment. And, looking to the rest of the provisions of the act, to see what is meant by a suspension of payment, it seems to me clearly to mean suspension in the sense of being unable to pay his debts. What does the plea allege? That the defendant, being a trader, and unable to pay his debts, executed the deed referred to. I think it is impossible to entertain any reasonable doubt that that discloses such a suspension of payment as to give the court of bankruptcy jurisdiction.

It is further objected that the several clauses of the deed are not set out in the plea. The statute, however, does not deal with the clauses: but merely refers to the general nature of the arrangements contemplated, leaving the details to the creditors themselves. The language used in the act is manifestly intended to give [762] the creditors the largest possible discretion in that respect. It would be absolutely impossible to frame a deed with all the provisos and stipulations necessary for the winding up of an estate. To require that would go far to frustrate and destroy the spirit and intention of the act. The same remarks will apply to the argument as to the primary trusts.

The objections to the form of the plea were sufficiently answered in the course of the argument.

Whether the deed has the effect of a release of the estate, as well as of the person of the debtor, it is unnecessary to inquire. It clearly operates a release of the debtor, and may be so pleaded; and the plaintiffs are in the same situation as if they had actually executed it. For these reasons I am of opinion that the defendant is entitled to the judgment of the court upon this demurrer.

MAULE, J. I am of the same opinion. The plea is certainly in some respects defective; but, upon the whole, I think its defects are not such as to entitle the plaintiffs to succeed upon this demurrer. There is much weight in the objection as to the omission of the words; and, though I incline to think that omission is remedied by what may be picked up in other parts of the plea, I should not be surprised if another court should hold the form defective. As to the non-enumeration of the names of the creditors, I think the case comes within that series of cases relating to the avoidance of prolixity. If the number of persons constituting a class be small, they might very well be enumerated; but the courts have said, that, as they probably might be numerous, it is enough to describe them in pleading by their general description, in order to avoid prolixity. The 225th section of the statute speaks of suspension of payment as of a thing of which the creditor is to **[763]** have notice; and then it shall be lawful for the court to make an order or certificate declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of the requisite number of creditors. The suspension of payment is not introduced there as a new thing, though the expression is introduced for the first time: the statute speaks of it as of something which the framers consider as having been spoken of before in the 224th section. The circumstances mentioned in s. 224 do, in my opinion, constitute a suspension of payment within the meaning of s. 225. The 224th section speaks of notice to the creditors of the suspension of payment of such trader, and of the execution by him of a deed or memorandum of arrangement. The earlier provisions of the statute (s. 211) shew that this means a trader who is "unable to meet his engagements with his creditors, and is desirous of laying the state of his affairs before them." I therefore think the suspension of payment is insufficiently averred in this plea. When a trader who is unable to meet his engagements with his creditors enters into an arrangement of this kind, I think that constitutes a "suspension of payment" within the 225th section. That being so, the objection to the plea on that ground also fails. As to the non-allegation of the trusts of the deed, the answer has been given by the Lord Chief Justice. Though not parties executing the deed, the provisions of the statute having been complied with, the deed is as binding upon the defendants as if they had actually signed it. In effect the six sevenths are constituted attorneys for the non-assenting seventh. These facts being alleged shew that the deed is the plaintiffs' deed. The 224th section of the statute makes a deed executed in the manner prescribed, subject to the conditions after mentioned, "as effectual and obligatory in all respects upon all the creditors who shall not have **[764]** signed such deed or memorandum of arrangement, as if they had duly signed the same." If the trader does what the act of parliament and the covenants in the deed require him to do, and any creditor shall afterwards sue him in respect of a debt or demand included in the account annexed to the certificate, according to the case of *Gibbons* v. *Vouillon* (ante, vol. viii. p. 483), the deed shall operate as a release. I therefore think the plea is sufficient. If the deed contain any provisions inconsistent with that construction, that might be shewn by way of replication. With regard to the plea being pleaded to the further maintenance of the action, I have already sufficiently intimated my opinion in the course of the argument. Upon the whole, therefore, I concur with my Lord in thinking that the defendant is entitled to judgment.

Cresswell, J. I also think our judgment upon this demurrer must be for the defendant. As to the objection that the Christian and surnames of all the creditors parties to the deed of the third part are not set out, I think the case falls within the rule cited from my brother Stephen's book, which permits certain matters to be alleged in general terms, with a view to avoid undue prolixity. I think the objection as to the inconsistency in the dates arises evidently from a mere clerical error, and is sufficiently cured by the other parts of the plea which have been referred to, and that we may collect from the whole of it when the deed was made. Profert is made, and some of the covenants are set out, and there is a positive averment of the execution of the deed by six sevenths in number and value of the defendant's creditors. As to the objection to the deed being pleaded as a release,—the defendant **[765]** might have placed himself in a difficulty if he had pleaded it as a release by the plaintiffs. It is not a release of the defendant by the plaintiffs. The defendant is not released by the deed, but by the act of parliament, the 224th section of which says that the deed entered into and signed in the manner prescribed, and subject to certain conditions, "shall be as effectual and obligatory in all respects upon all the creditors who shall not have signed the same, as if they had duly signed it." Accordingly, the plea, after averring that the deed was executed by the required number of creditors, and shewing that the provisions of the statute had been duly complied with, concludes with an averment, that, "by reason of the matters aforesaid, and of suing the defendant in this action, the defendant became and was released and discharged from the causes of action in the introductory part of the plea mentioned, and from the plaintiffs' right to sue for the same." I think it is correctly pleaded. As to the suspension of payment, it seems to me that there is no difficulty, inasmuch as the objection arises upon general demurrer only. If the question had been raised by special demurrer, there might have been some difficulty in saying that the plea discloses a suspension of payment. It states that the defendant was a trader, and was indebted to divers persons in divers sums, and was unable to pay the same in full. When a man says that, surely it cannot be a very forced construction to say that he has failed to meet his engagements with his creditors. Upon the whole, I think the plea is sufficient, and that the defendant is entitled to judgment.

Talfourd, J. I am of the same opinion. The objection arising from the omission of the names of the several creditors and the amount of their respective debts, has received a sufficient answer from my Lord **[766]** and my learned Brothers. The cases cited in support of that objection, will be found to be cases where, as in *Gatty* v. *Field* (9 Q. B. 431), the plea professed to set out the names, but set them out imperfectly, or where the reference was of such a nature as that there could have been no objection, on the score of prolixity, to the setting them out. As to the allegation of suspension of payment, though there might have been some difficulty if the imperfect statement of it had been pointed out as ground of special demurrer, I think that, taking the statement of the deed with the antecedent and subsequent references, it sufficiently appears that the making of the deed itself amounted to a suspension of payment within the meaning of the statute. Upon the whole, it appears to me that the plea in substance satisfies all the requisites of the act of parliament, and therefore that there must be judgment for the defendant.

Judgment for the defendant (*b*).

Parker v. The Great Western Railway Company. June 6, 1850.

The court refused to compel the plaintiff to give security for costs, upon affidavits stating that he was in insolvent circumstances, and had mortgaged or assigned to a third party all his interest in the subject matter of the action.

This was an action brought by the plaintiff, a carrier, to recover from the Great Western Railway Company a large sum of money alleged to be due to him from them for overcharges said to have been made by the company in respect of goods carried on their railway. Upon the cause coming on for trial, it was re-**[767]**-ferred to an arbitrator, who was still proceeding with the reference.

On the 7th of February last, a notice, signed by the plaintiff, of which the following is a copy, was served upon the company:—

"To the Great Western Railway Company.

"Take notice, that, by indenture bearing date the 7th day of February, 1850, and made between the undersigned, Richard Parker, of the New Inn Yard, Old Bailey, in the city of London, common carrier, of the one part, and John Scott, of, &c., of the other part,—after reciting, amongst other things, that the said Richard Parker claimed various large sums of money to be due and owing to him from the Great Western Railway Company, and had brought an action for recovery of part thereof, which action and all other matters in difference between the said Richard Parker and the said company had been referred to arbitration: and that the reference was still pending; and that the said Richard Parker was indebted to the said John Scott in a certain sum of money in the said indenture mentioned,—the said Richard Parker did thereby bargain, sell, assign, transfer, and set over unto the said John Scott, his executors, administrators, and assigns, all and every the several claims and demands, sums and sum of money whatsoever due and owing to the said Richard Parker from the Great Western Railway Company for and in respect of damages, overcharges, or otherwise, for recovery of part whereof the said action had been commenced, and in respect of

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(*b*) See *Stewart* v. *Collins*, post, vol. x. p. 634.

other part whereof a notice in writing had been given to the said Great Western Railway Company by the said Richard Parker, which said notice was accompanied by three books of account containing the particulars of such last-mentioned claim, and in respect of other part **[768]** whereof a further notice in writing had been given pursuant to the power and authority contained in the therein-recited order of reference, and also all and every other claims and demands, sums and sum of money thereafter to be made or to accrue to the said Richard Parker, and which should or might be included in any award to be made by the arbitrator to whom the said cause and the said matters in difference had been referred, and all and every the right and interest, benefit, claim, and demand whatsoever of the said Richard Parker of, in, and to the same, and every part thereof respectively, and of, in, and to the said action, reference, and the award to be made in pursuance thereof,—To hold the said premises unto the said John Scott, his executors, administrators, and assigns: And take further notice, that, in the said indenture is contained a power for the said John Scott, his executors, administrators, and assigns, to demand, recover, and receive of and from the said Great Western Railway Company, and every person whomsoever liable to pay the same, the said claims and demands, sums and sum of money, every or any part thereof, and to prosecute the said action and reference in such manner as the said John Scott, his executors, administrators, and assigns, might think fit, and to obtain and procure the award of the said arbitrator, and to take and prosecute all such ways and means and all such proceedings as might be necessary or proper in the judgment of the said John Scott, his executors, administrators, or assigns, for obtaining and enforcing the performance and fulfilment of the said award, and also to enter into any composition, compromise, or agreement touching the said claims and demands, sums and sum of money, every or any part thereof, or the said action and reference, which the said John Scott, his executors, administrators, or assigns might think fit; and that the consent **[769]** of the said Richard Parker, his executors or administrators, should not be requisite or necessary for that purpose, and to give such receipts, releases, acquittances, and discharges from time to time for all such moneys as should be paid to the said John Scott, his executors, administrators, or assigns, or to his or their attorney or attorneys, for or on account of the said premises, and generally to do, execute, and assent to any and every other act and thing which he or they might think proper with reference to the matters aforesaid; and in the said indenture is contained a proviso for redemption of the said premises on payment, on or before the 7th day of May next, by the said Richard Parker, his executors or administrators, to the said John Scott, his executors, administrators, or assigns, of the sum of 3268l. 16s. 4d., with interest thereon at the rate of 5l. per centum per annum, and of such further sum and sums of money as the said John Scott, his executors or administrators, should from time to time advance to or for the said Richard Parker; provided that the amount to be secured by the said indenture should not exceed in the whole the principal sum of 5000l. Dated," &c.

Upon an affidavit setting forth the above facts, and further stating that the plaintiff was made a bankrupt in 1846, and that afterwards he set up again in business as a carrier at the New Inn, Old Bailey, but that ever since his said bankruptcy he had been in failing circumstances: that the plaintiff, for a long time prior to the said 8th of February, 1850, had a person in charge of his premises and his stock and plant at the New Inn, Old Bailey, on behalf of other persons, creditors of the plaintiff, either under an execution against the said plaintiff, or under some agreement whereby the plaintiff agreed to account to the said creditors or persons for all the business he transacted there: that the **[770]** plaintiff had for some time past had a place other than his own premises, where he could put his waggons and carts, to prevent any person from seizing them, and that they had frequently been put there to avoid seizure by his creditors: that the horses and other plant of the plaintiff had frequently been seized by persons having claims upon him, and that the plaintiff had often been obliged to leave his goods at the station of the said railway, because he had not enough money to pay for the carriage of them: that the plaintiff had lately left the premises he occupied at the New Inn, Old Bailey, as aforesaid, and taken very small premises elsewhere for conducting his business of a carrier: that the plaintiff had from time to time received money from John Scott, mentioned in the aforesaid notice, and that the said John Scott had been assisting the plaintiff in all his undertakings and in this action: that, at one of the meetings held before the arbitrator, application was made to the arbitrator, by the counsel for the plaintiff, to allow the said John Scott to be present at the said reference, and that it was then expressly stated by the said plaintiff's counsel, as a reason for the said application, that the said John Scott was interested as assignee of the said claims in this action against the company; that the arbitrator acquiesced in the application; and that the said John Scott was present at the said meeting, and at all the subsequent meetings held under the said reference: that the said John Scott had for some time past found, and still found, the money for the plaintiff to conduct this action, and that there was, as the deponent believed, some agreement or understanding on the part of the said John Scott to pay the plaintiff's costs of this action: and that the deponent verily believed that the plaintiff was in insolvent circumstances, and altogether without means of his own, and unable to pay the defendants their costs of the action, if they should **[771]** be successful; and that the action was proceeding solely for the benefit of the said John Scott.

Hoggins moved for a rule calling upon the plaintiff to shew cause why the proceedings should not be stayed until he gave the defendants security for costs. The affidavit sufficiently shews that the plaintiff is insolvent, and that the action and reference are proceeding solely for the benefit of Scott, the assignee of the claim thereby sought to be recovered, and therefore the defendants are entitled to security. In *Perkins* v. *Adcock* (14 M. & W. 808), it was expressly held by the court of Exchequer, that, where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will require security for costs. So, in *Ball* v. *Ross* (1 M. & G. 445, 1 Scott, N. R. 217), where an action of trespass appeared to have been brought by a man in very humble circumstances, at the instigation and at the costs of his landlord, the court ordered the latter to give security for the defendant's costs,—being satisfied from the affidavits that the action was "really and substantially the action of the landlord." [Maule, J. You assume that the defendants are entitled to security for costs under the circumstances, even if the plaintiff be a solvent person. The authorities, however, do not warrant that. The action being brought by the proper plaintiff, he being a person having an interest in the result,—the assignment to Scott being by way of mortgage only,—and being solvent, surely no case is made out for calling upon him or anybody else to give security for the costs. Wilde, C. J. I do not recollect any case of a mere mortgagee being compelled to give security. Maule, J. The **[772]** case of *Wray* v. *Brown* (8 Scott, 557, 6 N. C. 271) seems conclusive on the point: there, the court refused to compel the plaintiff to give security for costs, upon an affidavit that he had been bankrupt, and thrice discharged under the insolvent debtors act, and that he was suing as trustee for a third person who alone was beneficially interested in the subject-matter of the action. Tindal, C. J., said: "It appears to me, that, as each of the grounds here urged for requiring the plaintiff to give security for costs, taken separately, is insufficient, so, taken together, they do not help each other. That the action is brought in the name of the plaintiff as trustee for a third person is, according to the authority of *Morgan* v. *Evans* (7 J. B. Moore, 344), no ground for compelling security: and *Snow* v. *Townsend* (6 Taunt. 123, 1 Marsh. 477) shews that insolvency is no ground for such a motion. The true principle that governs these cases is laid down by Lord Kenyon in *Webb* v. *Ward* (7 T. R. 296). 'It cannot,' he says, 'be laid down as a general rule, that an uncertificated bankrupt must in all cases give security for costs when an action is brought by him: that would be going much too far: each case must depend on its own circumstances. But it is fair to say, that, if the action be really brought for the benefit of the assignees, they should be responsible for the costs.' I therefore think this rule must be discharged." And Erskine, J., said: "Finding it to be clearly settled that the circumstance of the plaintiff having been discharged under the insolvent debtors act did not entitle him to come and ask for security for costs, the defendant adds another ground, viz. that the action is really brought for the benefit of a third person: but this was held, in *Morgan* v. *Evans*, not to be a sufficient reason for compelling **[773]** the plaintiff to give security. I therefore agree that the rule must be discharged." That case, I think, disposes of the present application. A man having a cause of action against another, be he ever so insolvent, has a right to enforce it in a court of law. But, if he lends his name to another, to enable that other to proceed for his own benefit, the defendant is entitled to ask for security.]

Wilde, C. J. All the cases that I am aware of in which security for costs has been enforced, have been cases where the action is shewn to have been really brought for the benefit of a third person, in the name of the nominal plaintiff. I know of none where security has been required merely on the ground that the debt has been assigned to a third person. The case of assignees suing in the name of the bankrupt is different. The mere circumstance of the party who has a lien upon the proceeds of the action attending before the arbitrator to watch the proceedings, cannot have the effect of casting upon him a liability which otherwise the law would not have cast upon him.

Maule, J. My Brother Coleridge, in the case of *Andrews* v. *Marris* (7 Dowl. P. C. 712), states the rule very much in the terms in which it has been stated by my Lord. He says,—"The principle is, that, where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is insolvent, the court will compel him for whose benefit the action is proceeding to come in and give security for costs." This case clearly does not fall within that principle.

The rest of the court concurring,

Rule refused (*b*).

[774] Pallister *v.* The Mayor, &c., of Gravesend. June 10, 1850.

[S. C. 19 L. J. C. P. 358. Followed, *Bush* v. *Martin*, 1863, 2 H. & C. 325. Adopted, *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, 1889, 23 Q. B. D. 497.]

A bond given by a corporation, after the passing of the 5 & 6 W. 4, c. 76, but before the passing of 6 & 7 W. 4, c. 104, to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first-mentioned act, is valid, notwithstanding the 92nd section of the former act might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon.

This was an action of debt, in which the plaintiff declared in his first count on a bond made by the defendants on the 1st of July, 1836, in the second for money lent, in the third for money had and received by the defendants to his use, in the fourth for interest, and in the fifth for money due upon an account stated.

Second plea,—to the first count,—that the defendants are a body corporate, and the mayor, aldermen, and burgesses of the borough of Gravesend, being the borough of Gravesend in the schedule A. to a certain act made and passed in the sixth year of the reign of his late Majesty, King William the Fourth, intituled "An act to provide for the regulation of municipal corporations in England and Wales (5 & 6 W. 4, c. 76), and that, after the passing of the said act, and before the making of the said supposed writing obligatory, to wit, on the 26th of December, 1835, councillors under the provisions of the said act were duly elected for the first time, and the said election was then duly declared; and thereupon then the mayor, jurats, and inhabitants of the villages and parishes of Gravesend and Milton, in the county of Kent, being the governing body of the body corporate named in conjunction with such borough in the said schedule, went out of office, and their whole powers and **[775]** duties ceased, pursuant to the said act*: That afterwards, and after the passing of the said act, and before the making of the said supposed writing obligatory in the said first count mentioned, to wit, on the 1st of January, 1836, a treasurer of the said borough, to wit, one John Hales, was duly elected according to the provisions of the said act: That, before the making of the said supposed writing obligatory, to wit, on the day and year last aforesaid, they, the defendants, were, and from thence hitherto had been, a corporation within and subject to the provisions of the said act, and not otherwise: That afterwards, and before the passing of an act of parliament made and passed in the seventh year of the reign of his late Majesty, King William the Fourth, intituled "An act for the better administration of the borough fund in certain boroughs" (6 & 7 W. 4, c. 104), and before the passing of a certain act of parliament made and passed in the first year of the reign of our Lady the now Queen, intituled "An act to amend"

(*b*) In *Day* v. *Smith*, 1 Dowl. P. C. 460, Patteson, J., says, that the rule is confined to **[774]** cases "where a party has been deprived of all his property; and therefore the court forces those who are become possessed of it to give security. But there is no instance in which, an individual's property having been assigned, the courts have made the assignee find security for costs."

an act for the regulation of municipal corporations in England and Wales" (7 W. 4 & 1 Vict. c. 78), to wit, on the 1st day of July, 1836, it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600l. to be secured by such bond so conditioned as above set forth: That the plaintiff did then unlawfully lend and advance to the defendants the said sum of 600l., and the defendants did then unlawfully make and deliver to the plaintiff the said supposed writing obligatory in the first count mentioned, and the same then was made and sealed as therein mentioned, and in pursuance of the said loan and advance made to the said body corporate after the passing of the said act to provide for the regulation of **[776]** municipal corporations in England and Wales: That the said writing obligatory was not made or given to secure the payment of any lawful debt due from the said body corporate to any person, contracted before the passing of the said last-mentioned act, and unredeemed, or any part thereof, or the payment of any interest of such debt or any part thereof, or any part of such interest, nor was the said supposed writing obligatory made or given in respect of any right, interest, claim, or demand of any person or persons, or body corporate or bodies corporate, by virtue of any proceeding either at law or in equity which had been instituted before the passing of the said last-mentioned act, or at any other time, or by virtue of any mortgage or otherwise: That the said supposed writing obligatory was not given for, towards, or on account of * * the salary of any mayor, or of any recorder or police magistrate whatever, or for, towards, or on account of the salary of any town-clerk or treasurer whatever, or of any other officer at any time appointed by the council of the said borough, or for, towards, or on account of any payment of any expenses incurred at any time in preparing or printing any burgess-lists, ward-lists, or notices, or other matters attending such elections as are in the said act mentioned, or for, towards, or on account of any sum whatever paid or to be paid by the said borough to the treasurer of any county as in the said last-mentioned act is provided, or for, towards, or on account of the expense of maintaining any borough-gaol, house of correction, or corporate buildings whatever, or the payment of any constables, or of any other expenses incurred in carrying into effect the provisions of the said last-mentioned act,—of which several premises the plaintiff had always had notice; wherefore the defendant said that the said writing obligatory was and is void, illegal, and of no effect,—verification.

[777] To this plea the plaintiff replied, that the said sum of 6000l. lent and advanced by the plaintiff to the defendants as in the second plea mentioned, was money borrowed by the council of the said borough for the purpose of being applied, and which was actually applied, to wit, on, &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said act made and passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An act to provide for the regulation of municipal corporations in England and Wales," to wit, a certain debt of 670l. due and owing to one William Wood.

Demurrer, on the ground that it did not appear by the second plea that there was any bargain between the plaintiff and the said council and the said William Wood, or either of them, that the said money should be or was borrowed or applied for the purpose in the plea mentioned. Joinder.

Fifth plea,—to the second, fourth, and fifth counts,—that the defendants are a body corporate, &c. [as in the second plea, down to the first asterisk]: That afterwards, and after the passing of the said act, and before the lending of the moneys in the second count mentioned, to wit, on the 1st of January, 1836, a treasurer of the said borough, to wit, one John Hales, was duly elected according to the provisions of the said act: That, before the accruing of any of the supposed causes of action in the introductory part of this plea mentioned, to wit, on, &c., the defendants were, and from thence hitherto had been, a corporation within and subject to the provisions of the said act, and not otherwise: That afterwards, and before the passing of an act of parliament made and passed in the seventh year of the reign of his late Majesty King William the Fourth, intituled "An act for the better administration of the borough **[778]** fund in certain boroughs" (6 & 7 W. 4, c. 104), and before the passing of a certain act of parliament made and passed in the first year of the reign of our Lady the now Queen, intituled "An act to amend an act for the regulation of municipal corporations in England and Wales" (7 W. 4 & 1 Vict. c. 78), to wit, on the 1st of July, 1836, the said money in the second count mentioned was unlawfully lent to the defendants by the plaintiff: [The plea then went on to aver that the money in the fourth count mentioned was interest upon, and that the account stated in the fifth count mentioned was stated in respect of, the money lent as in the second count mentioned.] That the said supposed debt and causes of action in the introductory part of that plea mentioned were not contracted, and did not accrue, before the passing of the first-mentioned act. [The plea then proceeded to aver that the debt was not contracted in respect of any of the matters mentioned in the 5 & 6 W. 4, c. 76, s. 92, as in the second plea, from the double asterisk to the end; concluding with a verification.]

Replication, that the said sum of money in the second count mentioned was borrowed by the council of the borough for the purpose of being applied, and which was actually applied, to wit, on, &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said act made and passed in the sixth year of the reign of His late Majesty King William the Fourth, intituled "An act to provide for the regulation of municipal corporations in England and Wales," to wit, a certain debt due and owing to one W. Wood.

Demurrer, on the ground that it did not appear by the fifth plea that there was any bargain between the plaintiff and the said council and the said W. Wood, or **[779]** either of them, that the said money should be or was borrowed or applied for the purpose in that plea mentioned. Joinder.

Sixth plea,—to the third count,—that the defendants were a body corporate mentioned in schedule A. of the 5 & 6 W. 4, c. 76; that councillors were duly elected, and the old governing body ceased; that, after the passing of the act, and before the accruing of the cause of action in the third count mentioned, to wit, on, &c., a treasurer was elected, to wit, &c.; that the defendants were and had been a corporation under the provisions of the act; that, before the passing of the statute 6 & 7 W. 4, c. 104, and before the passing of the statute 7 W. 4 & 1 Vict. c. 78, to wit, on, &c., it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600l., to be secured by a bond to be made and executed by the defendants, whereby they should acknowledge themselves to be held and firmly bound to the plaintiff in the penal sum of 1200l., with a condition for the payment of 600l., and interest at the rate of 5l. per centum per annum; that the plaintiff did then unlawfully pay, lend, and advance to the defendants the said sum of 600l. upon the terms aforesaid, and the defendants then had and received the same in pursuance of the said last-mentioned agreement for the said loan and advance, which was the said money in the said third count mentioned, and which said having and receiving was the said having and receiving therein mentioned; that they, the defendants, gave and delivered to the plaintiff the said supposed writing obligatory in the said first count mentioned, and no other, being so null and void as in the second plea mentioned; and that the supposed debt in the third count was not contracted before the passing of the first-mentioned act. [The plea **[780]** then went on to aver that the debt therein mentioned was not contracted in respect of any of the matters mentioned in the 5 & 6 W. 4, c. 76, s. 92, as in the second plea, from the double asterisk to the end; concluding with a verification.

To this plea the plaintiff demurred specially,—assigning for causes that the plea was argumentative; that it did not give colour; that it was consistent with the facts stated that the loan was legal; and that, if the loan and bond were illegal, the plea shewed no reason why the money should not be recovered under the third count. Joinder.

Peacock, for the plaintiff. The main question is, whether a corporation can legally, since the passing of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, give a bond for money borrowed by them. The principal objection to the power of the corporation to enter into such a bond as this, arises on the 92nd section of that act. That section enacts, "that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the schedules A. and B. to the act annexed, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or so much thereof [781] as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted or which may be hereafter instituted, or by virtue of any mortgage or otherwise,—shall be applied towards the payment of the salary of the mayor and of the recorder and of the police-magistrate hereinafter mentioned, when there is a recorder or police-magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act." The section then goes on to direct the application of the surplus, and to provide, that, if the fund should be insufficient for the purposes above mentioned, the council should order a rate to make up the deficiency. There is nothing in that section to prevent the corporation from entering into a bond. It may be that the fund [782] created by that section cannot be made available for the payment of the bond; but it does not follow that the corporation may not possess other property which would be available,—things which yield no profit, such as furniture, paintings, plate, the mace, &c. By the 1st section of the 6 & 7 W. 4, c. 104, "reciting certain provisions of the 92nd section of the former act, and that certain difficulties had occurred in putting the said act into execution," it is enacted, "that, from and after the passing of this act, it shall be lawful for the council of any borough named in the said schedules to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said act for regulating corporations." Here, the corporation, after the passing of the 5 & 6 W. 4, c. 76, and before the passing of the 6 & 7 W. 4, c. 104, borrow money of the plaintiff for the purpose of paying an old debt, giving him this bond by way of security. Under the last-mentioned act they might have given the bond to the original creditor, and then no question could have arisen. The 28th section of the 7 W. 4 & 1 Vict. c. 78—reciting that by the 6 & 7 W. 4, c. 104, it is enacted "that it shall be lawful for the council of any borough named in the schedules A. and B. annexed to the 5 & 6 W. 4, c. 76, to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said act for regulating corporations," enacts—"that any money borrowed by any such council for the purpose of being applied, and which shall be actually applied, in or towards satisfaction and discharge of any such pre-existing debt or [783] obligation, shall be deemed and taken to be, within the true intent and meaning of the said act of the last session of parliament (6 & 7 W. 4, c. 104), a debt contracted by or on behalf of such body corporate before the passing of the said act for regulating corporations." If that provision is retrospective, there is an end of the question. [Maule, J. The 28th section of the 7 W. 4 & 1 Vict. c. 78, is merely an extension of the 1st section of the 6 & 7 W. 4, c. 104; and that applies only to cases arising after the passing of that act. As soon as the 20th of August, 1836, arrived, the corporation might lawfully give a bond for securing a debt contracted by them before the passing of the 5 & 6 W. 4, c. 76. But this bond was given before that date.] The Municipal Corporation Reform Act does not take away the right of the corporation to execute a bond. [Maule, J. If you are right in that, we need not embarrass ourselves with the other questions.] There may, no doubt, be a difficulty in enforcing the judgment, inasmuch as the borough fund could not be made available to pay it: see *The Attorney-General* v. *Aspinall* (2 Mylne & Cr. 613). Still it is submitted that there is nothing in the 92nd section to prevent the corporation from entering into such a contract. The sixth plea, to the third count, is clearly a mere argumentative denial that the corporation received the money to the use of the plaintiff. If it should appear that the money was obtained by them in pursuance of an illegal agreement, that would arise under not guilty. [Maule, J. The defendants say the bond is void,—that it is given upon a consideration which has failed.]

Bramwell, contrà. The authorities are numerous to shew that the 7 W. 4, & 1 Vict. c. 78, s. 28, is not **[784]** retrospective. [To this the whole court assented.] The object was, to allow the corporation to do something which before they could not do. Then, this is not an instrument that can be enforced against the corporation, inasmuch as it is given to secure a debt which the borough fund is not liable to the payment of. It may seem strange to say that a corporate body, having a corporate seal, cannot bind themselves by a bond. But it is submitted that they have no more authority to borrow money than have overseers or surveyors. All property of the corporation must be equally exempted from the payment of debts. There can be no reason why the legislature should make any distinction in this respect between property which produces profit and that which produces none. [Maule, J. The corporation might clearly sell any chattels they possessed. Might they not also be taken in execution?] Clearly not. No property of the corporation could lawfully be applied to the payment of this debt. The court cannot give judgment against the defendants in this action, because such judgment would be attended with consequences which the legislature has declared shall not ensue. A corporation cannot anticipate its future means, be they what they may. In *The Queen* v. *The Town Council of Lichfield* (Dav. & Meriv. 491), the court of Queen's Bench quashed an order of the town council for the payment of a debt secured by the mayor's promissory note, for a sum of money borrowed for the purpose of paying debts of the corporation incurred since the passing of the 5 & 6 W. 4, c. 76. [Talfourd, J. The question there was as to the applicability of the borough fund.] As to the point of form,—the sixth plea, it is submitted, is a good plea, inasmuch as it confesses and avoids; it shews the bond declared on to be **[785]** that the contract is an unlawful one, the defendants have confessed the receipt of so much money, and then the plea is bad.

Peacock, in reply, was stopped by the court.

Maule, J.(*a*). I am of opinion that this bond is a good and valid bond. As to what property may be taken in satisfaction of the judgment in this case, or what may be the difficulties in the way of enforcing it, these are matters which we are not now called upon to consider. The only question at present before the court is, whether the plaintiff shall recover, or whether he shall take nothing by his writ. I see nothing in the Municipal Corporation Reform Act to render this bond invalid. It is conceded that it would have been valid before that act. The 92nd section creates a "borough fund," which is to consist of the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities, belonging or payable to the body corporate, or to any member thereof in his corporate capacity, and of all fines or penalties for offences against the act the application of which had not already been provided for; and, on failure of these several sources of revenue, the borough fund is to be made up by a rate imposed upon the inhabitants. It then goes on to direct what expenses shall be paid out of the borough fund, and concludes with a provision that nothing therein contained shall be construed to render any part of the real or personal estate of the corporation liable to the payment of any debt contracted by the corporation before the passing of the act. The bond in question was given for money borrowed by the corporation after the pass-**[786]**-ing of the act. It does not, however, follow that the bond cannot be enforced. It does not follow that the corporation may not have property which is not directly affected by s. 92, and which is at their disposition independently of the act: and I see no reason why property which might be charged or disposed of at the will of the corporation, might not be subject to an execution for the purpose of satisfying a judgment on this bond. Assuming it, therefore, to be true that the fact that no execution could issue upon a judgment if obtained, might be pleaded in bar, it seems to me that there

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(*a*) Wilde, C. J., was absent.

is a total failure of any ground being shewn for the argument that has been urged on the part of the defendants. I therefore think that the bond is a good one, and consequently it follows, as has been very properly conceded, that the pleas are bad, and that there must be judgment for the plaintiff.

CRESSWELL, J. I am of the same opinion. Considering the powers which corporations possessed before the passing of the 5 & 6 W. 4, c. 77, I cannot see anything in that act to prevent them from executing an instrument of this nature. The simple question for us to determine is, whether this is a legal bond upon which the obligee may maintain an action. I agree with my brother Maule in thinking that it is, and therefore that the plaintiff must have judgment.

TALFOURD, J. I am entirely of the same opinion. It is not contended that this bond would not have been valid at common law: but we are asked to infer that it is invalid by reason of the provisions contained in the 92nd section of 5 & 6 W. 4, c. 77. Giving to the argument urged on the part of the defendants its fullest effect, it merely raises difficulties in the way of the plaintiff in enforcing the judgment. Whether the **[787]** plaintiff can obtain the fruits of his judgment by an execution or by a mandamus, the bond is clearly a valid bond, and our judgment must, valeat quantum, be for the plaintiff.

Judgment for the plaintiff.

MERITON v. COOMBES AND ANOTHER. June 10, 1850.

[S. C. 1 L. M. & P. 510; 19 L. J. C. P. 336. Referred to, *Beddall* v. *Maitland*, 1881, 17 Ch. D. 189.]

To trespass for breaking and entering the plaintiff's dwelling house, ejecting and expelling the plaintiff and his family therefrom, and seizing his goods, the defendants pleaded, "as to the trespasses in and to the dwelling-house, and seizing and taking the goods," liberum tenementum. The plaintiff traversed the liberum tenementum, and new-assigned the expulsion:—Held, on demurrer, that the new-assignment was bad, the pleas justifying the expulsion, as well as the breaking and entering of the dwelling-house and the seizure of the goods.

This was an action of trespass for breaking and entering the dwelling-house of the plaintiff, and remaining therein, and breaking the doors, &c., and ejecting, expelling, putting out, and removing the plaintiff and his family, servants, and lodgers from and out of the possession, and seizing the plaintiff's goods, &c.

The defendants pleaded,—thirdly, as to the seizing and taking the goods, that the defendant Coombes was lawfully possessed of a certain dwelling-house, to wit, &c., and, because the goods and chattels in the declaration mentioned were wrongfully in and upon the said dwelling-house, incumbering the same, and doing damage therein to the defendant Coombes, the defendant Coombes, in his own right, and the defendant Colls as his servant, and by his command, at the same time when, &c., seized and took the said goods and chattels in the declaration mentioned, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage, &c.,—verification.

Fourthly, as to the trespasses in and to the dwelling-house, and seizing and taking the goods, that the said **[788]** dwelling-house is and was the dwelling-house, soil, and freehold of Edward Majoribanks and Sir Edmund Antrobus, Bart., wherefore the defendants, as the servants of the said Edward Majoribanks and Sir Edmund Antrobus, and by their command, broke and entered the said dwelling-house, and, because the said goods and chattels in the declaration mentioned were in and upon the said dwelling-house, incumbering the same, the defendants, as the servants of the said Edward Majoribanks and Sir Edmund Antrobus, and by their command, removed and carried away the same to a small and convenient distance, doing no unnecessary damage, &c.,—verification.

Fifthly, as to the trespass in and to the dwelling-house, and seizing and taking the plaintiff's goods, that the dwelling-house was the dwelling-house, soil, and freehold of Catherine Campbell Preston, wherefore the defendants as her servants and by her command broke and entered the said dwelling-house, and, because the said goods and chattels were in and upon the said dwelling-house, incumbering the same, the defendants, as the servants of the said Catherine Campbell Preston, and by her command, removed and carried away the same to a small and convenient distance, doing no unnecessary damage, &c.,—verification.

The plaintiff replied de injuriâ to the third plea, and traversed the fourth and fifth pleas. He also new-assigned, that he sued out his writ, and declared in this action, not only for the said several trespasses in the introductory parts of the third, fourth, and last pleas respectively, and in the declaration, in that behalf mentioned, and in those pleas attempted to be justified, but also for that the defendants, at the said times when, &c., ejected, expelled, put out, and amoved the plaintiff and his family, servants, and lodgers, from and out of the possession and enjoyment of the said dwelling-house, with **[789]** the appurtenances, in the declaration mentioned, and kept and detained them so ejected and expelled for the said space of time in the declaration in that behalf mentioned, whereby the plaintiff during all such time lost and was deprived of the use and benefit of his said dwelling-house, &c., which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said third, fourth, and last pleas mentioned, and therein attempted to be justified; wherefore, inasmuch as the defendant had not answered the said trespasses above newly assigned, the plaintiff prayed judgment and his damages by him sustained on occasion of the committing thereof to be adjudged to him, &c.

The defendants demurred specially to the replications and the new-assignment, on the ground, amongst others, of duplicity.

Corrie, in support of the demurrer. The new-assignment is clearly bad, and the pleas afford a good answer to the declaration. [Cresswell, J. Has not the owner a right to turn out of his house a man who is there without any lawful title?]

John Gray, contrà. The breaking and entering may possibly be justified under liberum tenementum. The plaintiff therefore new assigns the expulsion as a substantive trespass. The justifications may be assumed to be addressed to the breaking and entering, which are the substance of the charge, the expulsion being mere matter of aggravation: *Taylor* v. *Cole* (1 H. Blac. 555). In that case, Lord Loughborough, in giving the judgment of the Exchequer Chamber, says: "Undoubtedly, to enter into a house and to expel the possessor may be distinct acts, and they may be also connected. But, when the plaintiff charges them as parts of one trespass, **[790]** as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new-assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation." Here, the plaintiff has adopted that course. It may be that it may be proved at the trial, that the title relied on by the defendants, had ceased at the time of the expulsion. [Maule, J. Is a new-assignment the proper course? Should you not have replied?] *Smith* v. *Monprivatt* (2 Campb. 174) shews that a new-assignment is the proper course. There, to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded not guilty, and a justification as to breaking and entering and staying in the house twenty-four hours, under a writ of fi. fa. The defendants (the sheriffs) proved their justification; but it appeared that their officers continued in the plaintiff's house beyond twenty-four hours. It was contended, for the plaintiff, that the excess beyond twenty-four hours stood merely upon the plea of not guilty; and, as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered. But Lord Ellenborough said: "I am of opinion that the last plea in point of law applies to the whole declaration; and that, if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new-assignment" (*b*).

Corrie, in reply. The object of a new-assignment is, **[791]** to "re-state, in a more minute and circumstantial manner, the cause of action, or some part thereof, alleged in the declaration, in consequence of the defendant having, through mistake or design, omitted to answer it in his plea. It is therefore in the nature of a new declaration, or, rather, it is a more precise and particular repetition of the declaration in those

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(*b*) See *Dye* v. *Leatherdale*, 3 Wils. 20; *Fisherwood* v. *Cannon*, 3 T. R. 297; *Gates* v. *Bayley*, 2 Wils. 313; *Cheasley* v. *Barnes*, 10 East, 73.

cases where the law permitted a general form of declaring equally applicable to two or more states of facts, but leaving it doubtful in the description which was intended:" 1 Chitty on Pleading, 7th edit. 653. If the plaintiff acquired title at any time, the defendants' justification fails. The third plea is not pleaded to the expulsion. To be good, the new-assignment must be good as to the whole to which it is pleaded. [Maule, J. It may perhaps be doubtful whether this new-assignment states a trespass.] It re-asserts everything stated in the declaration.

Maule, J.(*a*)[1]. It appears to me that the new-assignment in this case is bad. The declaration complains that the defendants, on, &c., and on divers other days and times, with force and arms, &c., broke and entered the plaintiff's dwelling-house, and remained therein, broke the doors, &c., and expelled and put out the plaintiff and his family, servants, and lodgers, and seized his goods, &c. To this the defendants have pleaded several pleas of liberum tenementum, one of them commencing "as to the seizing and taking the goods," and the other "as to the trespasses in and to the dwelling-house, and seizing and taking the goods," and justifying all the trespasses alleged in the declaration. Then comes a replication, traversing the liberum tenementum; and, further, there is a new-**[792]**-assignment, that the plaintiff sued out his writ and declared in the action, not only for the several trespasses in the introductory parts of the third, fourth, and last pleas respectively, and in the declaration, in that behalf mentioned, and in those pleas attempted to be justified,—that is to say, the trespasses in and to the dwelling-house, and seizing and taking the goods,—but also for that the defendants, at the said times when, &c., ejected, expelled, put out, and amoved the plaintiff and his family, servants, and lodgers from and out of the possession and enjoyment of the said dwelling-house, with the appurtenances, in the declaration mentioned, and kept and detained them so ejected, and expelled for the said space of time in the declaration in that behalf mentioned, whereby the plaintiff during all such time lost and was deprived of the use and benefit of his said dwelling-house, &c., which said trespasses above newly assigned were other and different trespasses than the said trespasses in the said third, fourth, and last pleas mentioned, and therein attempted to be justified. It may be doubted whether the matter contained in this new-assignment would, on general demurrer, constitute a good declaration in trespass. It does not state that the defendants committed any assault upon the plaintiff; but that they ejected and expelled him and his family, servants, and lodgers from the dwelling-house. Removing a person from the possession of a dwelling-house is a trespass to a dwelling-house. A trespass is personal because it is an injury to the person. This is an injury to the dwelling-house within the meaning of, and justified by, the pleas. I therefore think that the new-assignment is bad, and consequently that the judgment must be for the defendants.

Cresswell, J. I am also of opinion, for the reasons **[793]** given by my brother Maule, that the defendants are entitled to judgment on this demurrer. The new-assignment shews the trespass complained of is a matter that has already been justified.

Talfourd, J., concurred.

Judgment for the defendants.

Monypenny *v.* Dering and Others (*a*)[2]. 1850.

[See S. C. in Chancery, 7 Hare, 568; 2 De G. M. & G. 145.]

The testator devised lands to P. M. (his brother) for life, remainder to the use of the first son of the body of P. M. for life, remainder to the use of the first son of the

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(*a*)[1] The Lord Chief Justice was absent, on account of indisposition.

(*a*)[2] The plaintiff in the suit was Robert Thomas Gybbon Gybbon Monypenny.

The defendants were,—Robert Dering, Thomas Gybbon Monypenny; Robert Phillips Dearden Monypenny, an infant, by James Dearden, his guardian; James Isaac Monypenny; Phillips Monypenny; William Backhouse Monypenny; Charles Dawson; William David Cathcart Monypenny, and Thomas Phillips Blackwell Monypenny, Richard James Laud Monypenny, James Robert Blackwell Monypenny, and Phillips Howard Monypenny, infants, by John Cavell, their guardian; Susannah Monypenny; Peregrine Royds Dearden; John Corsley; and Elizabeth Charlotte, now the wife of Henry Doyle Sewell.

body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of his said brother P. M., severally and successively, according to seniority of age, for the life interests and limitations as he had before directed respecting the first son and his issue; and, in default of issue of the body of his said brother P. M., or in case of his not leaving any at his decease, to the use of his brother T. M. for life, remainder to T. M., the eldest son of T. M. for life, remainder to the first son of the body of T. M. the son, and the heirs male of his body; and, in default of issue of the body of T. M. the son, to the use of all and every other the son and sons of the body of the testator's brother T. M., for the like estates and interests, severally and successively, according to seniority of age; and, in failure of all such issue of the body of his said brother T. M., to the use of him, his heirs and assigns, for ever: and the testator declared, that, if his said brothers, or either of them, or either of their issue, should become entitled to the estate, or any part thereof, of E. Joddrell, the estate theretofore devised for the benefit of his said brothers and their issue should become and be and remain to the use of the next person entitled thereto, as they would have done if the person so succeeding to the Joddrell estate were actually dead.—By a codicil, the testator devised the same lands to his wife for life, and, after her decease, to the same uses as were declared by his will.—The testator's brother P. M., after the death of the widow, viz., in Michaelmas Term, 1827, suffered a recovery of the devised estates, to the use of the said P. M. in fee.—By a settlement on the marriage of R. J. M. (nephew of P. M.) with Susannah M., dated the 10th of June, 1835, P. M. charged the estate with a jointure of 300l. per annum to her in the event of her surviving them, P. M. and R. J. M.—In January, 1841, P. M. died without ever having had any issue, and having by his will devised the estates in question to his nephew R. J. M. for life, with remainder to his eldest son R. P. D. M. for life, remainder to his first and other sons successively in tail male, with divers remainders over.—In September, 1842, R. J. M. died, leaving his widow Susannah M. and R. P. D. M., his only son (then an infant), him surviving:—Held,—first, that the testator's brother P. M. took an estate for life in remainder after the life estate of the widow:—Secondly, that T. G. M. took an estate for life in remainder after the life-estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his (T. G. M.'s) becoming entitled to the Joddrell estates; and also a remainder in tail general after the estate-tail of R. T. G. G. M. (son of T. G. M.): —Thirdly, that R. T. G. G. M. took a contingent remainder in tail male after the determination of the life-estate of his father T. G. M.:—Fourthly, that P. M. acquired no estate or interest under the recovery:—Fifthly, that Susannah M. took no estate or interest under the deed of the 10th of June, 1835:—Sixthly, that the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned.

The following case was sent by his Honor Vice-Chancellor Wigram for the opinion of this Court:—

James Monypenny, late of Maytham Hall, in the [794] parish of Rolvenden, in the county of Kent, was, at the time of the making of his last will and testament hereinafter mentioned, and thenceforth up to and at the time of his death, seised in fee-simple of, or otherwise well entitled to, divers hereditaments and premises in the said county of Kent, respectively called Maytham Hall Estate, and Lower Maytham Hall Estate, all which said hereditaments and premises were of gavelkind tenure.

The said James Monypenny, being so seised or entitled as aforesaid, and being of sound and disposing mind, memory, and understanding, on the 11th of February, 1804, duly made and published his last will [795] and testament in writing, dated the 11th day of February, 1804, and duly executed and attested as by law was then required for passing real estates by devise, and thereby he devised the said Maytham Hall Estates as follows:—"I give and devise my said house called Maytham Hall, with all and every the appurtenances, to the uses, intents, and purposes following, that is to say, to the use, intent, and purpose that my brother Phillips Monypenny shall receive and take the rents, issues, and profits thereof for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said Phillips Monypenny for and during the term of his natural life; and, from and immediately after his decease, to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of my said brother Phillips Monypenny, severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue: and, in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, to the use of my brother Thomas Monypenny for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of Thomas Monypenny, the eldest son of my said brother Thomas Monypenny, for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said Thomas Monypenny, son of my said brother Thomas Monypenny, and the heirs male of his body; and, in default of issue of the body of the said Thomas Monypenny the son, to the use of all and every other the son and sons of the body of my said **[796]** brother Thomas Monypenny, for the like estates and interests, severally and successively, according to the seniority of age: And, in failure of all such issue of body of my said brother Thomas Monypenny, to the use of him, his heirs and assigns, for ever. And I do hereby declare, that, if it shall happen at any time hereafter that my said brothers, or either of them, their or either of their issue, shall become entitled to the real or copyhold estate, or any part thereof, late of Elizabeth Joddrell, widow, daughter of the late Phillips Gybbon, situate in the said parish of Rolvenden, or in the parishes of Benenden, Tenterden, or either of them, or elsewhere, then and in that case, and immediately upon such event taking place, the said estates hereinbefore devised for the benefit of my said brothers and their issue shall be and remain to the use of the next person entitled thereto under and by virtue of this my will, in the same manner as they would have done if the person so succeeding to the said estate late of the said Elizabeth Joddrell were actually dead. And I declare that my said devisees, as they may hereafter respectively become entitled to my said estates, shall be at full liberty to fell and cut all such timber and underwood as will not improve by standing, and shall not be impeached or impeachable for such waste; and shall and may, as they respectively become entitled, grant leases of my said estates, or any part or parts thereof, not exceeding seven years, so that such lease and leases be granted for the best and utmost improved rent that can be procured for the same, and so that no sum or sums of money be paid by any lessee or lessees in the consideration of such lease or leases."

After the date of the will, and before the date of the codicil afterwards stated, the testator's brother Thomas Monypenny died, leaving his son Thomas, named in the **[797]** will, him surviving; and such son afterwards took the name of Thomas Gybbon Monypenny.

On the 25th of July 1818, the said testator James Monypenny, being of sound and disposing mind, memory, and understanding, duly made and published a codicil to his said will, dated the said 25th of July, 1818, and executed and attested as by law was then required for passing real estate by devise, and therein recited that his brother Thomas had died; and, after reciting that by his said will he gave and devised his said house called Maytham Hall, with all and every the appurtenances, unto and to the uses in the said will expressed, he revoked the said devise, and did thereby give and devise his house called Maytham Hall, with all and every the appurtenances, to the uses, intents, and purposes thereinafter expressed and referred to, that is to say, to the use, intent, and purpose that his wife should receive and take the rents, issues, and profits thereof from the time of his decease for and during the term of her natural life, without impeachment of waste, but subject to the keeping up, supporting, and maintaining the buildings and fences belonging thereto; and, from and immediately after her decease, to such and the same uses as were declared of the said hereditaments by his said will, and subject to the declaration contained in his said will in case his said brothers, or either of them, their or either of their issue, should become entitled to the said estate of Elizabeth Joddrell, widow. And the said testator ratified and confirmed his will in all other respects.

The said testator James Monypenny afterwards made two other codicils to his said will, neither of which in any manner affected the disposition of his real estate made by his said will and first codicil.

The said testator James Monypenny died in June, 1822, without having in any manner revoked or altered [798] the disposition of the said Maytham Hall estate made by his will and first codicil, and leaving him surviving his wife Mary Monypenny, and his brother the said Phillips Monypenny, and the said Thomas Gybbon Monypenny, son of his deceased brother Thomas Monypenny.

On the testator's death, his widow Mary Monypenny entered into the receipt of the rents and profits of the said Maytham Hall estate, and continued to receive and enjoy the same until her death in the year 1826.

After the widow's death, the said Phillips Monypenny, the brother of the testator, entered into the receipt of the rents and profits of the said estates, and continued in such receipt until the time of his decease.

In Michaelmas Term, 1827, Phillips Monypenny duly suffered a common recovery of the devised estates, in which he was vouched, and vouched over the common vouchee; and such recovery was declared to enure to the use of the said Phillips Monypenny in fee.

By a settlement executed on the marriage of Robert Joseph Monypenny, the nephew of the said Phillips Monypenny, with the defendant Susannah Monypenny, dated the 10th of June, 1835, the said Phillips Monypenny charged the said Maytham Hall estate with the payment of a jointure of 300l. per annum to the said Susannah Monypenny, in the event of her surviving the said Phillips Monypenny and Robert Joseph Monypenny.

In January, 1841, Phillips Monypenny died, without ever having had any issue, but having made a will, by which he devised the Maytham Hall estate to certain uses in favour of his nephew the said Robert Joseph Monypenny, for life, with remainder to his eldest son Robert Phillips Dearden Monypenny for his life, with remainder to his first and other sons successively in tail male, with divers remainders over.

On the death of the said Phillips Monypenny, the [799] said Robert Joseph Monypenny entered into the receipt of the rents and profits of the said Maytham Hall estate, claiming under the said devise to him in the will of the said Phillips Monypenny, and continued in such receipt until the time of his death.

In September, 1842, the said Robert Joseph Monypenny died, leaving the said defendant Susannah Monypenny, his widow, and Robert Phillips Dearden Monypenny, his only son, then an infant of the age of six years, him surviving; and the said Robert Phillips Dearden Monypenny thereupon, by two of his guardians (being the defendants Susannah Monypenny and Peregrine Royds Dearden), entered into the receipt of the rents and profits of the Maytham Hall estate, subject to the jointure of his mother the said Susannah Monypenny, and is still in possession of the said estates, claiming under the devise to him in the said will of the said Phillips Monypenny.

The said Thomas Gybbon Monypenny has become entitled to, and is now in the possession of, the estates of the said Elizabeth Joddrell.

The said Thomas Gybbon Monypenny is married, and the plaintiff, Robert Thomas Gybbon Monypenny is his first son. The defendants Susannah Monypenny, Peregrine Royds Dearden, John Corsley, Thomas Gybbon Monypenny, Robert Phillips Dearden Monypenny, James Isaac Monypenny, Phillips Monypenny, and William Backhouse Monypenny, are the co-heirs, or represent the interests of co-heirs, of the testator James Monypenny, at the time of his own death and of the death of the testator Phillips Monypenny.

The plaintiff, the said Robert Thomas Gybbon Gybbon Monypenny, claims the Maytham Hall estate as tenant in tail male thereof, by virtue of the devise to him as the first son of the said Thomas Gybbon Mony-[800]-penny, in the will of the said testator James Monypenny.

The defendant the said Robert Phillips Dearden Monypenny claims to retain the possession of the said Maytham Hall estate as devisee for life under the will of the said Phillips Monypenny, subject to his mother's jointure, on the ground that the said Phillips Monypenny acquired the fee-simple of the said estate by the said common recovery suffered by him in 1827; and he also claims as representing two of the co-heirs in gavelkind of the testator James Monypenny, in case the limitations in the will of James Monypenny, succeeding the limitation to the first son of Phillips Monypenny for life, should be held to be void.

The defendants William David Cathcart Monypenny, James Robert Blackwell Monypenny, and Phillips Howard Monypenny, are infants, and remainder-men in tail next in succession to the defendant Robert Phillips Dearden Monypenny under the will of the said Phillips Monypenny. William David Cathcart Monypenny is also tenant-in-tail next in succession to the plaintiff under the will of the said James Monypenny, if the recovery be void.

The defendant Thomas Gybbon Monypenny claims the Maytham Hall estate as tenant for life thereof, by virtue of the devise to him in the will of the said testator James Monypenny, on the ground that it did not shift from him on his accession to the estates of Elizabeth Joddrell; and he also claims by descent as one of the co-heirs in gavelkind of the testator James Monypenny, in case the limitations in the will of James Monypenny, succeeding the limitation to the first son of Phillips Monypenny for life, should be held to be void.

The said Susannah Monypenny claims her said jointure of 300l. under the said settlement of 1835, [801] on the same grounds upon which her said son, the said Robert Phillips Dearden Monypenny, claims his life-estate.

The defendant Elizabeth Charlotte Sewell claims a legacy charged on the Maytham Hall estate by the will of the said Phillips Monypenny.

The other defendants, representing co-heirs in gavelkind of the said James Monypenny, claim the said Maytham Hall estate, on the ground that the devises of the estate in the will and codicil of the said James Monypenny after the devise to the first son of the said Phillips Monypenny, were void.

The questions in this case have reference to these conflicting claims.

The questions for the opinion of the court, were,—

First, what estate or estates, in possession or in remainder, did Phillips Monypenny take under the will and codicil of the testator James Monypenny in the Maytham Hall property?

Secondly, did Thomas Gybbon Monypenny take any, and what, estate or estates in the Maytham Hall property, under the same will and codicil?

Thirdly, did Robert Thomas Gybbon Gybbon Monypenny take any, and what, estate or estates in the same property, under the same will and codicil?

Fourthly, did Phillips Monypenny acquire any, and what, estate in the same property, under the recovery of 1827?

Fifthly, did Susannah Monypenny take any, and what, estate or interest in the same property, under the deed of the 10th of June, 1835?

Sixthly, did the co-heirs in gavelkind of the said testator, at his death, take by descent from the testator James Monypenny any, and what, estate in the same property?

Either party was to be at liberty to refer to the will of the testator James Monypenny.

[802] SUPPLEMENTAL CASE.

The said testator James Monypenny also by his said will devised the said Lower Maytham Hall estate as follows:—

"I give and devise my said house called Lower Maytham Hall, with all and every the appurtenances, to the uses, intents, and purposes following, that is to say, To the use of my brother Phillips Monypenny, and his assigns, for and during the term of his natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said Phillips Monypenny, To the use of John Jones and Richard Smith, their heirs and assigns, during the life of the said Phillips Monypenny, upon trust to preserve the contingent uses and estates hereinafter limited from being defeated; and, from and immediately after the decease of the said Phillips Monypenny, To the same uses, subject to the same declarations, and with the same powers, as are expressed in the same will concerning the said Maytham Hall estate, subject to the limitation thereof to the use of the said Phillips Monypenny during his life."

The said testator James Monypenny, by the said codicil to his said will, dated the 25th of July, 1818, repeated the same language with reference to the said Lower Maytham Hall estate as he had thereinbefore used with reference to the said Maytham Hall estate, substituting only the words "Lower Maytham Hall" for the words "Maytham Hall."

For the deaths and other circumstances material to the consideration of the questions in this case, the court is referred to the statements contained in the case to which the present one is supplemental. Those statements are to be read as if inserted in this place, except **[803]** that the words "Lower Maytham Hall" are to be substituted for the words "Maytham Hall" wherever the same occur. The various claims made to the "Lower Maytham Hall" estate are the same as those made to the "Maytham Hall" estate.

The questions were repeated, substituting in each the "Lower Maytham Hall" estate for the "Maytham Hall" estate.

John Hodgson, for the plaintiff, the eldest son of the testator's brother Thomas,—the second brother named in the will. This case has already been before the court of Exchequer (16 M. & W. 418), when that court, not contenting themselves with sending a certificate, embodied their decision in a considered judgment, holding that all the limitations after that to the use of the first son of the body of Phillips Monypenny, were void for remoteness, and that the sons of Phillips Monypenny, if he had any, would not, by the application of the doctrine of cy-pres, have taken an estate-tail, inasmuch as such a construction of the will would be to make the estate devolve in a line of succession different from that which the testator had expressly designated. The testator appears to have contemplated a family settlement. Upon the face of it, there is a devise to Phillips Monypenny, remainder to his sons in tail male, remainder to Thomas Monypenny for life, remainder to his first and other sons successively in tail male. A question may arise whether Phillips Monypenny does not take an estate-tail, by implication, in remainder, and also a further question on the supplemental case, whether the limitation may not operate a contingent remainder to the family of Thomas. For the heirs-at-law, it may be said that a limitation to the child of an unborn child is void for remoteness. The **[804]** question, therefore, will be, whether the doctrine of remoteness can apply to the case of a limitation by way of contingent remainder. In *Cole* v. *Sewell* (4 Drury & W. 1), Sir E. Sugden, C., says: "It is now perfectly well settled, that, where a limitation is to take effect as a remainder, remoteness is out of the question; for, the given limitation is either vested in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends, happens, so that the remainder may vest eo instanti the preceding limitation determines, it can never take effect at all." And this doctrine is adverted to in Sugden's Law of Real Property, 116, et seq. Mr. Jarman *(b)* and Mr. Lewis *(c)* came to a different conclusion. The rule is settled as to executory devises, in *Cadell* v. *Palmer* (3 M. & Scott, 571, 10 Bingh. 140).

The doctrine of cy-pres is adopted for the purpose of giving effect to the intention of the testator, where it could not be carried into effect modo et formâ. The cases usually cited on this subject, are, *Nicholl* v. *Nicholl* (2 W. Bl. 1149) and *Pitt* v. *Jackson* (3 Bro. C. C. 51): and there is also a case of *Vanderplank* v. *King* (3 Hare, 1). The court of Exchequer, in the opinion they have given upon this case, observe upon those authorities.

The First Institute, 27, *Dubber* v. *Trollope* (Ambler, 453), *Robinson* v. *Robinson* (1 Burr. 38, 2 Ves. 225), *Mellish* v. *Mellish* (2 B. & C. 520, 3 D. & R. 804), and *Doe d. Herbert* v. *Selby* (2 B. & C. 926, 4 D. & R. 608), were also cited: and it was sub-**[805]**-mitted that the answer to the first question should be, that Phillips Monypenny took an estate for life, with remainder to his sons in tail male, remainder to Thomas Monypenny for life, with remainder to his sons in tail male,—to the second, that Thomas Gybbon Monypenny took an estate for life in remainder, determinable upon his accession to the Joddrell estate,—to the third, that Robert Thomas Gybbon Gybbon Monypenny took an estate-tail in remainder (now fallen into possession),—to the fourth, that Phillips Monypenny acquired no estate by the recovery,—to the fifth, that Susannah Monypenny took nothing under the deed of the 10th of June, 1835,—and to the sixth, that the co-heirs in gavelkind took nothing by descent from the testator.

C. Hall, for the defendant Thomas Gybbon Monypenny, contended for the same construction of the will as that contended for by Hodgson, except that he insisted that the interest of Thomas Gybbon Monypenny was not affected by his accession to the Joddrell estates. He cited and commented upon the following authorities,—*Nicholl* v. *Nicholl* (2 W. Bl. 1159; Fearne, Cont. R., 10th edit. 205, n.), *Stackpoole* v. *Stackpoole* (4 Drury & W. 320), *Pitt* v. *Jackson* (2 Bro. C. C. 51), *Humberston* v.

(b) See 2 Jarman on Wills, 727.

(c) See Lewis on Perp. 408, 410, 663; Supplement, 103, et seq.

Humberston (1 P. Wms. 332), *Robinson* v. *Hardcastle* (2 T. R. 241), *Brudenell* v. *Elwes* (1 East, 442, 451), *Routledge* v. *Dorril* (2 Ves. jun. 357, 364), *Vanderplank* v. *King* (3 Hare, 1), Butler's note in Fearne Cont. R. 10th edit. 206, *Williams* v. *Seale* (6 Hare, 239, 253), *Langston* v. *Langston* (2 Clark & Fin. 194), *Chorlton* v. *Craven* (cited, 2 B. & C. 524), *Mellish* v. *Mellish* (2 B. & C. 520, 3 D. & R. 804), Dyer, 179 b. pl. 45, Robinson on Gavelkind, 120, n. (*x*), 123, *Dubber* v. *Trollope* (cited in *Minshull* v. *Minshull*, 1 Atk. 412), *Lewis* **[806]** v. *Puxley* (16 M. & W. 733), *Doe d. Gallini* v. *Gallini* (5 B. & Ad. 621, 3 Ad. & E. 340), *Ellicombe* v. *Gompertz* (3 Mylne & C. 127, 152), *Stanley* v. *Lennard* (1 Eden, 87), *Tarbuck* v. *Tarbuck* (4 Law J., N. S., Ch. 129; cited 2 Jarman on Wills, 2nd edit. 390), *Morse* v. *Lord Ormonde* (1 Russ. 382), *Malcolm* v. *Taylor* (2 Russ. & M. 416, 421), Hayes on Limitations to Heirs in Tail, 43, 2 Jarman on Wills (1st edit.), 398, *Wight* v. *Leigh* (15 Ves. 564), *Attorney-General* v. *Sutton* (1 P. Wms. 754), *Langley* v. *Baldwin* (1 Eq. Ca. Abr. 185, pl. 29; cited 1 P. Wms. 759), *Parr* v. *Swindels* (4 Russ. 283), *Doe d. Bean* v. *Halley* (8 T. R. 5), *Longhead* v. *Phelps* (2 W. Bla. 704), *Proctor* v. *The Bishop of Bath and Wells* (2 H. Bla. 358), *Minter* v. *Wraith* (13 Simons, 52), *Machell* v. *Weeding* (8 Simons, 4), *Doe d. Barnard* v. *Reason* (cited in *Doe d. Bourne* v. *Holmes*, 3 Wils. 244), 1 Inst. § 31, Co. Litt. 22, and Fearne's Cont. Rem. 10th edit. 252.

Willcock, who appeared for the heirs in gavelkind, objected to be heard before Malins, who appeared for Robert Phillips Dearden Monypenny, contending, that, inasmuch as all the parties were arrayed against his clients, he ought to have an opportunity of answering all the arguments that could be urged against them.

Malins submitted, that, as his client was in possession, he was entitled first to hear upon what grounds it was sought to dispossess him.

COLTMAN, J., Mr. Hodgson, Mr. Hall, and Mr. Malins are all equally interested in opposing the claim of the heirs-at-law. The proper course, therefore, will be for Mr. Malins to answer the arguments of Mr. **[807]** Hodgson and Mr. Hall, and then to argue against Mr. Willcock's clients; and for Mr. Malins to reply to Mr. Willcock, and Mr. Hodgson to reply generally.

Malins (with whom was Faber), for Robert Phillips Dearden Monypenny, contended that the testator's brother Phillips Monypenny took an estate-tail in the Maytham Hall estate, and, by the recovery suffered by him in Michaelmas Term, 1827, acquired an absolute estate in fee-simple therein. He cited and commented upon the following authorities,—*Stanley* v. *Lennard* (1 Eden, 87), *Seaward* v. *Willock* (5 East, 198), *Loddington* v. *Kime* (1 Salk. 224, 1 Lord Raym. 203, 3 Lev. 431), *Carter* v. *Barnardiston* (3 Bro. P. C. 64), *Doe d. Cock* v. *Cooper* (1 East, 229), *Doe d. Wright* v. *Jesson* (5 M. & Selw. 95), *Doe d. Blandford* v. *Applin* (4 T. R. 82), 2 Jarman on Wills (1st edit.), 280-284, *Jesson* v. *Wright* (2 Bligh, 1), *Doe d. Bosnall* v. *Harvey* (4 B. & C. 610, 7 D. & R. 78), *Doe d. Atkinson* v. *Featherstone* (1 B. & Ad. 944), *Fetherston* v. *Fetherston* (3 Clark & Fin. 67, 9 Bligh, N. S. 237), *Doe d. Tremewen* v. *Permewen* (11 Ad. & E. 431, 3 P. & D. 303), *Trash* v. *Wood* (4 Mylne & C. 324), *Campbell* v. *Harding* (2 Russ. & M. 390), *Doe d. Cotton* v. *Stenlake* (12 East, 515), *Doe d. Bean* v. *Halley* (8 T. R. 5), *Langley* v. *Baldwin* (1 Eq. Ca. Abr. 185, pl. 29), *Attorney-General* v. *Sutton* (1 P. Wms. 754), *Humberston* v. *Humberston* (1 P. Wms. 332), *Wight* v. *Leigh* (15 Ves. 564), *Doe d. Gallini* v. *Gallini* (5 B. & Ad. 621, 3 Ad. & E. 340), *Parr* v. *Swindels* (4 Russ. 283), *Bamfield* v. *Popham* (1 P. Wms. 54, Salk. 236, 2 Vern. 427, 449), *Blackborn* v. *Edgley* (1 P. Wms. 605), *Doe d. Liversage* v. *Vaughan* (5 B. & Ald. 464, 1 D. & R. 52), **[808]** *Foster* v. *The Earl of Romney* (11 East, 594), *Denn d. Briddon* v. *Page* (11 East, 603, n.), *Hay* v. *The Earl of Coventry* (3 T. R. 83), *Ellicombe* v. *Gompertz* (3 Mylne & Cr. 127), *Trickey* v. *Trickey* (3 Mylne & K. 560), *Morse* v. *Lord Ormonde* (1 Russ. 382), *Driver d. Edgar* v. *Edgar* (Cowp. 379), Fearne's Cont. R. 10th edit. 204, 205, *Page* v. *Hayward* (2 Salk. 570), *Fountain* v. *Gooch* (4 Bac. Abr. 262, Legacies and Devises (D)), *Robinson* v. *Robinson* (11 Beavan, 371), *Doe d. Jones* v. *Davies* (4 B. & Ad. 43), *Chorlton* v. *Craven* (cited in *Mellish* v. *Mellish*, 2 B. & C. 524). [Maule, J., referred to *Lord Dungannon* v. *Smith* (12 Clark & Fin. 546, 1 Drury & W. 509) and *Doe d. Woodall* v. *Woodall* (ante, vol. iii. p. 349).]

Coote, for Susannah Monypenny, who claimed under the settlement of the 10th of June, 1835, upon the same grounds upon which Robert Phillips Dearden Monypenny claimed his life-estate, contended that Phillips Monypenny took an estate in tail general,—citing *Doe d. Burrin* v. *Charlton* (1 M. & G. 429, 1 Scott, N. R. 290) and *Reece* v. *Steel* (2 Simons, 233).

Willcock, for the heirs in gavelkind, contended that Phillips Monypenny took an estate for life only, with remainder to his eldest son for life; and that all the subsequent remainders were void for remoteness,—so that, on the decease of Phillips Monypenny in 1841, without issue, the co-heirs of the testator became entitled. He cited and observed upon the following authorities,—*Brudenell* v. *Elwes* (7 Ves. 390), Butler's note to Fearne's Cont. R. 10th edit. 204, *Chapman d. Oliver* **[809]** v. *Brown* (3 Burr. 1626), *Wight* v. *Leigh* (15 Ves. 564), *Doe d. Gallini* v. *Gallini* (5 B. & Ad. 621, 3 Ad. & E. 340), *Doe d. Burrin* v. *Chorlton* (1 M. & G. 429, 1 Scott, N. R. 290), *Nicholl* v. *Nicholl* (2 W. Bla. 1159), *Langston* v. *Langston* (2 Clark & Fin. 194), *Pitt* v. *Jackson* (2 Bro. C. C. 51), *Smith* v. *Lord Camelford* (2 Ves. jun. 698, 711), *Brudenell* v. *Elwes* (1 East, 450), *Stackpoole* v. *Stackpoole* (4 Drury & W. 320), *Somerville* v. *Lethbridge* (6 T. R. 213), *Seaward* v. *Willock* (5 East, 198), *Vanderplank* v. *King* (3 Hare, 1, 16), *Jesson* v. *Wright* (2 Bligh, 1), *Fetherston* v. *Fetherston* (3 Clark & Fin. 67, 9 Bligh, N. S. 237), *Colson* v. *Colson* (2 Stra. 1125), *Doe d. Blandford* v. *Applin* (4 T. R. 82), *Blackborn* v. *Edgley* (1 P. Wms. 605), *Reece* v. *Steel* (2 Simons, 233), and *Chorlton* v. *Craven* (cited in *Mellish* v. *Mellish*, 2 B. & C. 524).

Bagshawe, for a person who claimed under one of the co-heirs in gavelkind, observed upon *Blackborn* v. *Edgley* (1 P. Wms. 605) and *Vanderplank* v. *King* (3 Hare, 1), and cited *Beard* v. *Westcott* (5 Taunt. 393, 5 B. & Ald. 801).

Malins, in reply to Willcock and Bagshaw, referred to *Doe d. Comberbach* v. *Perryn* (3 T. R. 484), *Lord Dungannon* v. *Smith* (12 Clark & Fin. 546, 1 Drury & W. 509), *Mortimer* v. *West* (2 Simons, 274), and *Brooke* v. *Turner* (2 N. C. 422, 2 Scott, 611).

[810] Willcock observed upon *Mortimer* v. *West* and *Brooke* v. *Turner*.

Hodgson replied generally.

The following certificate was afterwards sent to Vice-Chancellor Wigram:

"This case has been argued before us by counsel: we have considered it, and are of opinion as follows:—

"1. We are of opinion that Phillips Monypenny took an estate for life, in remainder after the life-estate of the widow, Mary Monypenny.

"2. We think that Thomas Gybbon Monypenny took an estate for life in remainder after the life-estate of Phillips Monypenny, contingent on Phillips Monypenny not leaving any issue at his decease, and determinable on Thomas Gybbon Monypenny's becoming entitled to the estates of Elizabeth Joddrell; and also a remainder in tail general after the estate-tail of Robert Thomas Gybbon Gybbon Monypenny.

"3. We think that Robert Thomas Gybbon Gybbon Monypenny took a contingent remainder in tail male after the determination of the life-estate of his father.

"4. We think that Phillips Monypenny acquired no estate or interest under the recovery.

"5. We think that Susannah Monypenny took no estate or interest under the said deed.

"6. We think the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned.

"W. H. MAULE.
"C. CRESSWELL.
"Jan. 12, 1850. "E. V. WILLIAMS"(*a*).

[811] SERRELL *v.* THE DERBYSHIRE, STAFFORDSHIRE, AND WORCESTERSHIRE JUNCTION RAILWAY COMPANY. June 11, 1850.

[S. C. 19 L. J. C. P. 371. See *London and County Banking Company* v. *Groome*, 1881, 8 Q. B. D. 293.]

A., B., and C., three directors of a railway company, in fraud of the company, drew a cheque upon the company's bankers in favour of one of their body. This cheque, though bearing the stamp usually impressed upon documents issued by the company, and countersigned by the secretary, did not upon the face of it purport to be drawn

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(*a*) For the ultimate result of the case, in equity, see 7 Hare, 568, and (on appeal) 2 De Gex, M'N. & G., 145.

And see *Doe d. Evers* v. *Ward*, 18 Q. B. 197, *Doe d. Evers* v. *Challis*, 18 Q. B., 224, 231.

on behalf of the company, nor did the drawers describe themselves therein as directors:—Held, that the company were not liable for the amount to a bonâ fide holder for value.—Whether one who takes an overdue cheque takes it subject to its equities,—as in the case of an overdue bill of exchange.—Quære.

This was an action of assumpsit. The first count of the declaration was on a banker's cheque alleged to have been drawn by the defendants on Messrs. Hankey, payable to Daniel Turton Johnson, for the sum of 420l., and by him transferred to the plaintiff, who sued as lawful bearer of the same.

There was also a count upon an account stated.

The defendants pleaded, to the first count,—first, that they did not make the cheque, modo et formâ,—secondly, that the cheque was not duly presented for payment,—thirdly, that the defendants had not due notice of the non-payment of the cheque,—fourthly, that the cheque was delivered to Daniel Turton Johnson by the directors of the Derbyshire, Staffordshire, and Worcestershire Junction Railway Company, for remuneration to him as a director of the said company, but that no determination as to such remuneration was ever come to by the said company at a general meeting thereof, and that the plaintiff took the cheque with notice of these facts,—fifthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it after the expiration of a reasonable time for presenting it for payment,—sixthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque [812] with notice, alleging that he was the bearer thereof without value,—seventhly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it on certain terms and conditions which he had violated; and, to the last count,—eighthly, that they did not promise modo et formâ.

The plaintiff joined issue on the first, second, third, and eighth pleas, and replied de injuriâ to the fourth, fifth, sixth, and seventh.

The cause came on to be tried before Wilde, C. J., at the sittings in London after Michaelmas Term, 1848, when a verdict was found for the plaintiff for the amount of the cheque and interest, subject to the opinion of the court upon the following case,—power being reserved to the court to draw any inference or conclusion from the evidence which a jury might have drawn at nisi prius, and to consider the questions as to the admissibility of evidence as reserved at the trial:—

The following is a fac simile of the cheque, and of the stamp or mark thereon impressed; and it was agreed between the parties that the original cheque should, if required, be produced by the plaintiff to the court. The cheque was not under the common seal of the company.

"Messrs. Hankey. "London, August 13, 1847.

"Pay Daniel Turton Johnson, Esq., or bearer, four hundred and twenty pounds.

"420l. 0s. 0d.

"J. M. Mathew.
"W. King.
"E. J. Spiers.

Aug. 13,
1847.

"R. S. Mackenzie, Sec."

[813] The date stamp impressed upon the cheque was put upon all the documents of the company.

Upon the trial, on the part of the plaintiff, the act of parliament establishing the company was produced, and the same was to be considered as forming part of the case, and was to be referred to by either side upon the argument. The act received the Royal assent on the 2nd July, 1847.

The company had been in existence for the purpose of obtaining the act for about two years previously; and the parties whose names appear as the drawers of the cheque, as well as Daniel Turton Johnson, the payee, had been directors of the company during the whole of that time, and were such directors when the cheque was made. The act nominated five persons as the first five directors of the company, viz., Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew, and Edmund John Spiers, and incorporates with it the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

The cheque mentioned in the declaration was produced; and, after the evidence hereafter mentioned, after proof of the handwriting of the three persons whose names were subscribed as drawers, and of Mackenzie, the secretary of the company, was read.

The evidence of the circumstances under which the cheque was drawn, was to the following effect:—

The three persons by whom the said cheque is drawn were three of the directors of the said company, as before mentioned.

The first general meeting of the proprietors was held on the 29th of December, 1847.

Upon the 13th of August, 1847, a meeting took place of the five directors before mentioned, viz., Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew, and Edmund John Spiers; **[814]** and at that meeting a resolution was entered into that each attending director should receive remuneration for his services prior to the passing of the act; and a certain sum was agreed to be appropriated to the purpose of such remuneration. There were twenty-five directors. The number of meetings which had been held was ascertained, and the whole twenty-five directors counted as having attended such meetings; and the amount appropriated as the remuneration was then divided amongst the five directors who actually attended: and, by this arrangement, 600 guineas was appropriated to the chairman, and 400 guineas to each of the other four directors; and the cheque upon which this action is brought was one of those drawn under the above arrangement as the remuneration to be paid to Daniel Turton Johnson, one of the directors.

Edmund John Spiers, one of the five directors who attended the meeting at which the before mentioned resolution was adopted, objected to the proceeding altogether; but the chairman, who was also counsel for the company, advised the directors that the proceeding was perfectly legal; and the resolution was therefore adopted. Spiers then objected to the amount, and stated that he could produce instances of companies that were paying dividends, in which the remuneration to the directors was less than the amount then proposed to be allowed; but the other directors insisted that the proposed sum was inadequate as a compensation for the trouble they had taken. Some other allowances were also made to the directors for expenses. Four other cheques were drawn at the same time in favour of the four other directors. Spiers received his cheque, because he was told, that, if he did not, the other directors would divide the amount appropriated to him, and the company would gain nothing by his not taking it.

At the time the cheques were drawn, the company **[815]** had no funds to pay them, and it was agreed that the cheques should not be presented until the bankers should have funds wherewith to pay them; and that, whenever that time should come, all the cheques should be presented together, so that no one should have an unfair start.

A call was made prior to the general meeting which was held on the 29th of December, 1847. The previous payment of the call was a necessary qualification to attend such meeting.

Before the day of meeting, in order to qualify the directors to attend the meeting, credit was given to them as having paid the amount of the call due by them respectively; but in fact no such payments were made, but the amounts of such call were credited as a remuneration to the directors in respect of their services during the six months between the passing of the act and the date of the general meeting.

The cheque in question was presented for payment by the bankers of the plaintiff on his behalf on the 6th of October, 1847, when it was dishonoured; and notice of dishonour was given to the company on the 7th of October.

The evidence on the part of the plaintiff, of the consideration given by him for the cheque, and in explanation of the delay that had been incurred in the presentment, was to the following effect,—that the cheque was seen in the plaintiff's possession, by his clerk, the latter end of August, 1847; that Johnson, the payee of the cheque, in August, requested the plaintiff not to present the cheque, saying to the effect that he had promised the directors it should not be presented. The witness could not say it was not mentioned in the plaintiff's presence that the cheque was given for remuneration to the directors.

A letter from Johnson to the plaintiff was read in **[816]** evidence, stating that the plaintiff must not pay in the cheque until Johnson should tell him to do so; that Johnson would be at the board that day, and hoped an arrangement would be made for payment; that the calls were responded to slowly, but surely; that Johnson relied on the plaintiff keeping his cheque until he (Johnson) should have seen the directors.

The defendants' counsel objected to the reception of the evidence of the above mentioned communications between Johnson and the plaintiff: and the evidence was received subject to the objection.

An indenture of mortgage was given in evidence, dated the 5th of November, 1846, between the plaintiff and Johnson, reciting a loan of 2000l. by the plaintiff to Johnson, and assigning certain securities for such loan, and containing a covenant to pay the amount and interest on or before the 8th of May, 1847.

The several following cheques drawn by the plaintiff upon his bankers, payable to Johnson, were read in evidence:—

23rd August, 1847. Cheque for 69l. 10s. This cheque was received by Johnson, and paid by the plaintiffs' bankers.

18th August, 1847. Cheque for 120l. This cheque was proved to be in Johnson's possession on the 18th of August, 1847, and to have been paid by the plaintiffs' bankers.

26th August, 1847. Cheque for 100l. This cheque was also proved to have been given to Johnson on its date, and afterwards paid by the plaintiffs' bankers.

Evidence was also given of several requests by Johnson to the plaintiff not to present the cheque, accompanied by statements that it was the wish of the directors that the cheque should not be presented at present. This evidence was objected to, and received in manner before stated.

[817] It was also proved that other moneys and cheques had passed between the plaintiff and Johnson; and applications by the plaintiff to Johnson for payment of the mortgage were proved to have been made before the receipt of the cheque in question.

It was proved by Messrs. Hankey & Co.'s clerk that the three persons who signed the cheque in question had no joint account at Messrs. Hankey & Co.'s; that the company had an account; *and that cheques to the extent of fifty or sixty, drawn by three of the directors of the company, had been paid by the bankers on account of the company* (a). This evidence was also objected to, and received subject to the objection.

If the court should be of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for the amount of the cheque and interest: otherwise, a nonsuit was to be entered.

Byles, Serjt. (with whom was Simon), for the plaintiff (b). The questions raised

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(a) These words were added to the case at the suggestion of the court.

(b) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the cheque in question was the cheque of the company, and that the company were and are liable to the plaintiff as bearer:

"2. That the cheque is drawn in accordance with the 97th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), being signed by two directors of the company; and that it sufficiently appears on the face of the instrument that it was signed by the three individuals whose names are at the foot as directors, and not as individuals,—the stamp set against their names identifying them in that character, and the countersignature of the secretary also indicating that it was an act of the company:

"3. That, if there were any doubt as to this on the document itself, there was abundant evidence to satisfy the court or a jury that it was in fact a cheque of the company, and not of the individual parties whose names appeared at the foot:

"4. That delay in presentment could not per se affect the right of the plaintiff to sue the drawers, no damage having been sustained by the company by reason of such delay:

"5. That there was no evidence to leave to the jury, and none from which the upon this case are,—**[818]** first, whether the directors of this company had power to draw cheques at all,—secondly, whether this cheque purports to be the cheque of the company,—and, thirdly, whether the plaintiff was a holder for value, and without notice of any fraud or illegality. In the first place, it is submitted that the directors clearly had power to draw cheques. This depends upon the construction of the local act, 10 & 11 Vict. c. cx. The 1st section of that act incorporates with it the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). The 4th section gives the names of the three persons who signed the cheque in question, as members of the company, and in s. 14 they are named directors. The payee of the cheque also was a director at the time of the passing of the special act. And by s. 54, the expenses incurred in the formation of the company are to constitute the first charge upon its funds. The powers of the directors are defined by ss. 90 and 91, the former of which enacts that "the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially con-**[819]**-vened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting." And s. 91 enacts, that, "except as otherwise provided by the special act, the following powers of the company, that is to say,—the choice and removal of the directors, except as hereinbefore mentioned, and the increasing or reducing their number where authorised by the special act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends,—shall be exercised only at a general meeting of the company." Then, the 95th section having impowered the directors to form committees, and to grant to such committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they should from time to time think proper to intrust to them, the 97th section provides that "the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows, that is to say,—With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same;—With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the party to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee, or any two **[820]** of them, or any two of the directors, and in the same manner may vary or discharge the same;—With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same: And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and, on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only." It appears from the special case, that Messrs. Hankeys were the bankers of the company, and that the company were in the habit of drawing cheques upon them, the course of business being that such cheques should

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court could infer that the plaintiff took the cheque with a knowledge of the purpose for which it was drawn:

"6. That there was sufficient evidence of value given by the plaintiff."

be signed by three directors. Supposing the cheque in question to have been drawn for a proper purpose, the directors clearly would have power to draw it, such power being necessarily incident to their power to manage the affairs of the company. [Hill, contrà, observed that he would not dispute the power of the directors to draw cheques for the lawful purposes of the company, provided it were done under circumstances which would justify it.] The cheque is countersigned by the secretary of the company, and bears the seal of the company; and it is drawn upon the bankers of the company, with whom the three directors who signed the cheque had no account. There is nothing upon the face of the instrument to denote that it was not drawn on account of the ordinary business of the com-**[821]**-pany. It appears that a mortgage-deed had been executed for a larger demand than the amount of the cheque. The plaintiff is a holder for value and without notice that the cheque was given for any illegal purpose; for he had a right to assume that the directors were acting within the limits of their authority. The most recent case upon the subject is that of *Rothschild* v. *Corney* (9 B. & C. 388). There, the plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1330l. Six days after the date of the cheques, the defendants, acting bonâ fide, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money, it was held that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, whether they had acted bonâ fide, and with due caution. Lord Tenterden there says: "It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date does so at his peril; and therefore the mere fact of the defendant's having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was, indeed, a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men." And Littledale, J., said: "It has been urged as matter of law, that a party taking a cheque overdue, has it with the same title, and no other, as the person from whom he receives it. But, although the rule of law certainly is so with respect to bills of exchange and promissory **[822]** notes, I think it cannot be applied to cheques." That case is still law, with this qualification, that the true question is whether the person receiving the instrument has become identified with the fraud, not whether he used "due caution" or not. The cheque was drawn in August, 1847. There was no evidence as to the time when it came into the plaintiff's hands; though it was seen in his possession in the month of August. The fact of the presentment being postponed until the 6th of October was no proof of fraud on the plaintiff's part; neither was the fact of the presentment having been postponed at the instance of the directors. A cheque may be presented at any time, provided the drawer sustains no loss from the delay in presenting it: *Serle* v. *Norton* (2 M. & Rob. 401), *Alexander* v. *Burchfield* (3 Scott, N. R. 555, 1 Carr. & M. 75), *Robinson* v. *Hawksford* (9 Q. B. 52).

M. D. Hill (with whom was Wordsworth), contrà (*d*). The main question is whether this was the cheque of **[823]** the company. A subordinate question is, whether, following the rule as to bills of exchange and promissory notes, the plaintiff is not precluded from recovering, on the ground that the cheque was received by him so long after its date, and its presentment postponed for an unreasonable period.

(*d*) The points marked for argument on the part of the defendants were as follows:

"1. That the defendants are not the makers of the cheque upon which the plaintiff is suing:

"2. That the cheque not appearing on its face to have been made either by the defendants or on their behalf, the defendants cannot in law be liable as the makers of it, whether it was in fact made on their behalf and by their authority or not:

"3. That, even if it were open to the plaintiff to shew that the cheque was in fact made on behalf of the defendants and by their authority, so as to render them liable as the makers, still there is nothing in the special case to prove that the parties whose names appear on the cheque as the makers had the authority of the defendants to make it on their behalf; but that, on the contrary, it distinctly appears that they had

1. To entitle the three persons who signed this cheque to bind the company, they must have had authority to draw cheques on behalf of the company, and they must have executed that authority. It may be conceded that the directors had authority generally to draw cheques for the purposes of the company. But, had these three persons authority to draw this cheque? The mode in which, and the exceptions subject to which, the powers of the company are to be exercised by the directors, are defined by ss. 90 and 91 of the 8 & 9 Vict. c. 16; and the 97th section regulates the making of contracts on behalf of the company. The facts disclosed by the case shew that the drawing of this cheque was the result of a gross conspiracy. It does not appear when the date stamp was put upon the cheque. But, assuming that it was there when the signatures were attached to the instrument, it makes no difference. In *Bult* v. *Morrell* (12 Ad. & E. 745), the plaintiffs declared on a bill of exchange by R. P., directed to A., B., C., D., E., and F., and accepted by them. Pleas by A., B., and C.,—first, that R. P. did not make the bill in manner and form, &c.,—secondly, that A., B., and C. did not **[824]** accept in manner and form, &c. Issues thereon. Judgment by default against D., E., and F. The bill produced at the trial was drawn upon the directors of the Imperial Salt and Alkali Company, and accepted "for the company" by D. and E., signing as directors. F. signed his name with theirs as "manager." All the defendants were shareholders, and all but F. were directors. The jury found that F., as manager, was not an acceptor of the bill. It was not put to them to say (nor did counsel desire that they should be asked) whether or not D. and E. had authority to bind the company by acceptances. A verdict having been found for the plaintiffs, it was held, on a motion to enter a nonsuit, that F. was not in point of law liable as an acceptor, either by his having actually signed his name with those of D. and E., or by their having accepted the bill as directors of a company in which he held shares; and that the plaintiff had failed on both issues. In *Beckham* v. *Knight* (a), this court held, that, although a dormant partner may be liable upon an implied contract entered into for the joint and equal benefit of the whole firm, the same liability does not arise upon an express contract. The Court of Exchequer, however, held otherwise in *Beckham* v. *Drake* (9 M. & W. 79), and distinguished the case from the cases of bills of exchange and promissory notes. No extrinsic evidence is admissible for the purpose of adding a party to a bill of exchange: *Emly* v. *Lye* (5 East, 7). The parties who signed the cheque may be liable personally,—*Thomas* v. *Bishop* (2 Stra. 955); *Siffkin* v. *Walker* (2 Campb. 308); *Leadbitter* v. *Farrow* (5 M. & Selw. 345),—but they clearly had no power to **[825]** bind the company. The fact of the special act being declared to be a "public act," does not make it notice to all the world that the persons therein named as directors are so: *Brett* v. *Beales* (M. & M. 421). And, supposing it were notice, of what particular fact is it notice? That the directors had power to draw cheques on behalf and for the purposes of the company; not that this was a cheque drawn within the scope of their authority. Then, this cheque having been taken after its maturity,—for, a cheque is like a bill payable at sight,—the plaintiff took it subject to its equities in the hands of the person from whom he received it: Bayley on Bills, 6th edit. 165, 166.

Byles, Serjt., in reply. No doubt the directors were guilty of a gross fraud in misappropriating the funds of the company as they did: but that will not affect the title of the plaintiff, a bonâ fide holder for value. They are general agents to do all acts connected with the business of the company: and, in the absence of anything to

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not such authority, the cheque having been made for a purpose for which the directors had no authority to make it, except with the sanction of a general meeting of the company, which was never obtained:

"4. That the cheque was not presented for payment within a reasonable time:

"5. That the defendants had not due notice of the non-payment of the cheque:

"6. That the cheque was made and delivered to Daniel Turton Johnson by the directors of the company under the circumstances and in the manner stated in the fourth, fifth, sixth, and seventh pleas; by reason whereof the said Daniel Turton Johnson could not himself have sued the defendants on the said cheque; and that the plaintiff, for one or other of the causes respectively stated in those pleas, is equally precluded from suing thereon."

(a) 4 N. C. 243, 5 Scott, 619. And see *Beckham* v. *Knight*, 1 Scott, N. R. 675, 1 M. & G. 738.

shew they had a more limited authority than they assumed to exercise, the plaintiff was fairly entitled to suppose that they had not exceeded it: Story on Agency, §§ 17, 18, 19. The circumstance of the cheque having been taken after its date makes no difference. The holder is not bound to present it immediately. [Cresswell, J. In *Down* v. *Halling* (4 B. & C. 330, 6 D. & R. 455), Holroyd, J., says: "A cheque is payable immediately, and the holder of it keeps it at his peril, and a person taking it after it is due, takes it also at his peril. Now, in this case, the cheque had been due five days at the time when it was taken by the defendants. That was a circumstance which ought to have excited their suspicion. I think that when the **[826]** defendants took the cheque, more than a reasonable time for presenting it for payment had elapsed, and therefore they took it at their peril."] That was the case of a lost cheque; and it is not consistent with the subsequent case of *Rothschild* v. *Corney* (9 B. & C. 388). [Maule, J. I think the two cases may be reconciled. There is no such strict rule of law as to cheques, that they must be presented promptly. But, where a reasonable time has passed, they stand in this respect upon the same footing as bills of exchange.]

MAULE, J.(*b*). In this case some questions of law and of fact are submitted to the court, and there are several issues joined between the parties: but, in the view the court is disposed to take of the case, it will not be necessary to enter very minutely into all of them. The first issue is, whether the cheque declared on was made by the defendants. In order to prove the affirmative of that issue, a paper is produced, signed by three persons who are proved to have been directors of the company, and countersigned by a person who is described as, and who we are told was, the secretary of the company. There was a written date upon the paper, "London, August 13, 1847," and also a stamp which was impressed upon it opposite the names of the three persons who appear to be the drawers, bearing in the centre the same date, "August 13, 1847," and round the margin the words "Derbyshire, Staffordshire, and Worcestershire Junction Railway Company." One question is, whether that document upon the face of it purports to be the cheque of the company. It seems to me that it does not. It does not purport to be drawn by the company in its corporate character. The persons by whom it is drawn are, in fact, directors of the **[827]** company; but they do not describe themselves as such. There is no mention whatever of the company, except on the stamp. Looking at the instrument alone, it does not profess to be a document by which the company purport to direct the bankers to pay money on their account. The directors whose names appear upon it do order the bankers to pay the sum therein mentioned; but, without the aid of extrinsic evidence, we cannot construe the instrument as the cheque or order of the company. If I saw this document out of court, I should be at a loss to know the meaning of the stamp. It is not a substitute for signature, like the cross of a marksman. It is not usual or customary to sign a document in this circular form. It looks rather (if one were obliged to construe it) as if this were a document which had passed through the office of the company on such a day, and received the stamp as a mode of identifying or ear-marking it,—as is usual in some offices. But, looking at it without the aid of extrinsic evidence, or conjecture, I am utterly unable to say that this document purports to be a document made by the company. Now, the evidence is, that all documents issued by the company had this stamp upon them. If so, it must intimate something different from what is suggested on the part of the plaintiff; for, it must be put upon some documents that are required to be put under the common seal of the company, and therefore cannot be intended to make it an instrument binding on the company. The other evidence from which it is insisted that we are to infer that this was the cheque of the company, was, "that cheques to the extent of fifty or sixty, drawn by three directors of the company, had been paid by the bankers on account of the company." The form of these, and by whom signed, does not appear. Even if they were in the same form, and signed by the same three directors, and countersigned by the **[828]** same secretary, I do not think it would make any difference. Because the company have sanctioned the payment of some cheques when satisfied of the honesty of the transaction, it by no means follows that they are bound by this confessedly dishonest and disgraceful transaction. Undoubtedly there are cases in which a principal may be bound by the acts of his agent, although he has exceeded or not

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(*b*) Wilde, C. J., was engaged in the Court of Criminal Appeal.

properly followed his authority. But, here, although the three directors who signed this cheque might have had authority to bind the company by contracts entered into on their behalf, they clearly had not authority to do what they have done here, viz. to cheat the company. Besides, the document does not purport to be made by any one, or by any set of persons, as agents for, or on behalf of, any one else. I therefore think the defendants are entitled to succeed upon the first issue. Probably this cheque may be considered as in the nature of an overdue bill, and, fraud being shewn, the onus is cast upon the plaintiff of shewing when he took it, and by what means he acquired title to it. It is, however, unnecessary to decide that point upon the present occasion. I think there must be judgment of nonsuit.

CRESSWELL, J. I am of the same opinion. It appears that the parties who drew this cheque had no authority to do so: it was a gross fraud upon the company whose servants they were. Nor, indeed, do they upon the face of the instrument affect to bind the company. They sign the cheque with their own names, and do not profess to sign as agents or on behalf of the company: and I find nothing on the stamp to connect them with the company. The company, in fact, never had authorised any person to bind them by such an instrument. It cannot, therefore, in any shape be considered to be their cheque; and no person had any **[829]** right to take it as an instrument issued by them. In *Brooks* v. *Mitchell* (9 M. & W. 15, 18), Parke, B., says: "If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily."

TALFOURD, J. I also am of opinion that there ought to be a nonsuit in this case. It is unnecessary for us to do more than consider the first issue, for that disposes of the whole case. I am clearly of opinion that the cheque was not the cheque of the company. If I were to hazard a conjecture as to what was the intention of the three persons who signed the cheque, I should say that they advisedly did an act of an equivocal character, in contemplation of the hour of peril,—hoping that the cheques would be paid without demur, but prepared, in the event of any inquiry arising, to say that they meant to bind themselves personally. There is no evidence that this cheque is drawn in a form that is either sanctioned by the company or warranted by the act of parliament. It is true, it is stated in the case that cheques drawn by three directors had been paid by the bankers on account of the company. But there is no statement as to what was the form of those cheques. And, supposing they were in the same form as the cheque in question, for anything that appears those were cheques properly so called, and fairly drawn for the purposes of the company. This cheque, however, and those which were drawn at the same time, were not so drawn; but were drawn in fraud of the company, and to be paid out of future assets: the case **[830]** in terms so finds. It appears to me, therefore, that there is nothing in its form or its substance to shew that this cheque was the cheque of the company. It is enough to say that the plaintiff fails upon the first issue, and consequently that a nonsuit must be entered.

Judgment of nonsuit.

End of Trinity Term.

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